

Recovery across the Borders – the Mainland Judgments (Reciprocal Enforcement) Ordinance (“the Ordinance”)

With judicial systems being polar opposites, there was never a recognized channel for mutual recognition or enforcement of judgments between the Mainland and the SAR. Mainland monetary judgments, even obtained by judgment creditors, could only be recognized and enforced in Hong Kong by commencement of a new debt recovery action in the High Court. Such complex proceedings are clearly time-and-costs-consuming in which mainland judgment creditors tend to abandon further actions in Hong Kong.

Not until 23rd April 2008, where the third reading and passing of the Mainland Judgments (Reciprocal Enforcement) Bill by the Legislative Council marked a big step ahead. The Ordinance was formally promulgated by the Chief Executive on 30th April 2008 and will come into effect on a day to be appointed by the Secretary for Justice (s.1(2)). The enactment ended the labyrinth of negotiations between Hong Kong and Mainland judicial authorities, in particular giving effect to the Arrangement on Reciprocal Recognition and Enforcement of Judgment in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Court Agreements between Parties Concerned made between the Supreme People’s Court of the Peoples Republic of China and the HKSAR Government dated 14th July 2006 (“the Arrangement”). (Please specifically refer to our March 2007 Update: <http://www.fclklaw.com.hk/english/legal/update20.htm>).

Prerequisites for Protection

The Ordinance primarily provides registration of final monetary judgments given by designated courts pursuant to a “Choice of Hong Kong Court Agreement” and/or “Choice of Mainland Court Agreement” . In other words, the Ordinance only protects those agreements where **a specific choice of court clause is expressly and/or severally provided** (s.3). Note that the Ordinance only applies to judgments arising out of **commercial contracts** (i.e. non-commercial contracts, such as employment or personal contracts, are not applicable) for **payment of a sum of money** (but not in form of penalty or charges etc.).

Mainland Judgments – Enforcement in Hong Kong

The Ordinance circumvented the complexities in recognizing judgments by mainland courts as “**final**” . The “designated courts” from which judgments are recognized are confined to the Supreme People’ s Court, the Higher People’ s Court, the Intermediate People’ s Courts and recognized Basic People’ s Courts (s.6 & Sch.1).

A judgment creditor under a mainland judgment may make an ex parte (unilateral) application to the High Court to have the judgment registered. The time limit for making an application for registration shall be **2 years** from the date of judgment being handed down (s.7(2)).

Upon registration with the High Court Registrar, the judgment shall be of the same force and effect as if it had been a judgment originally given in the High Court of Hong Kong (s.14(1)). The registered judgment would also be recognized in any Hong Kong courts as conclusive between the parties of proceedings. The judgment sum shall then be expressed in **Hong Kong currency** instead of Renmenbi. Note that those mainland judgments which were partly performed or partly satisfied are still registrable in the High Court (ss.10&13).

The aggrieved judgment debtor may nonetheless apply to have the **registered judgment set aside**. Pursuant to section 18(2) of the Ordinance, registration of the judgment would be set aside if the court is satisfied with any of the followings:-

- The choice of Mainland Court Agreement pursuant to which the judgment was given is per se invalid under Mainland Law;
- The judgment has been wholly satisfied prior to registration;
- Hong Kong courts have exclusive jurisdiction over the case in accordance with Hong Kong laws;
- The judgment was given in the absence of the judgment debtor, who according to Mainland Law was not summoned to the original court or was not given sufficient time to defend his case;

- On the same cause of action, the judgment has been given by a Hong Kong court or otherwise an arbitral award has been made by an arbitration body in Hong Kong (e.g. HKIAC) or a place outside of Hong Kong (e.g. CIETAC);
- The judgment was obtained by fraud;
- Enforcement of the judgment is contrary to public policy; or
- The judgment has been reversed or set aside pursuant to an appeal or a retrial under Mainland Law.

Hong Kong Judgments – Enforcement in Mainland

Part V of the Ordinance facilitates the enforcement of Hong Kong monetary judgments for execution in the Mainland. On application by the Hong Kong judgment creditor, the High Court or the District Court shall issue a certified copy of the judgment. The High Court shall also issue a certificate certifying that the judgment can be enforced by execution in Hong Kong (s.21(3)). Note that the Hong Kong judgment **must be final** (i.e. judgments from the Court of Final Appeal, the Court of Appeal, the Court of First Instance of the High Court or the District Court in exercise of their jurisdiction) together with a **Choice of Hong Kong Court Agreement clause**. As a result, no fresh application for enforcement has to be taken out in the Mainland by the judgment creditor.

The Remaining Steps ...

The Ordinance shall come into full force by **the Secretary for Justice’ s announcement** and **promulgation of a Judicial Interpretation** by the Supreme People’ s Court in Beijing.

Hong Kong as a Special Administrative Region remains judicially independent whilst enjoying the benefits of its judgments being recognized in the Mainland. Notwithstanding its own limitations, the new enactment will safeguard interests of both Hong Kong and Mainland entities involved in cross-border business. The substantial revision of the Ordinance from its original bill, in particular the recognition of finality from Basic People’ s Courts, reflects a resolute effort between Hong Kong and Mainland for more imminent judicial assistance. It is expected that the Ordinance serves as a pioneer to closer judicial arrangements between Hong Kong and the PRC,

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with extension to issues on non-commercial judgment enforcement and contentious recognition.

Prepared in June 2008.

Postscript

On 3rd July 2008, the Supreme People's Court of China promulgated a Judicial Interpretation giving effect to the Arrangement. Accordingly, the Arrangement shall come into effect on 1 August 2008 in the Mainland. In Hong Kong, the Secretary for Justice upon gazettal on 4th July 2008 appointed 1st August 2008 as the commencement date for the Ordinance. The Ordinance shall hence be in full operation starting from 1st August 2008.