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Panel on Administration of Justice and Legal Services

Background brief for meeting on 24 October 2005

Reciprocal enforcement of judgments in commercial matters between the Hong Kong Special Administrative Region and the Mainland

Purpose

This paper provides background information on the past discussions of Members of the Legislative Council (LegCo) on issues relating to reciprocal enforcement of judgments (REJ) in commercial matters between the Hong Kong Special Administrative Region (HKSAR) and the Mainland.

Background

Enforcement of Mainland judgments in the HKSAR

2. At present, there is no arrangement between the HKSAR and the Mainland on REJ. However, a Mainland judgment may be recognised and enforced by the HKSAR courts under the common law. At common law, a foreign money judgment, including a Mainland judgment, may be recognised and enforced by action as a debt, if it is –

(a) given by a competent court (as determined by the HKSAR courts with reference to the private international law rules);

(b) a judgment for a fixed sum of money; and

(c) a final judgment that is conclusive upon the merits of the claim.

Enforceability of HKSAR judgments in the Mainland

3. According to the Administration, it does not appear that HKSAR judgments are at present enforceable in the Mainland. China, being a civil law jurisdiction, does not have a rule that is similar to the common law rule in Hong Kong on recognition and enforcement of foreign judgments.

Proposed arrangement with the Mainland on REJ

4. The Administration has proposed to establish between the HKSAR and the Mainland a mechanism for REJ (the Arrangement) so as to promote the HKSAR as a centre for the resolution of commercial disputes, and to develop the HKSAR's legal services.

Benefits of the proposed arrangement with the Mainland

5. According to the paper provided by the Administration to the Panel on Administration of Justice and Legal Services (AJLS Panel) on 20 March 2002 [Annex to LC Paper No. CB(2) 1431/01-02(01) (**Appendix I**)], the Arrangement will benefit not only the HKSAR businesses but also the international community doing business with the Mainland. They will be able to stipulate the courts of the HKSAR as the forum for the settlement of disputes arising from contracts with Mainland parties on the basis that judgments made by the HKSAR in their favour can be recognised and enforced in the Mainland.

6. The Administration has further pointed out that following China's accession to the World Trade Organization, and with the growing volume of trade in goods and services between the HKSAR and the Mainland, it is also in the HKSAR's interest to develop an arrangement with the Mainland which will ensure that HKSAR judgments can be effectively enforced in the Mainland. Such an arrangement will also facilitate enforcement of Mainland judgments in the HKSAR by eliminating the disadvantages and problems that a judgment creditor of a Mainland judgment will face if he seeks enforcement under the common law in Hong Kong.

The Arrangement

7. The Administration has proposed to start with a focussed approach, as the HKSAR has never had an arrangement with the Mainland for REJ. The scope of the cooperation may be expanded in the light of actual experience gained in running the initial scheme. The Administration has proposed that the Arrangement –

(a) 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;

(b) will only permit the enforcement of a judgment that is final and conclusive; and

(c) will provide for grounds that will allow the court of either jurisdiction to refuse to enforce a judgment given in the other jurisdiction.

Members are requested to refer to **Appendix I** for details of the proposed REJ arrangement.

The consultation exercise

8. The Administration consulted the legal profession, chambers of commerce and trade associations on a proposed framework of the Arrangement in March and April 2002. The Administration received 17 written responses. 10 respondents expressed support to the Arrangement, two respondents including the Hong Kong Bar Association expressed reservation about the Arrangement, and the remaining respondents made some comments on certain aspects of the Arrangement or expressed mixed views among its members. For details of the consultation exercise, members may wish to refer to LC Paper No. CB(2)2020/01-02(01) (**Appendix II**).

Discussions of the AJLS Panel

9. The Administration first briefed the AJLS Panel on its intention to develop a working arrangement on REJ with the Mainland on 20 December 2001. It briefed the Panel again on 27 May 2002 on the proposed framework of the Arrangement, as well as the outcome of the consultation exercise. The Administration has since then commenced exploratory discussion with the Mainland authorities on the proposed Arrangement. The Administration briefed the Panel again on the progress of its discussion with the Mainland authorities on the proposed Arrangement on 22 March and 22 November 2004. Representatives of the Hong Kong Bar Association attended some of these meetings and provided views on the relevant issues.

10. At the meeting on 22 November 2004, the Administration informed the Panel that discussion on the Arrangement was still continuing. Both the HKSAR and the Mainland authorities recognise that the Arrangement would need to be underpinned by local legislation in the HKSAR before it may take effect in Hong Kong. The Administration has undertaken to report to the Panel when there is major development.

Concerns raised

11. The various concerns raised on the Arrangement are summarised below in paragraphs 12 to 23 below.

Scope

12. Some members expressed concern that in view of the differences in the legal systems of the HKSAR and the Mainland, and the quality of justice and judicial decisions rendered by the Mainland courts, there was a need to proceed with the matter with extreme caution. Some other members pointed out that the business sector was concerned about the implications and the possible adverse impact on their interests of the implementation of the Arrangement. These members suggested implementing a limited form of REJ at the initial stage to apply to –

(a) judgments made by certain status of courts in the Mainland which had been approved by the highest court in the Mainland;

(b) those regions of the Mainland where there were substantial economic activities involving foreign direct investment, such as Tianjin, Beijing, Shanghai, and Guangdong as "trial points"; and

(c) claims in the region of $500,000 to $1 million.

13. In response to the proposal in paragraph 12(a) above, the Administration explained that the proposed Arrangement constituted only a limited form of REJ, as it would not apply to all judgments but only foreign-related judgments on commercial agreements, where the parties had consented to have any disputes decided by either the Mainland courts or the Hong Kong courts. Also, given the international nature of the disputes, most of the foreign-related civil and commercial cases were presently handled by the Intermediate People's Courts or above in major provinces, special economics zones and municipalities in the Mainland.

14. While the Administration agreed to give consideration to the proposals in paragraph 12(b) and (c) above, the Administration explained that there might be difficulties in deciding the criteria for determining the "trial points". The Administration also cautioned that any proposals which imposed unilaterally certain restrictions on the Mainland might not get easy acceptance by the Mainland authorities, given the principle of reciprocity on which the Arrangement was based.

Safeguards

15. The Administration has advised that as in the cases of enforcement of foreign judgments under common law rules and under Cap. 319, the Arrangement will provide for grounds that will allow the court of either jurisdiction to refuse to enforce a judgment given in the other jurisdiction. The registration of a judgment under the Arrangement may be refused or set aside, if –

(a) the judgment is wholly satisfied;

(b) the judgment was obtained by fraud;

(c) the judgment was obtained in breach of natural justice;

(d) enforcement of the judgment would be contrary to public policy (order public) in the place of the registering court;

(e) the judgment is inconsistent with a prior judgment of the registering court;

(f) the judgment was obtained in proceedings at which the defendant was not given sufficient notice; and

(g) 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.

16. Some members suggested that the safeguards proposed in the Arrangement should be improved to include grounds such as judgments obtained under duress or by corrupt practices, or obtained under circumstances which were unfair to the defendant.

17. The Administration responded that the safeguards were drawn up by making reference to cases of enforcement of foreign judgments under common law rules, the Foreign Judgment (Reciprocal Enforcement) Ordinance (Cap. 319), and the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the Hague Convention). The Administration would take into account members' views in its discussions with the Mainland on the Arrangement.

Choice of court

18. A member asked whether the contracting parties under the Arrangement could choose the HKSAR courts as the place of jurisdiction. The Administration advised that under the Arrangement, both contracting parties would have the freedom to choose whether they wished to have their commercial disputes settled by the courts in the HKSAR or in the Mainland or both, for enforcement in either the HKSAR or in the Mainland as the case might be. The REJ arrangement would not alter the bargaining power between the contracting parties.

19. The Bar Association pointed out that the criteria for determining whether cases fell within the jurisdiction of the Intermediate People's Courts or above and the HKSAR's District Court or above might be different. Certain cases might be heard and determined by the courts in one place but not in the courts in the other place for reasons such as the nationality of the litigating parties. The Administration agreed to undertake some research on the matter and revert to the Panel.

Finality

20. Some members and the Bar Association expressed concern whether Mainland judgments were final and conclusive judgments under the common law, in view of the civil procedures in the Mainland. The Bar Association suggested that the common law approach should be maintained in addressing the issue of finality.

21. The Administration responded that the issue of how and when a judgment should be treated as final and conclusive would be discussed with the Mainland authorities to ensure that an arrangement that was mutually acceptable would be reached. The Administration's initial thinking was to follow the arrangements adopted under the Foreign Judgments (Reciprocal Enforcement) Ordinance.

Implementation

22. A member asked how REJ could be implemented if parties to a commercial contract under the Arrangement filed charges against one another in courts of different places. The Administration undertook to discuss with the Mainland authorities on ways to address such a situation.

23. Some members expressed concern whether enforcement of judgments would be truly reciprocal. A member considered that the major factor for the successful implementation of the Arrangement was confidence of the contracting parties in submitting cases to the jurisdiction of the courts of the HKSAR and the Mainland. The experience in implementing the arrangements for reciprocal enforcement of arbitral awards between the HKSAR and the Mainland which had been concluded a few years ago could be useful reference. In this connection, the Panel noted the advice of the Administration in July 2004 that between 2000 and 2003, a total of 58 applications for enforcement of Mainland arbitral awards were granted. However, the Administration was still awaiting a reply from the Mainland authorities on the number of applications for enforcement of Hong Kong arbitral awards in the Mainland.

Question in Council

24. At the Council meeting on 26 January 2005, Hon Margaret NG raised an oral question to request the Administration to provide statistics on the number of applications for enforcement of Hong Kong arbitral awards in the Mainland, and asked whether the enforcement situation as reflected in the statistics would affect the Administration's position on the current negotiation on REJ in commercial matters between the HKSAR and the Mainland.

25. In reply, the Secretary for Justice advised that while there had been no record for enforcement of Hong Kong arbitral awards in the Mainland, there had been no evidence of non-enforcement of arbitral awards. The Intermediate People's Court of Guangdong would conduct a field study in Guangdong to study why there was no record of any application for the enforcement of Hong Kong arbitral awards. For details, members may wish to refer to the extract from the Record of Proceedings of the Council meeting on 26 January 2005 (**Appendix III**).

Relevant papers

26. A list of other relevant papers is in **Appendix IV**. These papers are available on the LegCo website (http://www.legco.gov.hk).

Council Business Division 2
Legislative Council Secretariat
21 October 2005

RECIPROCAL ENFORCEMENT OF JUDGMENTS IN COMMERCIAL MATTERS BETWEEN THE HKSAR AND THE MAINLAND

PURPOSE

This paper seeks views on the Administration's proposal to establish a mechanism for reciprocal enforcement of judgments ("REJ") between the Mainland and HKSAR and on the scope of the proposed arrangement.

BENEFITS OF THE PROPOSED ARRANGEMENT WITH THE MAINLAND

2. At present, there is no arrangement on REJ between the HKSAR and the Mainland. The current legislative regime under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319); the common law position on enforcement of foreign and Mainland judgments in Hong Kong and the enforceability of HKSAR judgments in the Mainland are set out at the Appendix.

3. To facilitate the development of the HKSAR into a centre for commercial dispute resolution, it is important that judgments made in the HKSAR are enforceable in jurisdictions where the judgment debtor keeps his assets. An arrangement on REJ with the Mainland will benefit not only the HKSAR businesses, but also the international community doing business with the Mainland. They will be able to stipulate the courts of the HKSAR as the forum for the settlement of disputes arising from contracts with Mainland parties on the basis that judgments made by HKSAR courts in their favour can be recognised and enforced in the Mainland. Such an arrangement, combined with the cultural similarities between the HKSAR and the Mainland, and the well-developed legal system and legal services sector in the HKSAR, will be instrumental in making the HKSAR a centre for resolution of commercial disputes, especially those involving parties from the Mainland. It will also benefit members of our legal profession.

4. Following China's accession to WTO, and with the growing volume of trade in goods and services between the HKSAR and the Mainland, it is also in our interest to develop an arrangement with the Mainland which will ensure that HKSAR judgments can be effectively enforced in the Mainland. This does not

appear to be the case currently under the Mainland's existing law (see paragraph 7 of the Appendix). From the Mainland's perspective, such an arrangement will also facilitate enforcement of Mainland judgments in the HKSAR by eliminating the disadvantages and problems as set out in the Appendix.

THE PROPOSED ARRANGEMENT

5. As the HKSAR has never had an arrangement with the Mainland for REJ, the Administration intends to start with a focussed approach. We may consider expanding the scope of the co-operation in the light of actual experience gained in running the initial scheme.

6. On these premises, we consider 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 elements of the arrangement are discussed below.

Money Judgments

7. In line with the system under Cap. 319 and the common law, the proposed arrangement will only apply to money judgments. Orders for specific performance or injunction, for instance, will not be covered.

Commercial Contracts

8. As a starting point, we intend to focus only on commercial contracts and to exclude other civil matters as, in practice, cases most likely to benefit from the arrangement would be judgments arising from commercial contracts. It is also likely that the number of commercial disputes involving Mainland parties will rise after China's accession to the WTO. Such an REJ arrangement is also in line with the Administration's initiative to develop the HKSAR into a centre for resolution of commercial disputes.

9. By "commercial contract", we mean 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. These exclusions are consistent with the intention of Cap. 319 and discussions in the international arena on REJ matters.

Choice of Court

10. The proposed arrangement will only apply to judgments of the HKSAR or Mainland Courts where the parties to a commercial contract have agreed that the court of either place or the courts of both places will have jurisdiction. The deference to choice of court agreement is a reflection of the respect accorded to the autonomy of parties to commercial contracts, a principle that is upheld as well in the international arena. In this connection, it is relevant to note that under the common law, the courts may not give effect to a choice of court expressed in an agreement in certain limited circumstances, e.g. if such a choice is contrary to a statutory rule against the ousting of the jurisdiction of the court or against referring a dispute to the courts and law of a foreign country.

11. To reflect the limits which the law of either jurisdiction puts on the efficacy of a choice of forum clause, the proposed arrangement should require that the relevant choice of forum clause is a valid one.

12. For the purposes of the HKSAR courts, we propose that the arrangement should cover judgments given in the District Court and above (amounting to $50,000 or above generally) and will effectively exclude those given by the Small Claim Tribunal. The reasons for so limiting the scope of HKSAR judgments covered by the arrangement are to bring practical benefits to the parties concerned and to ensure that these practical benefits are proportional to the efforts and resources required for the enforcement of judgments under the proposed arrangement.

13. For the purposes of the Mainland courts, our proposal is to cover judgments given by the Intermediate People's Courts or above since it will normally be this level of Mainland courts that will have jurisdiction to determine disputes relating to contracts with "HKSAR" parties.

Finality

14. The arrangement will only permit the enforcement of a judgment that is final and conclusive. The issue of how and when a judgment should be treated as final and conclusive will be considered in our discussions with the Mainland authorities to ensure that an arrangement that is mutually satisfactory will be reached.

Safeguards

15. As in the cases of enforcement of foreign judgments under common law rules and under Cap. 319, the proposed arrangement will provide for grounds that will allow the court of either jurisdiction to refuse to enforce a judgment given in the other jurisdiction. Having considered the common law, Cap. 319 as well as international treaty practice, we propose that registration of a judgment under the proposed arrangement may be refused or set aside, if : -

(a) the judgment is wholly satisfied;

(b) the judgment was obtained by fraud;

(c) the judgment was obtained in breach of natural justice;

(d) enforcement of the judgment would be contrary to public policy (order public) in the place of the registering court;

(e) the judgment is inconsistent with a prior judgment of the registering court;

(f) the judgment was obtained in proceedings at which the defendant was not given sufficient notice; and

(g) 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.

IMPLEMENTATION

16. Once a mutually satisfactory arrangement with the Mainland authorities has been reached, the Administration will seek to promote legislation to give it the requisite legislative backing. We envisage that a statutory registration scheme, similar to Cap 319, will be required. The arrangement will become effective when both jurisdictions have completed the necessary procedure for its implementation.

Administration Wing
Chief Secretary for Administration's Office
March 2002

Appendix

Enforcement of Foreign/Mainland Judgments in the HKSAR Under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319)

At present legal arrangements are in place to ensure that civil and commercial judgments obtained in a number of jurisdictions outside the HKSAR may be registered and enforced in the HKSAR, and conversely, that judgments obtained in the courts here can be similarly enforced in other jurisdictions. These arrangements form the basis of the registration system in the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). The Ordinance provides that judgments given in superior courts of foreign countries to which the benefits conferred by the Ordinance have been extended are capable of registration for enforcement in Hong Kong, subject to certain conditions. The term "judgment" in the Ordinance has a broad meaning, covering a judgment given by a court in any civil proceedings, and a judgment given by a court in any criminal proceedings for the payment of money in respect of compensation or damages to an injured party. The Ordinance provides the HKSAR with the necessary flexibility in negotiating individual agreements with foreign jurisdictions for enforcement of judgments on a reciprocal basis. However, Mainland judgments cannot be enforced under Cap. 319 and there are no arrangements between the HKSAR and the Mainland on reciprocal enforcement of judgments. Furthermore, the Mainland cannot be considered as a foreign country, or foreign jurisdiction, within the meaning of Cap. 319.

Recognition and Enforcement of Mainland Judgments in the HKSAR under Common Law Rules

2. At common law, a foreign money judgment, including a Mainland judgment, may be recognised and enforced by action as a debt, subject to certain overriding principles. A judgment does not have to originate from a common law country in order to benefit from the common law rules; and reciprocity is not a requirement under the common law.

3. Hence, a judgment originating from the Mainland may be recognised and enforced by the HKSAR courts on conditions that it is : -

(a) given by a competent court (as determined by the HKSAR courts with reference to the private international law rules);

(b) a judgment for a fixed sum of money; and

(c) a final judgment that is conclusive upon the merits of the claim.

4. Defences are available to a defendant in a common law action brought on a judgment from another jurisdiction. They include inter-alia the lack of jurisdiction; the judgment having been obtained by fraud; recognition of the judgment being contrary to public policy (of the HKSAR); and the judgment having been obtained in breach of natural justice, etc.

Suing on the Original Cause of Action

5. Instead of bringing an action at common law on a Mainland judgment, the judgment creditor may bring a fresh action in the HKSAR based on the same cause of action. He would have to show, among other things, that the HKSAR courts are an appropriate forum and competent to hear the case.

Enforcement of Mainland Judgments under the common law vs Recognition and Enforcement by Registration Under Cap. 319

6. Compared with a judgment creditor whose judgment is registrable under Cap. 319, the judgment creditor of a Mainland judgment who wishes to seek enforcement at common law in the HKSAR suffers the following disadvantages : -

(a) He cannot use the simplified procedure provided for in Cap. 319;

(b) the proceedings will take longer and he will incur higher legal costs; and

(c) more importantly, he will bear the burden of proof whereas in proceedings for the registration of a foreign judgment under Cap. 319, the burden of proof falls on the judgment debtor who will have to show why the judgment should not be registered.

Enforceability of HKSAR Judgments in the Mainland

7. It does not appear that HKSAR judgments are at present enforceable in the Mainland. The Mainland, being a civil law jurisdiction, does not have a rule that is similar to our common law rule on recognition and enforcement of foreign judgments. Article 267 of the Mainland's Civil Procedure Law enacted on 9 April 1991 provides that foreign judgments may be enforced in accordance with international agreements to which the PRC is a party or in accordance with the principle of reciprocity. It is considered that the HKSAR, not being a "foreign" country, may not benefit from the Article.

LC Paper No. CB(2)2020/01-02(01)

For information on
27 May 2002

LegCo Panel on Administration of Justice and Legal Services

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

Result of the Consultation Exercise

Purpose

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

The Consultation Exercise

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

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

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

General Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Specific Comments

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

Money Judgments (para. 7 of the Consultation Paper)

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

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

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

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

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

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

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

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

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

Finality (para. 14 of the Consultation Paper)

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

Safeguards (para. 15 of the Consultation Paper)

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

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

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

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

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

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

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

Others

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

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

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

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

Administration Wing
Chief Secretary for Administration's Office

Department of Justice

May 2002

Annex 1

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

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

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

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 matters of pre-requisite 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

Extract from the Record of Proceedings of the Council meeting on 26 January 2005

~~the scope of the Lands (Miscellaneous Provisions) Ordinance can cover. The issue about private land is still under examination.~~

PRESIDENT (in Cantonese): Third question.

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.

PRESIDENT (in Cantonese): Ms Margaret NG, has your supplementary question not been answered?

MS MARGARET NG (in Cantonese): *Madam President, the Secretary has not answered the second part of my supplementary at all. Given that such a case did not exist, that means while mainland awards will definitely be enforced in Hong Kong, we are not certain whether awards made in Hong Kong will be*

enforced in the Mainland. Under the circumstances, is there any reason for the continued requirement for compliance with the terms of the agreement?

SECRETARY FOR JUSTICE (in Cantonese): Madam President, as I said before, while we do not have any record of enforcement of Hong Kong arbitral awards in the Mainland, we do not have any evidence of non-enforcement of Hong Kong awards in the Mainland. As I have already explained the advantages of the proposed agreement for reciprocal enforcement of awards in part (b) of my main reply, I shall not repeat them. The proposal under negotiation currently seeks to give Hong Kong businessmen another option, but it is restricted to an award being enforceable in the other jurisdiction only if an agreement has been reached before or after the commercial dispute on which court is to have jurisdiction to make the award. Therefore, if a Hong Kong businessman does not have confidence in the judicial system and the enforcement of awards in the Mainland, there is really no need for him to make use of this arrangement. This arrangement only offers another channel to him to enforce an award.

MR RONNY TONG (in Cantonese): *Madam President, reciprocal enforcement of awards and judgements is based on the principle of mutuality. I would like to ask the Government: Before, not after, making these arrangements, has the Government conducted any research to find out the number of Hong Kong litigants who have experienced difficulties in enforcing or trying to enforce an award, or in applying for an award or judgement, thus necessitating these arrangements?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, before this arrangement came into force, there was no way of enforcing any Hong Kong award in the mainland Courts. Therefore, we could not have carried out such research.

MS AUDREY EU (in Cantonese): *Madam President, if a mainland arbitral award or judgement has to be enforced in Hong Kong, it has to go through the Courts of Hong Kong. Therefore, if we make enquiries with the Courts of Hong*

Kong, the Judiciary can certainly provide us with the number of mainland awards or judgements which have been enforced in Hong Kong. We are now asking questions about the situation in the Mainland. This is what the main question seeks to find out: We made a request in the AJLS Panel in March last year which was followed up in July, but were told there was no reply. It is now January and the Secretary said in two parts of her main reply that the situation was not satisfactory and disappointing. Madam President, will the Secretary explain to us why it has taken so long and yet we do not have a satisfactory reply?

SECRETARY FOR JUSTICE (in Cantonese): Madam President, my difficulty is that I do not know the reasons, even the SPC does not know the reasons and that is why a field study has to be conducted. The SPC indicated that it would conduct a study at the end of this month and therefore we would like to wait for the results. However, as Honourable Members could see, we did not accept the reply at all. After receiving the reply, we raised the issue with the SPC and when the President of the SPC visited Hong Kong in November, we raised the issue once again. However, does it mean that no conclusion has been reached after all these discussions? I think the information that we received from them on 19 November, that they were prepared to conduct a field study is a rather positive response. I hope the field study will produce useful results.

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?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, we learnt about the matter, that is, the proposed field study, only last week. To date, we have not received any information. I only know that the Intermediate People's Court of Guangdong Province is responsible for enforcing arbitral awards and they will conduct the field study in Guangdong. The questions which we have asked the SPC include: First, the number of applications made to the mainland Courts seeking enforcement of Hong Kong arbitral awards since the arrangement

came into force; second, the rate of success of enforcement of the applications; third, the reasons for rejecting the applications, if any; fourth, the approximate rate of successful enforcement out of the applications for enforcement of awards granted by the Courts and fifth, the reasons involved for any non-enforcement of awards for the applicants. Madam President, those were the questions we asked in the letter to the SPC dated 8 April 2004.

MR ALAN LEONG (in Cantonese): *Madam President, the Secretary listed three reasons in the second paragraph of part (b) of the main reply, explaining why there had to be continuous discussions on reciprocal enforcement of awards in commercial matters. Certainly, this is beneficial to the businessmen of Hong Kong. However, since reciprocal enforcement is involved, the question of enforcement of mainland judgements in Hong Kong definitely has to be considered. I think the Secretary knows that many businessmen have reservations about this. The Secretary said in the last paragraph of the main reply, "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". May I ask the Secretary whether the Department will actually report to the Panel only after negotiations with the mainland authorities have produced results? If so, a very embarrassing situation will arise should the Panel make any suggestions, for there is no way that they can be relayed to the mainland authorities during the process of negotiation. Will such a situation arise, that is, the conclusion reached may not be supported by the Legislative Council?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, as I said in the main reply, the arrangement for reciprocal enforcement of commercial judgements would give businessmen an advantage and another option. Without such an arrangement, businessmen might not be able to enforce any Hong Kong award in the Mainland at all. Furthermore, whether businessmen can take legal action in the Mainland also involves the question of jurisdiction. Therefore, we think that this arrangement is beneficial to the businessmen of Hong Kong. Mr Alan LEONG is worried that after we have reached an agreement, the Legislative Council may consider it unsatisfactory and will therefore disapprove of it, or will not support the legislative process involved. In fact, the

Department of Justice has been reporting the matter to the AJLS Panel and after listening to the views of its members, we have conveyed their suggestions to the other party. Therefore, we will also consider the views expressed by Mr Alan LEONG just now. If our agreement is not supported by the Legislative Council, or the proposed legislation cannot even be passed, there is no way to enforce it. When the negotiations have reached a more mature stage, we will certainly report to the AJLS Panel.

PRESIDENT (in Cantonese): We have spent more than 18 minutes on this question. Last supplementary question.

MR ALBERT HO (in Cantonese): *Madam President, the Secretary mentioned in the main reply that in early 2002, the Department of Justice had conducted a joint survey with Law Society, the Hong Kong International Arbitration Centre and others and received only a few responses. Can the Secretary tell us what information has been obtained from the few responses and what conclusion has been drawn?*

SECRETARY FOR JUSTICE (in Cantonese): Madam President, in 2002, the Working Group sent out letters to 18 internationally renowned law firms in co-ordination with Law Society to make enquiries about the situation of enforcement. However, no specific examples were provided in the responses to explain why the awards had not been enforced. The information provided to us mainly concerns the unavailability of information about the other party, the type of assets owned by the debtor there and where the debtor lives. Therefore, the difficulties of enforcement were not different from those encountered in Hong Kong. If the applicant did not know where the assets of the debtor were, no award could be enforced. The majority of the letters received expressed a common concern that the awards might not be enforced due to certain problems. These worries included protectionism, manipulation of relationships and the possibility that the local Courts might be unclear about enforcement procedures. However, these were worries of the law firms only and no specific examples had been cited to indicate that awards could not be enforced because of protectionism, bribery, and so on. They have not provided any concrete examples to us.

Appendix IV

Reciprocal enforcement of judgments in commercial matters between the Hong Kong Special Administrative Region and the Mainland

Relevant papers/documents

LC Paper No.		Papers/Documents
Papers provided by the Administration		
CB(2)722/01-02(04)	--	Administration's paper on "Enforcement of Mainland Judgments in the HKSAR and Benefits of an Arrangement of Reciprocal Enforcement of Judgments (REJ) between the HKSAR and the Mainland and Choice of Forum Provisions and their Implications on REJ under the Draft Hague Convention on Jurisdiction and foreign Judgments in Civil and Commercial Matters"
CB(2)1431/01-02(01)	--	Letter dated 20 March 2002 from Director of Administration enclosing a copy of paper on "Reciprocal enforcement of judgments in commercial matters between the HKSAR and the Mainland"
CB(2)2020/01-02(01)	--	Paper provided by Director of Administration on "Result of the Consultation Exercise"
CB(2)248/04-05(05)	--	Administration's paper on "Reciprocal enforcement of judgments in commercial matters between the HKSAR and the Mainland"
Submissions		
CB(2)248/04-05(04) *(Chinese version only)*	--	Submission from Mr P Y LO, a member of the Hong Kong Bar Association
Minutes of meetings of Panel on Administration of Justice and Legal Services		
CB(2)955/01-02	--	Minutes of meeting on 20 December 2001
CB(2)2780/01-02	--	Minutes of meeting on 27 May 2002
CB(2)386/04-05	--	Minutes of meeting on 22 November 2004