Mainland Judgments (Reciprocal Enforcement) Bill

The Administration's Response to Issues Raised at the Bills Committee Meeting held on 14 May 2007

In this paper, the Administration will deal with the submissions of the French Chamber of Commerce and Industry in Hong Kong (the FCCI) dated 14 May 2007 and the Hong Kong Bar Association dated 15 May 2007(a set of which was passed to the Administration on 28 May 2007) as well as the issues raised at the Bills Committee meeting of 14 May 2007.

2. In doing so, we will also refer to the Administration's response to the issues raised at the meeting of 30 April 2007 (the Administration's Response) (*please see* LC Paper No. CB(2)2091/06-07(01)) and the Administration's composite response to the views of deputations and submissions on the Bill (the Composite Response) (*please see* LC Paper No. CB(2)2091/06-07(02)), both issued on 4 June 2007, to some of the issues discussed herein.

I. Submissions of the FCCI

Choice of Court Agreement (Clauses 3 & 5(2)(b))

3. The Administration will deal with matters concerning Clause 3 of the Bill in greater details in paragraphs 12 – 16 below.

4. Clause 5(2)(b) of the Bill repeats the requirement for a choice of court agreement in writing specified under Article 1 of the *Arrangement*.[1]

5. The Bill does not seek to alter the Mainland's or the HKSAR's jurisdictional rules. This is reflected by, for example, Article 9(1)(3) of the *Arrangement* (to be implemented by Clause 18(1)(e)), which provides that one of the grounds for refusing enforcement would be that the court of the place where enforcement is sought has exclusive jurisdiction over the case according to the law of that place.

6. The Administration believes that the implementation of the *Arrangement* will promote Hong Kong's role as a leading dispute resolution

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[1] 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.

centre in the Region. Subject to the limitation imposed by the Mainland's jurisdictional rules mentioned above, parties not wishing to litigate in the Mainland will have the option of having their disputes resolved in Hong Kong courts, knowing that the resulting judgments can be enforced on the Mainland.

Conflicts of law – the Arbitration Ordinance

7. It is clear that the Bill, as in the case of the *Arrangement*, is not concerned with reciprocal enforcement of arbitral awards between the Mainland and the HKSAR. This is borne out by the requirement in the Bill that only Mainland judgments given by a designated court pursuant to a choice of Mainland court agreement are registrable under the Bill.

Time limit for application (Clause 7)

8. The time limit stipulated under Clause 7 for an application for registration of a Mainland judgment follows the provisions of Article 8 of the *Arrangement*. It is noted that the same time limit applies in relation to an application to a people's court in the Mainland for the execution of a judgment under Article 219 of the *Civil Procedure Law of the PRC* 《中華人民共和國民事訴訟法》[2]. As the Bill provides for the registration and enforcement of the Mainland judgments, it is logical and reasonable that the time limit for such an application should follow that provided under the Mainland law.

9. According to Clause 5(2)(d) of the Bill, which reflects Articles 1 and 2 of the *Arrangement*, it is provided that a judgment subject to an application for registration in Hong Kong is also enforceable in the Mainland. The Administration is given to understand that an application made outside the time limit provided under Article 219 of the *Civil Procedure Law* will not be entertained. Therefore, we cannot but adopt the same time limit relating to application for registration under the Bill. This is consistent with the proviso (b) in section 4(1) of Cap. 319 which provides that a foreign judgment should not be registered if at the date of the application, it could not be enforced by execution in the country of the original court.

Enforcement of Hong Kong judgments in the Mainland

10. The concerns of the FCCI as regards enforcing Hong Kong judgments in the Mainland are similar to those expressed by the Chinese Manufacturers' Association of Hong Kong and the Chinese General Chamber of Commerce on

[2] Adopted by the 8th NPC on 9 April 1991 which took effect on the same day.

the difficulties in enforcing judgments in the Mainland. The Administration will rely on paragraphs 25 and 26 of the Composite Reponse which dealt with the issue.

11. The Administration wishes to point out that following the implementation of the *Arrangement* by virtue of the Bill, in relation to a case whereby a Mainland judgment debtor has assets in Hong Kong, the judgment creditor concerned may apply for the registration and enforcement of the Mainland judgment against the judgment debtor's assets in Hong Kong. Such an enforcement mechanism is not available now.

II. The Bar Association 's Further Submissions of 15 May 2007

Clause 3 of the Bill

12. In the Bar Association's further letter of 15 May 2007, the Bar referred to an article written by Enzo Chow and published in the Hong Kong Lawyer (05.2007). The writer of the article queried the consequence where, in reaching a choice of court agreement, the parties have mistakenly designated the wrong court to deal with their dispute. The Bar also questioned whether the subsequent judgment given by a Mainland court to which the case was transferred (which is also a designated court under the Bill) would satisfy Clause 5 of the Bill, notwithstanding that it was not the particular court chosen by the parties under a choice of court agreement.

13. In the Administration's reply to the Clerk to Bills Committee dated 11 May 2007, we have already indicated our intention to amend Clause 3(1) and (2) of the Bill so that "designating a court in Hong Kong" and "designating a court in the Mainland" would respectively read "designating the courts in Hong Kong or any of them" and "designating the courts in the Mainland or any of them" by way of committee stage amendments. The above amended expression more accurately reflects the 1st paragraph of Article 3 of the *Arrangement* which requires the parties to agree in writing to designate any people's court in the Mainland or any court in Hong Kong to have exclusive jurisdiction over the subject matter of dispute.

14. As the Administration has stated in the previous meetings of the Bills Committee, notably the meeting on 14 May, that the *Arrangement* is intended to cover judgments given by (in the case of the Mainland) the designated courts (listed in Schedule 1 of the Bill) where the contracts contain an exclusive choice of court agreement selecting either the courts of the Mainland or a specific court of the Mainland. The *Arrangement* (see Articles 1 and 3) however does not

require parties to a choice of Mainland court agreement (as defined by the Bill) to limit their choice to a specified designated court.

15. With respect to a choice of Mainland court agreement, Article 25 of the *Civil Procedure Law* of the Mainland will apply whereby the parties' choice of court is subject to certain restrictions. Information on Article 25 of the *Civil Procedure Law* has been provided by the Administration (*please see* LC Paper No. CB(2)1641/06-07(01)). If the parties have chosen a court which is considered to have no jurisdiction, the case will be transferred under Article 36 of the *Civil Procedure Law* to a court which may exercise jurisdiction. Where the court to which a case is transferred is a designated court, the judgment given by that court is also covered by the *Arrangement*.

16. If, in the subsequent application for registration of a Mainland judgment, the validity of the choice of court agreement is in issue, this will be dealt with by the designated court according to the governing law, in this regard, the Administration will rely on paragraph 14 of the Administration's Response which discussed similar issues. A party may oppose to the enforcement of the judgment in Hong Kong based on the validity of the choice of court agreement but such an argument could only be made under clause 18 of the Bill (grounds for setting aside registration).

III. Issues Raised at the Bills Committee Meeting of 14 May 2007

Scope of "Mainland judgment" and "choice of Mainland court agreement"

17. At the meeting of 14 May 2007, some members of the Bills Committee have indicated that the Bill should only apply to judgments given by the court designated in a choice of Mainland court agreement. Whilst the Administration will consider ways and means of addressing this concern, it will also have to bear in mind that the purpose of the Bill is to give effect to the *Arrangement* and, accordingly, the provisions of the Bill must be consistent with the *Arrangement*.

18. With regard to the question of whether an exclusive choice of court agreement may be made after the date of commencement of the Bill in respect of a specified contract entered prior to the above date, the Administration considers this is permissible. Article 17 of the *Arrangement* specifies that it will only apply to judgments made after the *Arrangement* has been commenced and Article 3, paragraph 1 further stipulates that it will only cover an exclusive choice of court agreement made on or after the commencement of the

Arrangement (a required exclusive choice of court agreement). The *Arrangement* contains no provisions as regards the date of entering a specified contract from which a dispute was derived. Hence, the *Arrangement* will apply to a required exclusive choice of court agreement in respect of a specified contract, whether the latter was made before or after the commencement of the Bill, and whether the required exclusive choice of court agreement deals with all or some specific matters arising from the contract.

Clause 18 of the Bill

19. The Administration confirms that the grounds for setting aside the registration of Mainland judgments reflect the provisions in Article 9 of the *Arrangement*.

20. The Administration does not propose to include a safeguard in Clause 18 to empower the court to set aside the registration of a Mainland judgment on the ground that the court giving the judgment has no real and substantial connection with the dispute. In this respect, we will rely on the information paper submitted to the Bills Committee on 11 May 2007 which discussed the common law rules concerning refusal to recognize or enforce a judgment given by a foreign court that did not have real and substantial connection with the dispute. (*Please see* LC Paper No. CB(2)1827/06-07(01).)

21. The Administration considers that such a ground of refusal departs from the common law rule and is inconsistent with Cap. 319. It also falls outside the grounds of refusal to recognize and enforce a judgment under the *Arrangement* and hence could not be included in Clause 18.

Statistics on Arbitration Awards

22. According to the Judiciary, after the enactment of the Arbitration (Amendment) Ordinance 2000, between January 2000 and March 2007, a total of 72 applications were made for the enforcement of Mainland arbitral awards, the details of which are set out in the Annex. All the applications were granted by the court but five of them have been subsequently set aside, mainly by consent of the parties and for reasons under sections 40C and 40E of the Arbitration Ordinance (Cap. 341).

23. On the basis of the information provided by Hong Kong International Arbitration Centre (HKIAC), the total number of HKIAC arbitration cases and the number of cases with parties from both Hong Kong and the Mainland since 2002 were set out in the table below –

Year	Total No. of Arbitration Cases	No. of Cases with parties from HK and the Mainland
2002	320	23
2003	287	18
2004	280	32
2005	281	50
2006	394	62

24. The above statistics show a growing number of HKIAC arbitration cases with parties from both Hong Kong and the Mainland in recent years. They support the proposition that following the implementation of the Mainland/HKSAR arrangement on reciprocal enforcement of arbitral awards, there remains room for Hong Kong parties to choose to arbitrate their disputes in Hong Kong.

Department of Justice
June 2007

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ANNEX

Applications for Enforcement of Mainland Arbitration Awards in Hong Kong from 2000 to March 2007

Year	Name of Arbitral Body	No. of Applications to Enforce Arbitral Awards		No. of Applications to Set Aside Order	
		Granted	Refused	Granted	Refused
2000	CIETAC[Note] (Beijing)	15	0	0	5
	CIETAC (Shanghai)	7	0	1	2
	CIETAC (Shenzhen)	6	0	0	1
	Changzhou Arbitration Commission	2	0	1	0
	Annual Total	**30**	**0**	**2**	**8**
2001	CIETAC (Beijing)	5	0	1	0
	CIETAC (Shanghai)	1	0	0	1
	CIETAC (Shenzhen)	3	0	1	0
	Chongqing Arbitration Commission	1	0	0	1
	Shantou Arbitration Committee	1	0	0	0
	Annual Total	**11**	**0**	**2**	**2**
2002	CIETAC (Beijing)	3	0	0	0
	CIETAC (Shenzhen)	1	0	0	0
	CIETAC (Shanghai)	1	0	0	0
	Shanghai Arbitration Commission	1	0	0	0
	Nangtong Arbitration Committee	1	0	0	0
	Annual Total	**7**	**0**	**0**	**0**
2003	CIETAC (Beijing)	1	0	0	0
	CIETAC (Shanghai)	1	0	0	0
	CIETAC (Shenzhen)	3	0	0	1
	Shenzhen Arbitration Committee	1	0	0	0
	Beijing Arbitration Committee	2	0	0	0
	Guangzhou Arbitration Commission	1	0	0	0
	Qingdao Arbitration Committee	1	0	0	0
	Annual Total	**10**	**0**	**0**	**1**
2004	CIETAC(Beijing)	1	0	0	0
	CIETAC (Shenzhen)	1	0	0	0
	China Maritime Arbitration Commission	1	0	0	1
	Annual Total	**3**	**0**	**0**	**1**

Note CIETAC : China International Economic and Trade Arbitration Commission
中國國際經濟貿易仲裁委員會

Year	Name of Arbitral Body	No. of Applications to Enforce Arbitral Awards		No. of Applications to Set Aside Order	
		Granted	**Refused**	**Granted**	**Refused**
2005	CIETAC(Beijing)	2	0	0	0
	Xian Arbitration Committee	1	0	0	0
	Haikou Arbitration Commission	1	0	1	0
	Annual Total	**4**	**0**	**1**	**0**
2006	CIETAC(Beijing)	4	0	0	1
	CIETAC(Shenzhen)	2	0	0	0
	Annual Total	**6**	**0**	**0**	**1**
2007	Beijing Arbitration Commission	1	0	0	0
	Total (up to March 2007)	**1**	**0**	**0**	**0**
Total 2000 – 2007 (up to March)		**72**	**0**	**5**	**13**