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29 November 2005

The Hon. Margaret Ng
Chairperson
LegCo Panel on Administration of Justice
and Legal Services
Legislative Council
Hong Kong

Dear Margaret,

**Reciprocal Enforcement of Judgment (REJ) between
The Mainland and the HKSAR**

I am most grateful for your letter of 24 October 2005 reiterating your concerns on the proposed Arrangement that was discussed at the meeting of the AJLS Panel on the same day. I set out below the Administration's consolidated response to the issues raised.

Parties affected

It has always been the Administration's proposal that the Arrangement will only apply to judgments given by a court designated in a choice of court agreement agreed upon in a contract. In March 2002, the then Director of Administration wrote to the Panel explaining the framework of the proposed Arrangement. You may recall that the issue of "choice of court" was discussed in a paper attached to the letter, a copy of which is now enclosed for your easy reference.

In gist, the proposed Arrangement will only apply to judgments of the HKSAR or Mainland Courts where the parties to a commercial contract have entered into a choice of court agreement. The Administration explained that the deference to a choice of court agreement was a reflection of the respect accorded to the autonomy and freedom of parties to commercial contracts. No suggestion was made that the parties should be required to expressly opt in for the proposed Arrangement to apply in respect of the

relevant judgment. It may be further noted that during the consultation exercise before we first reported to the Panel, none of the views received suggested that the parties should expressly opt in for the proposed Arrangement to apply.

While the Administration is willing to take up the Panel's suggestion with the Mainland authorities, we would like to point out that an exclusive choice of court agreement is not a pre-condition for the application for registration of foreign judgments under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). Further, under the recently concluded Hague Convention on Choice of Court Agreements (which provides for free circulation of judgments based on choice of court agreements among Party States), it is not necessary for the parties to a choice of court agreement to expressly opt in the enforcement regime under the Convention. This is in line with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which does not require the parties to an arbitration agreement to expressly opt in the enforcement regime provided for in the Convention in order that the related arbitral award is enforceable thereunder. During the discussions with the Mainland authorities on the proposed REJ, both parties took heed of the development and practice in international judicial co-operation. Requiring parties to expressly opt in would be a step backward in the promotion of judicial co-operation. Such a requirement would also be inconsistent with the normal rules and practices adopted in the relevant international agreements.

Finality of Judgment

I am sure there is no dispute that at common law, in order to establish that a foreign money judgment is final, it must be shown that the court, by which the judgment was pronounced, conclusively, finally and forever established the existence of the debt in question so as to make it *res judicata* between the parties. However, you will also agree that a judgment can still be regarded as final even if it is under appeal.¹

In *Chiyu Banking Corp. Ltd v. Chan Tin Kwun* [1996] 2 HKLR 395, Cheung J (as he then was) held that because of the initiation of the protest procedure against the Mainland judgment sought to be enforced in Hong Kong in that case, which could result in the retrial of the case by the original trial court, the Mainland judgment failed to satisfy the common law requirement of being final and conclusive, and consequently ordered a stay of the Hong Kong

¹ See *Nouvion v Freeman* (1889) 15 App. Cas. 1; *Dicey and Morris on Conflict of Laws*, 13th edition, Vol 1, paras 14-021 and 14-024; Philip Smart, "Enforcement of Foreign Judgments" in Christine Booth (ed), *Enforcing Judgments in Hong Kong* (2004), Chap 13, at pp 260-1; and Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (2001), paras 2.36-2.37. The principle stated above was followed by Hong Kong courts in many cases, including Cheung J in *Chiyu Banking Corporation Limited v Chan Tin Kwun* [1996] 2 HKLR 395.

enforcement proceedings pending the outcome of the protest procedure. You will note that Cheung J's judgment was based on the expert evidence before him in the relevant proceedings and his judgment was approved by the Court of Appeal in subsequent cases, eg Lam Chit Man (trading as Yet Chong Electronic Co. v. LAM Chi-To (unreported, 18 December 2001, CACV 354/2001).

The Mainland team and our team deliberated the complicated concepts and issues involved at great lengths. Apart from saying that the number of cases under the protest procedure has been small as compared with the overall case load of the Mainland courts in each year and that the quality of judges has been improving due to the adoption of various measures, the Mainland team eventually agrees to create a special concession, which will be set out clearly in the arrangement as follows :


- (i) only a final judgment will be recognised and enforced;
- (ii) "final judgment" is defined, stating clearly that in case where an application to enforce a Mainland court judgment has been made in Hong Kong and the trial supervision procedure calling for a retrial is subsequently invoked, that case will not be retried by the original trial court but will have to be brought up for a retrial by a higher court. This is to ensure that the People's Court which pronounced the original judgment will not have the opportunity to vary or abrogate the very judgment of which enforcement is sought;
- (iii) a certificate of "final judgment" to be issued by the relevant Mainland court giving the judging must be submitted to the Hong Kong court by the person seeking enforcement; and
- (iv) a judicial interpretation will be issued by the Supreme People's Court (SPC) (this will be to the effect that the special retrial procedure for Mainland judgments sought to be enforced in Hong Kong will be published formally by SPC by way of a directive). In addition, an internal explanatory note on the new procedure will be drawn up and distributed by SPC before the Arrangement comes into force.

The above special procedures are generally in line with the requirements laid down by Hong Kong courts for determining the finality and conclusiveness of foreign judgments seeking registration and enforcement.

What has been intended since day one, and we believe is now before us, is an arrangement that addresses the legal issues identified by our court. The new mechanism, whereby judgments can be enforced in a summary way on a reciprocal basis, is designed only for those parties who, on the basis of freedom of contract, agree in the relevant contract to submit to the jurisdiction of the courts of the Mainland or Hong Kong. Upon application for enforcement of a Mainland judgment in Hong Kong, the judgment debtor may ask the Hong Kong court to refuse to enforce the judgment on the grounds listed in the proposed Arrangement, one of which relates to judgments obtained by fraud. Should there be problems in implementing the arrangement, they can be taken up and resolved by SPC and HKSARG through consultations. It is also evident that the Mainland authorities have, at their highest level, repeatedly (especially after the accession to the WTO) expressed unequivocally their commitment to strengthening the Rule of Law, implementing legal and judicial reform and enhancing the quality of judges through, inter alia, vigorous training and recruitment by way of State Judicial Examinations.

As soon as the proposed draft Arrangement is put in place, we will have a mechanism whereby parties who agree to submit to the court's jurisdiction have an option, which does not exist currently, to apply for enforcement of a money judgment in the other jurisdiction without having to go through the time-consuming and costly litigation process as it is the case now. There is no doubt that a simple and effective enforcement mechanism is one of the key considerations for investors in deciding where to resolve their disputes. If Hong Kong judgments can be enforced in the Mainland, this will make Hong Kong a more attractive dispute resolution centre. The proposed mechanism should dovetail with the greater PRD economic development plan, strengthen the relationship between the Mainland and Hong Kong, and reinforce Hong Kong's status as a leading financial and legal services centre.

The Administration should be pleased to discuss the subject matter in detail at the meeting of the AJLS Panel scheduled for 23 January 2006.

Yours sincerely,

(Stephen Kai-yi Wong)
Deputy Solicitor General

with enclosure

c.c. **Chairman, Hong Kong Bar Association**
President, the Law Society of Hong Kong
Clerk, the LegCo Panel on Administration of Justice
and Legal Services (for circulation to members)
Members of the REJ Team, HKSAR

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20 March 2002

The Hon Margaret Ng
Chairman of Panel on Administration
of Justice and Legal Services
c/o Legislative Council Building
8 Jackson Road
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Hong Kong

Dear Margaret

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

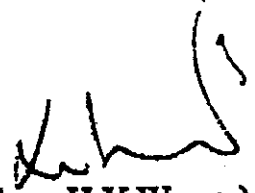
At the request of the LegCo AJLS Panel, the Administration attended its meeting held on 20 December 2001 to exchange views with Members on the above subject. We undertook to revert to the Panel on the broad framework of the REJ arrangement for discussion with the Mainland authorities.

(33)

In this connection, I am pleased to enclose a short paper at Annex, setting out our proposed broad framework of the REJ arrangement for Members' perusal. We are in tandem seeking views of the two legal professional bodies, chambers of commerce and other relevant bodies on the proposal. We have asked for comments by 30 April 2002.

In view of Members' interests, I should be most grateful if you could circulate the attached paper to them for their consideration. We welcome any views the Panel and Members may have on the proposed broad framework.

Yours Sincerely



(Andrew H Y Wong)
Director of Administration

Annex

14/11/05

**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.