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International Chamber of Commerce · Hong Kong, China Business Council 國際商會－中國香港商務局
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7 May 2002

**By Post**

Director of Administration
Government Secretariat
Room 1211
Central Government Offices (West Wing)
Hong Kong
Attention: Mr. James Chan Yum-min

Dear Sir,

***Re: Reciprocal Enforcement of Foreign Judgments in Commercial Matters between the HKSAR and the Mainland***

Thank you for your letter of 20 March 2002 addressed to our Chairman Lee Jark Pui.

Following consultation with members, we are pleased to set forth the following comments on the HKSAR Government's proposal:

Purpose and benefits

The establishment of a mechanism for reciprocal enforcement of judgments is very much welcomed and could not have come soon enough.

Commercial Contracts

1. It is not apparent from Cap. 319 that the intention is to restrict its applications to "commercial contracts". Indeed, Cap. 319 applies not only to civil contracts but also to compensation orders in criminal proceedings: see s. 2(1). We understand that as a start, the government may wish to give it a more limited application and subsequently to expand it gradually. However, some of the express exclusions, e.g. bankruptcy and winding up, and even "consumer matters", can be very commercial in nature and are the subject of frequent litigation.

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Choice of court

Jurisdiction Clause

2. In relation to paragraphs 10 and 11, we query the necessity of a choice of forum clause. While formal contracts are often used in cross-border transactions, it is not uncommon for parties to have self-prepared informal notes, memoranda, purchase orders without stating choice of forum. Whilst the autonomy of parties should be respected, the absence of jurisdiction clause is no offence to the principle. It should be sufficient that the original court has jurisdiction, whether pursuant to a valid jurisdiction clause in the contract or as adjudged by the court. This is in line with the current Cap. 319 scheme. A Jurisdiction clause is not a prerequisite to the application of Cap. 319, however a party can apply to set aside a registered foreign judgment on the ground that the original court had no jurisdiction (s. 6(1)(a)(ii)).

Level of Court

3. In relation to paragraphs 12 and 13, while we agree the practical benefits should be proportional to the efforts and resources required, and indeed we believe that for the vast majority of cases reciprocal enforcement would only be sought for judgments above HK$50,000, we believe that the parties would give due consideration to the cost and benefit of seeking enforcement and that they should be allowed to do so. Hence the limit of application to judgments of the District Court or above may not be necessary.

Finality

4. As regards paragraph 14, we do believe that the issue of finality of judgments should be carefully examined. We note that under both the common law and the current Cap. 319, a judgment can be final and conclusive even if it is pending an appeal, so long as it is final and unalterable in the court which pronounced it. However, because of the Mainland civil procedure, especially in relation to retrials, some Mainland judgments have been held by Hong Kong courts not to be final and conclusive, e.g. in *Tan Tay Cuan v Ng Chi Hung* HCA5477/2000 (5 February 2001), [2001] HKCFI 99. Further study is necessary.

Safeguards

5. As to paragraph 15, we agree to the safeguards listed but we would comment on the following in particular:-

re (c) We agree that breach of natural justice should be a ground to refuse enforcement. However, because of the difference in civil procedure

and in the concept of civil justice between HKSAR and the Mainland, a mutually acceptable standard of propriety has to be reached.

re (d) We note that 'order public' (ordre public) is put in brackets alongside 'public policy' which suggest that they bear the same meaning. However the concepts of public policy and ordre public are different. At common law, a foreign judgment is impeachable on the ground that its enforcement or recognition would be contrary to public policy: see rule 44 of Dicey & Morris. This ground is also found in Cap 319 under s 6(1)(a)(v). However, it can be noted from the commentaries in Dicey & Morris that 'public policy' in this context refers to the judicial policy which is limited in scope, as opposed to the much wider governmental, administrative and other policies. However, the term 'public policy' could literally bear a very wide meaning and the Mainland jurists may have a different concept. (See for reference Xian-chu Zhang, 'The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects' (1999) HKLJ 463 at 476-8.) Efforts should be made to ensure that both sides adopt a narrow meaning. The term should be defined in more detail if possible.

Ordre public is also an elusive and potentially very wide concept. The HKCFA judgment in *HKSAR v Ng Kung Siu and another* [2000] 1 HKC 117 and the references cited therein provide some insight. Ordre public includes the existence and functioning of the state organ, prescription for peace and good order, safety, public health, esthetic and moral considerations, and economic order.

We are not aware of arrangements in other jurisdictions where ordre public is a ground for refusing enforcement of a foreign judgment. Further, the present proposal concerns only money judgment, and it must be unusal for a money award be injurious to ordre public. We believe that the inclusion of ordre public may not be necessary. In any event, this term should be limited in scope so that it only applies in the very serious cases, and efforts should be made to ensure that HKSAR and Mainland have the same understanding over this term.

re (g) We believe that the issue of immunity requires further study. This ground is not found in other similar legislation and arrangements. Because of the political structure of China and the HKSAR's relationship with the Mainland, the basis of immunity cannot be diplomacy and respect of foreign sovereignty, but must be the jurisdictional limit of Hong Kong courts over Mainland organs and that of Mainland courts over Hong Kong organs. As such, the 'immunity' would be much wider than the usual diplomatic immunity. For

example, diplomatic immunity does not apply to commercial transactions, but if Hong Kong courts do not have jurisdiction over a party to the transaction, can Hong Kong courts cannot enforce the judgment? Because of the HKSAR's standing with the Mainland, there is a risk that such immunity would only work in favour of Mainland judgment debtors, unless adequate provisions will remove such eventuality.

Yours faithfully,

Anthony W. Y. Chan
Secretary