

Mainland Judgments (Reciprocal Enforcement) Bill

Composite Response to Questions Raised in the Meetings of 8 and 24 October 2007

Meeting of 8 October 2007

Long Title

The Administration was asked to provide information on the manner in which international agreements are given effect in local legislation. The Administration has undertaken a research on the different methods adopted in various legislation in order to give effect to international agreements applicable to Hong Kong.

2. Our research suggested that there is no uniform way to give effect to international agreements by legislation and even less so in making reference to the agreements in the long title of the relevant implementing ordinance. Broadly speaking, the ways in which international agreements are implemented by legislation in Hong Kong can be grouped into the following categories:

- (a) Some implementing legislation contains references to the relevant international agreement(s) in the long title with the relevant provisions of the agreement(s) attached in the schedule. Examples include the *Child Abduction and Custody Ordinance* (Cap. 512), *Recognition of Trusts Ordinance* (Cap. 76) and *Submarine Telegraph Ordinance* (Cap. 497).
- (b) Other implementing legislation makes reference to the relevant international agreement(s) in the long title without incorporating the text of the agreement(s) in the body of the ordinance. Examples include the *Whaling Industry (Regulation) Ordinance* (Cap. 496) and the *Ozone Layer Protection Ordinance* (Cap. 403).
- (c) There is legislation which does not refer to any international agreement(s) in the long title or the main body, but provides a mechanism for subsidiary legislation to be made to give effect to international agreements subsequently made in relation to the same subject matter. Examples include the *Fugitive Offenders Ordinance* (Cap. 503) and *Inland Revenue Ordinance* (Cap. 112).

3. In various ordinances which seek to enforce foreign judgments, orders or awards (including arbitral awards), such as the *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap. 319), the *Arbitration Ordinance* (Cap. 341) and *Maintenance Orders (Reciprocal Enforcement) Ordinance* (Cap. 188), it is noted that none of their long titles refer to the agreements on reciprocal enforcement of judgements, arbitral awards or maintenance orders (as the case may be) between Hong Kong and other jurisdictions. Neither do they incorporate or refer to the text of any such agreements in the body of the legislation.

4. As can be seen from the above, different methods have been employed for the purpose of implementing international agreements in our local legislation. In the present case, the Administration has considered the drafting approach carefully and took the view that the implementing legislation should be modelled on the *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap. 319). Bearing in mind that the drafting of the *REJ Arrangement*¹ is more akin to the Mainland drafting style, the Administration has adopted the principle that the Bill should be self-contained so that there would be no need for users to refer to the *REJ Arrangement*. The Administration considers that the approach adopted is consistent with all the ordinances mentioned in paragraph 3 above, all of which have a primary purpose similar to the Bill: to implement various agreements with other jurisdictions in rendering judicial assistance.

Clause 3

5. The Administration was asked to clarify how the exclusivity requirement in respect of a relevant choice of court agreement can be satisfied. The question of whether a choice of court agreement has specified the courts of the Mainland (or Hong Kong, as the case may be) or any of them as the court to determine a dispute to the exclusion of the courts of other jurisdictions is a question of law to be determined by the relevant court. The Administration considers it inappropriate to specify in the Bill any rules for interpretation of the terms of a choice of court agreement.

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 Agreement between Parties Concerned* signed on 14 July 2006.

Clause 5(2)(a)(iv)

6. The Administration was requested to consider whether the proposed Clauses 5(2)(a)(iv)(C) and (D) are necessary. Upon review, we agree that clause 5(2)(a) could be simplified and would introduce committee stage amendments to properly reflect our intention.

Clause 6(1)(d)

7. The Administration was asked to consider if the definition of “original court” is appropriate in the context of Clause 6(1)(d). We have reviewed the drafting of Clause 6(1)(d) and agree to introduce committee stage amendments to better reflect our intention.

Order 71A, rule 3

8. As stated in the Administration’s letter to the Committee dated 17 October (LC Paper No. CB(2)120/07-08(01)), the Administration has written to various chambers of commerce and other organisations of the business sector to seek their views on the proposed O.71A, rule 3, which requires a judgment creditor, who is a natural person, to exhibit his identity card or identification document, or a certified copy of the same.

9. The Administration has since received replies from the International Chamber of Commerce, Hong Kong ("ICCHK") and the Federation of Hong Kong Industries ("FHKI"). ICCHK advised that the wording in the proposed O.71A, rule 3(1)(a)(iv) and rule 3(2) may be retained in its current form whereas the FHKI opined that given the existing legal safeguards against falsification of the identity of a deponent, the proposed requirement would not be necessary. The fact that Cap. 319 does not contain a similar provision is another reason given by the FHKI against the proposed requirement.

10. The Administration will report further to the Committee when outstanding replies on the matter have been received from other relevant organisations.

Meeting of 24 October 2007

Clause 3

11. The Administration was requested to consider if the word “documents” in Clause 3(4) would cover documents in electronic forms. As “documents” is not defined in the Bill, the following definition as provided in the *Interpretation and General Clauses Ordinance* (Cap. 1) would apply:

"document" (文件) means any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means

12. We take the view that the above definition is wide enough to cover documents in electronic forms. The wording in Clauses 3(3) and 3(4) of the Bill together is sufficiently clear to convey the intention that the Bill covers an agreement concluded or evidenced by electronic means for the purpose of Clause 3.

13. The Administration was also asked to provide information on the presentation of documents in electronic forms in court proceedings as evidence. As far as civil proceedings are concerned, the *Rules of High Court* (Cap. 4A) do not contain specific provisions governing proof of documents in electronic forms. Nevertheless, section 9 of the *Electronic Transactions Ordinance* (Cap. 553) provides that without prejudice to any rules of evidence, an electronic record shall not be denied admissibility in evidence in any legal proceedings on the sole ground that it is an electronic record.

14. For the purpose of discovery in civil proceedings, the meaning of “documents” under Order 24 of the *Rules of High Court* is not restricted to paper writings, but extends to anything upon which evidence or information is recorded in a manner intelligible to the senses or capable of being made by the use of equipment. A computer database which forms part of the business records of a company is, in so far as it contains information capable of being retrieved and converted into readable form, a “document” for the purpose of Order 24².

² Paragraph 24/2/2 of the *Hong Kong Civil Procedure 2007*

Clause 11

15. The Administration was requested to provide information on how the exchange rate would be determined by the court when there has been substantial fluctuation on the exchange rate on the date of registration. Having consulted the Judiciary, we note that for the purpose of Clause 11, it is for the applicant to provide a written certificate from a bank to inform the court of the prevailing exchange rate at the date of registration. In case of dispute on exchange rate, it would be a matter of evidence for the court to resolve.

Clause 13

16. The Administration was requested to review Clause 13 and to consider if the procedures for enforcement of a Mainland judgment which requires to be performed in stages can be simplified.

17. Clause 13 is to implement Article 8(3) of the *REJ Arrangement*. Article 219 of the *Civil Procedure Law* states that the time limit for the submission of an application for execution shall be calculated from the last day of the period of performance specified by the legal document. Article 219 also states that if the relevant judgment specifies performance in stages, the time limit for the submission of an application for execution shall be calculated from the last day of the period specified for each stage of performance.

18. The Administration has sought clarifications from the relevant Mainland authority on the application of Article 219 of the *Civil Procedure Law* and has been given to understand that under Article 219, as far as a Mainland judgment requiring performance in stages is concerned, the judgment creditor would not be entitled to enforce any part of the judgment sum unless that relevant part has become due as specified in the judgment.

19. In respect of enforcing a foreign judgment under Cap. 319, section 4(1)(b) of Cap. 319 states that a foreign judgment shall not be registered if at the date of the application, it could not be enforced by execution in the country of the original court.

20. The Administration considers that in the context of enforcing a Mainland judgment in Hong Kong, the judgment creditor should not be entitled to register any part of the judgment sum that, at the date of application, could not be enforced by execution in the Mainland. It follows that Clause 13 should

be retained for the purpose of addressing the specific circumstances of enforcing Mainland judgments which require performance in stages.

21. In relation to the procedures for enforcing a Mainland judgment that requires performance in stages, the proposed Order 71A, rule 11 stipulates the requirements for evidence in support of application for registration of such a Mainland judgment. Under Order 71A, rule 11(2)(b), if an application for registration of any part of a Mainland judgment is preceded by any application for registration of a different part of the same judgment, the application procedures would be simplified to the effect that the judgment creditor would not be required to exhibit documents and information which have been exhibited or stated in the affidavit supporting the preceding application.

**Legal Policy Division
Department of Justice
November 2007**

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