Mainland Judgments (Reciprocal Enforcement) Bill

Composite Response to the Views of Deputations and Submissions on the Bill

The meeting with deputations and the Administration was held on 5 May 2007. Prior to the meeting, written submissions have also been made by the following bodies –

(a) The Law Society of Hong Kong;
(b) The Chinese Manufacturers' Association of Hong Kong ("CMA");
(c) The Chinese General Chamber of Commerce ("CGCC");
(d) Mr ONG Yew-kim;
(e) Hong Kong Bar Association; and
(f) Society for Community Organization ("SCO").

2. In addition to the written submission, both the Bar and Mr ONG also appeared at the meeting to deliver their respective views. Deputations of the following bodies also attended the meeting to render their views –

(a) International Chambers of Commerce – Hong Kong, China ("ICC")
(b) French Chambers of Commerce
(c) Hong Kong Institute of Arbitrators

With respect to the views and comments of the deputations on the Bill, the Administration responds as follows.

I. Comments of the Bar

Clause 2(1): definitions

3. The Bar's comments on the definition of "recognized Basic People's Court" and its relation with Clause 25 have been dealt with under the Administration's response to issues raised at the meeting of 30 April 2007 (Administration's Response). The Administration will rely on the response set out in paragraphs 17 to 21 thereof.

4. With respect to the Bar's views on the definition of "specified contract", the matter has similarly been dealt with in the Administration's Response and we will rely on paragraphs 9 to 16 thereof.

Clause 2(2): Interpretation of Mainland law terms

5. The matter was dealt with in paragraphs 22 – 26 of the Administration's Response.

Clause 3

6. The Bar suggested that the Chinese version of Clause 3(1) and (2) of the Bill fails to reproduce Article 3, first paragraph of the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the HKSAR pursuant to Choice of Court Agreements between Parties Concerned* signed on 14 July 2006 (the *Arrangement*). This suggestion is not entirely correct as the Chinese text of Clause 3 does not exclude choice of court agreements made by the parties concerned for resolving a dispute which has arisen in respect of a specified contract. The choice of court agreement and the relevant connection to a specified contract is reflected in the Chinese text of Clause 3(1) and (2) as follows -

> "由指明合約的各方訂立的協議……指明由……法院裁定*在*……*與該指明合約有關連的情況下產生的爭議*……".

Clause 5(2)(b) - Variation from the terms of the *Arrangement*

7. The adoption of the expression "依據" (pursuant to) instead of "具有[書面管轄協議]" (have entered [a choice of court agreement in writing]) in Clause 5(2)(b) cannot be said to be at variance with Article 1 of the *Arrangement*. Such an expression reflects the requirement of the *Arrangement* that the Mainland judgment concerned should be based on the choice of court agreement between the parties.

Clause 6

8. The Administration disagrees that the drafting of Clause 6(1)(d) is broader than the reference to "retrial" in Article 2(1)(2) of the *Arrangement*. The reference to "unless the original court is the Supreme People's Court" in Clause 6(1)(d) is necessary because the concept of bringing up cases for retrial in a higher level court cannot apply to the Supreme People's Court which is the highest court in the Mainland.

Clause 7

9. Clause 7 which specifies the time limit for application for registration of Mainland judgments also applies to the registration of Mainland judgments which are required to be performed in stages. If the performance of a Mainland judgment is required to be in stages, a judgment creditor may apply to register any part of the judgment in accordance with clause 13. Clause 7 is linked to Clause 13(2) (c) which provides that in the case of an application for registration of any part of a Mainland judgment, the other provisions of the Bill (including Clause 7) shall be construed and have application accordingly.

Clause 18

10. Clause 18 sets out the circumstances where the Court of First Instance shall set aside the registration of a Mainland judgment. The designated court, i.e. the Mainland court under the Bill, is in the best position to apply its law on the validity of the choice of court agreement because the test adopted in the *Arrangement* for testing such validity is by reference to the law of the designated court. Where the Mainland court has made a determination in accordance with its own law (as evidenced in the judgment) on the validity of a choice of Mainland court agreement, it would not be appropriate for the Hong Kong court to review the validity of the choice of court agreement by applying Mainland law.

Schedule 2: Chinese translation of supporting documents

11. The proposed RHC O.71B r.2 and RDC O.42 r.6 follow the existing RHC O.71 r.13 wherein no specific provisions are included requiring the certification of translation into the official language(s) of a foreign country covered in Cap. 319 in which execution of the Hong Kong judgment is sought.

12. According to the 2nd paragraph of Article 6 of the *Arrangement*, where any document submitted to a people's court of the Mainland for recognition and enforcement of a Hong Kong judgment is not in the Chinese language, the applicant shall submit a Chinese translation which has been duly certified correct. As the requirement for Chinese translation relates to applications made to the people's courts, the Administration is of the view that it is a matter for the Mainland courts to regulate as they see fit.[1]

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[1] It may be noted that Article 4 of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR* signed in 1999 also requires certification of Chinese translation of documents not in Chinese language. As in the case of Article 6 of the *Arrangement*, that article has not specified the authority from whom a Chinese translation should be obtained nor the manner of procuring a Chinese translation. Further, these matters were not dealt with by the Supreme People's Court's judicial interpretation which implemented the 1999 Arrangement.

13. Further, the Administration is of the view that an applicant who wishes to obtain a Chinese translation of the document in support for his application for enforcement of a Hong Kong judgment in the Mainland should do so at his own costs. This approach is no different from the existing regime under Cap. 319.

Schedule 2: Judgments subject to judicial review

14. The proposed RDC O.42, r.6(1) provides that the rule will apply to an application under Clause 21 of the Bill. Accordingly, the relevant Hong Kong judgment given by the District Court shall be subject to "a choice of Hong Kong court agreement" as defined by Clause 3(1) of the Bill and relates to a business-to-business contract.

15. Theoretically, a decision made by the District Court may be subject to judicial review by the Court of First Instance. However, RHC O.53 appears to be of little relevance to the civil and commercial matters specified under the *Arrangement*. The scope of judicial review relevant to the Bill, if at all, is confined to civil judgments made by the District Court, which may be reviewed by way of an appeal to the Court of Appeal as an alternative remedy. [2]

16. It has been commented that even if any grounds for judicial review exist, the court would normally require an applicant to pursue the alternative remedy before applying for judicial review. The exceptional circumstances where the courts will permit an applicant to apply for judicial review prior to exhausting other alternative remedies do not appear to apply to those civil and commercial matters covered by the *Arrangement*. [3]

Proposed RHC Order 71B and RDC Order 42 r.6(4)

17. Under RHC Order 71B r.2(4), the certificate to be issued by the High Court under Clause 21(3) shall state the date from which the judgment takes effect (sub-paragraph (e)) and that the time for appeal has expired or, as the case may be, the date on which it will expire and whether any notice of appeal against the judgment has been entered (sub-paragraphs (g) and (h)). Similar provisions can be found in the RDC O42 r.6(4). The Administration considers that these provisions should address the requirement for a "final enforceable judgment" under Article 2 of the *Arrangement*.

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2 *See* O.59, r.19, RHC and commentaries 59/19/1 and 59/19/3, *Hong Kong Civil Procedure 2007*, Volume 1.

3 See commentary at 53/14/13, para 4, *Hong Kong Civil Procedure 2007*, Volume 1.

Proposed RHC O71B r.2 and RDC O42 r.6

18. It is provided in the 2nd paragraph of Article 5 of the *Arrangement* that "the court of one side which has enforced the judgment in part or in whole shall, at the request of the court of the other side, provide information on the status of its enforcement". Noting this requirement, it is provided under RHC O71A r.3(1)(c)(iii) that in support of an application for registration of a Mainland judgment, an applicant must state in the supporting affidavit as regards "whether any action has been taken to enforce the judgment in Hong Kong and, if so, the details of such enforcement." Likewise, an applicant is also required to provide similar information when he applies for a certificate of Hong Kong judgment to be issued under RHC O71B r.2 and RDC O42 r.6.

19. The provision of such information will assist the courts of either side to be acquainted with the details of the enforcement actions taken on the other side. The Administration considers it inappropriate to make legislative provisions regarding the communications between the Judiciary and other judicial organs and enforcement of such provisions would be highly difficult.

Schedule 2, paragraph 3 - Amendment to the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap. 46)

20. The Bar queried the rationale to amend Cap. 46 so that Mainland judgments or any part thereof that satisfy the requirement of Clause 5(2)(a) to (e) will be excluded from the purview of that Ordinance. Having reviewed the provisions of Cap. 46, the Administration now takes the view that this amendment is not necessary.

21. The amendment was proposed out of abundance of caution in view of the different tests for validity of a choice of forum agreement adopted in Cap. 46 (section 3(2)) and Article 9(1) of the Arrangement. As Cap. 46 is intended to address foreign judgments which were given in violation of choice of forum agreements, the Administration is satisfied that it should equally apply to foreign judgments which were given in violation of a choice of forum agreement selecting the courts of the Mainland, whether or not it falls within the definition of "choice of Mainland court agreement" in the Bill. Accordingly, the Administration will move a Committee Stage Amendment to delete paragraph 3 of Schedule 2 from the Bill.

Natural Justice – Article 9 of the Arrangement

22. As the term "natural justice" does not exist under the Mainland's legal system, it is difficult to expressly include it as a mutual ground of refusal to enforce judgment under Article 9 of the *Arrangement*. Article 9(4) of the Arrangement is, however, related to the concept of natural justice. Moreover, it has been noted by many writers that the natural justice may sometimes overlap with "public policy" and "fraud" which are also grounds of defence that may be invoked before Hong Kong courts under Article 9, paragraph 2[4]. We consider that the safeguards provided under Article 9 (Clause 18 of the Bill) are comparable to those prescribed under sections 4 and 5 of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) in relation to the enforcement of other foreign judgments.

The Bar's Note of 11 May 2007

23. The Administration has no particular view on the Bar's comments as regards "forum shopping" save that we reiterated our observations on the position of the common law on the subject matter as set out in our paper submitted to the Bills Committee on 11 May 2007. We would add that it is the Administration's hope that, following the implementation of the *Arrangement*, parties should be encouraged to choose Hong Kong courts as the forum for resolving their dispute where possible. This is consistent with the Administration's long term objective of promoting Hong Kong as a regional centre for commercial dispute resolution.

24. The Administration concurs with the views of the Bar that the issue of unequal bargaining power should not be addressed by legislation in the context of reciprocal enforcement of judgments. It is noted that there is no such provision in Cap. 319 which applies to civil and commercial judgments of both common law and non-common law jurisdictions. Furthermore, it would not be possible to define in the law what would amount to unequal bargaining powers.

II. Comments of CMA and CGCC

25. Both the CMA and CGCC expressed a cautious welcome to the introduction of the Bill for the implementation of the *Arrangement*. The two bodies are however concerned with the difficulties in enforcing judgments in the Mainland. Similar comments have been received by the Administration when the consultation exercise was conducted in March 2002. With regard to the CMA's suggestion that a supervision mechanism should be established, it should be

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[4] Xianchu Zhang and Philip Smart, "Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR", [2006] HKLJ 553, at p 573 and footnote 117

noted that under Article 18 of the *Arrangement*, the Supreme People's Court and the Administration will resolve any problems arising in the course of implementation through consultation[5].

26. After the enactment of the Bill, the Administration will continue to liaise with and consult stakeholders for their views regarding the problems and difficulties in enforcing the relevant judgments in the two jurisdictions and to endeavour finding ways to resolve the problems.

27. The CMA also commented that the choice of court agreements covered by the *Arrangement* should be limited to formal written agreements signed between the parties. Clause 3(3)(b) of the Bill reflects paragraph 3 of Article 3 of the *Arrangement* which provides that the relevant choice of court agreements include those concluded or evidenced by electronic means. The inclusion of such a provision is necessary since electronic communications are common place in modern days and are widely used in business transactions. The drafting of Clause 3(3)(b) is similar to other UN model law and international conventions in respect of the "writing" requirements.[6]

III. Comments of ICC

28. The ICC considered that the prerequisite of a choice of court agreement designating the Mainland courts or Hong Kong courts shall have exclusive jurisdiction is uncommon in commercial contracts. This condition was included after lengthy discussion with the Mainland side on the scope of the *Arrangement* that only judgments relating to business-to-business contracts whereby parties have entered into an exclusive choice of court agreement should be covered. This approach follows that of the Hague Convention and is adopted on the basis that parties could decide on their own freewill (subject to the prevailing law) as regards the forum for resolving their disputes. This also gives the parties an alternative means to resolve business-to-business disputes in addition to an agreement to submit a dispute to arbitration.

29. Before the signing of the *Arrangement*, the Administration has consulted the legal profession in December 2005 and January 2006 and duly informed them of the proposed requirement that parties should have entered into an exclusive choice of court agreement. Since signing the *Arrangement*, the Administration have further briefed the legal profession and other stakeholders

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5 See Article 18 of the *Arrangement*.

6 See, for example, Article 3(c)(ii) of the *Hague Convention on Choice of Court Agreements* and Article 6(1) of the *UNCITRAL Model Law on Electronic Commerce*.

such as chambers of commerce and trade associations that the exclusive choice of court agreement would form a prerequisite in order to invoke the *Arrangement* for the enforcement of judgments in the other jurisdiction.

IV. Comments of Mr ONG Yew Kim

30. Our primary objective is to ensure that both the Chinese and English texts reflect the policy intention accurately and that there is no actual or perceived discrepancy in meaning between the two texts. We do not intend to achieve linguistic fluency at the expense of legal accuracy. The Bill had been drafted with this objective in mind and we have tried our best to ensure legal accuracy without any compromise on linguistic fluency as far as possible.

Chinese rendition of "judgment debtor" and "judgment creditor"

31. There have been comments on the Chinese rendition of "judgment debtor" (判定債務人) and "judgment creditor" (判定債權人). The authority for these Chinese renditions can be found in 英漢法律詞典 (法律出版社出版) and 牛津法律大詞典 (光明日報出版社). Both renditions were considered by the Bilingual Laws Advisory Committee and endorsed by the Legislative Council when the Chinese text of the Matrimonial Causes Rules (Cap.179 sub. leg. A) was authenticated in 1995. Since then, the Chinese renditions are followed in the other provisions of the Laws of Hong Kong, such as, the High Court Ordinance (Cap. 4), Matrimonial Proceedings and Property Ordinance (Cap. 192), Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), District Court Ordinance (Cap.336) and Clearing and Settlement Systems Ordinance (Cap. 584). The Administration submits that, for consistency purpose, the existing Chinese rendition should be retained.

V. Comments of the SCO

32. The SCO's suggestion that the Bill should apply only to Mainland judgments of the Intermediate People's Courts or courts of higher level cannot be adopted as this suggestion contravenes Article 2 of the *Arrangement*. Similarly, the Administration cannot adopt a ground of refusal to enforce Mainland judgments that does not appear in Article 9 of the Arrangement. It should be noted that if the enforcement of a Mainland judgment is contrary to the public policy of Hong Kong, this already constitutes a ground to apply for setting aside the registration of the judgment under Clause 18.

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