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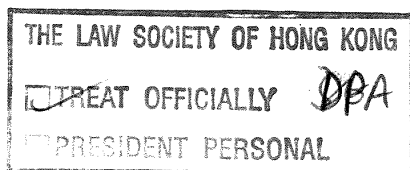
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CSO/ADM CR 7/3221/01

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20 March 2002

Mr Herbert H K Tsoi
The Law Society of Hong Kong
3/F Wing On House
71 Des Voeux Road Central
Hong Kong

Dear Mr Tsoi,

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

As part of the Administration's initiative to promote Hong Kong as a centre for the resolution of international trade disputes and to develop Hong Kong's legal services, the Administration proposes to establish a mechanism for reciprocal enforcement of judgments ("REJ") between the Mainland and Hong Kong.

The Administration's initial proposals on the framework of the arrangement are set out in the paper at Annex. Before we commence discussion with the Mainland authorities on the proposal, we are writing to invite comments from your organisation on this broad framework **by 30 April 2002**. Other considerations which you would like the Administration to take into account in finalising our proposal would be most welcome by the same deadline.

Should you require further information, please feel free to give me a call at 2810 2576 or Mr Wong Yu-yuen at 2810 2783.

Yours sincerely,

A handwritten signature in black ink, consisting of a long horizontal stroke followed by a loop and a small 'c' at the end.

(Chan Yum-min, James)
for Director of Administration

**RECIPROCAL ENFORCEMENT OF JUDGMENTS
IN COMMERCIAL MATTERS BETWEEN
THE HKSAR AND THE MAINLAND**

PURPOSE

This paper seeks views on the Administration's proposal to establish a mechanism for reciprocal enforcement of judgments ("REJ") between the Mainland and HKSAR and on the scope of the proposed arrangement.

BENEFITS OF THE PROPOSED ARRANGEMENT WITH THE MAINLAND

2. At present, there is no arrangement on REJ between the HKSAR and the Mainland. The current legislative regime under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319); the common law position on enforcement of foreign and Mainland judgments in Hong Kong and the enforceability of HKSAR judgments in the Mainland are set out at the Appendix.

3. To facilitate the development of the HKSAR into a centre for commercial dispute resolution, it is important that judgments made in the HKSAR are enforceable in jurisdictions where the judgment debtor keeps his assets. An arrangement on REJ with the Mainland will benefit not only the HKSAR businesses, but also the international community doing business with the Mainland. They will be able to stipulate the courts of the HKSAR as the forum for the settlement of disputes arising from contracts with Mainland parties on the basis that judgments made by HKSAR courts in their favour can be recognised and enforced in the Mainland. Such an arrangement, combined with the cultural similarities between the HKSAR and the Mainland, and the well-developed legal system and legal services sector in the HKSAR, will be instrumental in making the HKSAR a centre for resolution of commercial disputes, especially those involving parties from the Mainland. It will also benefit members of our legal profession.

4. Following China's accession to WTO, and with the growing volume of trade in goods and services between the HKSAR and the Mainland, it is also in our interest to develop an arrangement with the Mainland which will ensure that HKSAR judgments can be effectively enforced in the Mainland. This does not

appear to be the case currently under the Mainland's existing law (see paragraph 7 of the Appendix). From the Mainland's perspective, such an arrangement will also facilitate enforcement of Mainland judgments in the HKSAR by eliminating the disadvantages and problems as set out in the Appendix.

THE PROPOSED ARRANGEMENT

5. As the HKSAR has never had an arrangement with the Mainland for REJ, the Administration intends to start with a focussed approach. We may consider expanding the scope of the co-operation in the light of actual experience gained in running the initial scheme.

6. On these premises, we consider that the arrangement should cover only *money judgments* given by a court of either the Mainland (at the Intermediate People's Court level or higher) or the HKSAR (at the District Court level or higher) exercising its jurisdiction pursuant to a *valid choice of forum clause* contained in a *commercial contract*.

The elements of the arrangement are discussed below.

Money Judgments

7. In line with the system under Cap. 319 and the common law, the proposed arrangement will only apply to money judgments. Orders for specific performance or injunction, for instance, will not be covered.

Commercial Contracts

8. As a starting point, we intend to focus only on commercial contracts and to exclude other civil matters as, in practice, cases most likely to benefit from the arrangement would be judgments arising from commercial contracts. It is also likely that the number of commercial disputes involving Mainland parties will rise after China's accession to the WTO. Such an REJ arrangement is also in line with the Administration's initiative to develop the HKSAR into a centre for resolution of commercial disputes.

9. By "commercial contract", we mean a contract in which the parties are acting for the purposes of their respective trades or professions, excluding contracts relating to matrimonial matters, wills and successions, bankruptcy and winding up, lunacy, employment and consumer matters, etc. These exclusions are consistent with the intention of Cap. 319 and discussions in the international arena on REJ matters.

Choice of Court

10. The proposed arrangement will only apply to judgments of the HKSAR or Mainland Courts where the parties to a commercial contract have agreed that the court of either place or the courts of both places will have jurisdiction. The deference to choice of court agreement is a reflection of the respect accorded to the autonomy of parties to commercial contracts, a principle that is upheld as well in the international arena. In this connection, it is relevant to note that under the common law, the courts may not give effect to a choice of court expressed in an agreement in certain limited circumstances, e.g. if such a choice is contrary to a statutory rule against the ousting of the jurisdiction of the court or against referring a dispute to the courts and law of a foreign country.

11. To reflect the limits which the law of either jurisdiction puts on the efficacy of a choice of forum clause, the proposed arrangement should require that the relevant choice of forum clause is a valid one.

12. For the purposes of the HKSAR courts, we propose that the arrangement should cover judgments given in the District Court and above (amounting to \$50,000 or above generally) and will effectively exclude those given by the Small Claim Tribunal. The reasons for so limiting the scope of HKSAR judgments covered by the arrangement are to bring practical benefits to the parties concerned and to ensure that these practical benefits are proportional to the efforts and resources required for the enforcement of judgments under the proposed arrangement.

13. For the purposes of the Mainland courts, our proposal is to cover judgments given by the Intermediate People's Courts or above since it will normally be this level of Mainland courts that will have jurisdiction to determine disputes relating to contracts with "HKSAR" parties.

Finality

14. The arrangement will only permit the enforcement of a judgment that is final and conclusive. The issue of how and when a judgment should be treated as final and conclusive will be considered in our discussions with the Mainland authorities to ensure that an arrangement that is mutually satisfactory will be reached.

Safeguards

15. As in the cases of enforcement of foreign judgments under common law rules and under Cap. 319, the proposed arrangement will provide for grounds that will allow the court of either jurisdiction to refuse to enforce a judgment given in the other jurisdiction. Having considered the common law, Cap. 319 as well as international treaty practice, we propose that registration of a judgment under the proposed arrangement may be refused or set aside, if : -

- (a) the judgment is wholly satisfied;
- (b) the judgment was obtained by fraud;
- (c) the judgment was obtained in breach of natural justice;
- (d) enforcement of the judgment would be contrary to public policy (order public) in the place of the registering court;
- (e) the judgment is inconsistent with a prior judgment of the registering court;
- (f) the judgment was obtained in proceedings at which the defendant was not given sufficient notice; and
- (g) in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the court of origin and did not submit to its jurisdiction.

IMPLEMENTATION

16. Once a mutually satisfactory arrangement with the Mainland authorities has been reached, the Administration will seek to promote legislation to give it the requisite legislative backing. We envisage that a statutory registration scheme, similar to Cap 319, will be required. The arrangement will become effective when both jurisdictions have completed the necessary procedure for its implementation.

Administration Wing
Chief Secretary for Administration's Office
March 2002

Appendix

Enforcement of Foreign/Mainland Judgments in the HKSAR Under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319)

At present legal arrangements are in place to ensure that civil and commercial judgments obtained in a number of jurisdictions outside the HKSAR may be registered and enforced in the HKSAR, and conversely, that judgments obtained in the courts here can be similarly enforced in other jurisdictions. These arrangements form the basis of the registration system in the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). The Ordinance provides that judgments given in superior courts of foreign countries to which the benefits conferred by the Ordinance have been extended are capable of registration for enforcement in Hong Kong, subject to certain conditions. The term “judgment” in the Ordinance has a broad meaning, covering a judgment given by a court in any civil proceedings, and a judgment given by a court in any criminal proceedings for the payment of money in respect of compensation or damages to an injured party. The Ordinance provides the HKSAR with the necessary flexibility in negotiating individual agreements with foreign jurisdictions for enforcement of judgments on a reciprocal basis. However, Mainland judgments cannot be enforced under Cap. 319 and there are no arrangements between the HKSAR and the Mainland on reciprocal enforcement of judgments. Furthermore, the Mainland cannot be considered as a foreign country, or foreign jurisdiction, within the meaning of Cap. 319.

Recognition and Enforcement of Mainland Judgments in the HKSAR under Common Law Rules

2. At common law, a foreign money judgment, including a Mainland judgment, may be recognised and enforced by action as a debt, subject to certain overriding principles. A judgment does not have to originate from a common law country in order to benefit from the common law rules; and reciprocity is not a requirement under the common law.

3. Hence, a judgment originating from the Mainland may be recognised and enforced by the HKSAR courts on conditions that it is : -

- (a) given by a competent court (as determined by the HKSAR courts with reference to the private international law rules);
- (b) a judgment for a fixed sum of money; and
- (c) a final judgment that is conclusive upon the merits of the claim.

4. Defences are available to a defendant in a common law action brought on a judgment from another jurisdiction. They include inter-alia the lack of jurisdiction; the judgment having been obtained by fraud; recognition of the judgment being contrary to public policy (of the HKSAR); and the judgment having been obtained in breach of natural justice, etc.

Suing on the Original Cause of Action

5. Instead of bringing an action at common law on a Mainland judgment, the judgment creditor may bring a fresh action in the HKSAR based on the same cause of action. He would have to show, among other things, that the HKSAR courts are an appropriate forum and competent to hear the case.

Enforcement of Mainland Judgments under the common law vs Recognition and Enforcement by Registration Under Cap. 319

6. Compared with a judgment creditor whose judgment is registrable under Cap. 319, the judgment creditor of a Mainland judgment who wishes to seek enforcement at common law in the HKSAR suffers the following disadvantages : -

- (a) He cannot use the simplified procedure provided for in Cap. 319;
- (b) the proceedings will take longer and he will incur higher legal costs; and

- (c) more importantly, he will bear the burden of proof whereas in proceedings for the registration of a foreign judgment under Cap. 319, the burden of proof falls on the judgment debtor who will have to show why the judgment should not be registered.

Enforceability of HKSAR Judgments in the Mainland

7. It does not appear that HKSAR judgments are at present enforceable in the Mainland. The Mainland, being a civil law jurisdiction, does not have a rule that is similar to our common law rule on recognition and enforcement of foreign judgments. Article 267 of the Mainland's Civil Procedure Law enacted on 9 April 1991 provides that foreign judgments may be enforced in accordance with international agreements to which the PRC is a party or in accordance with the principle of reciprocity. It is considered that the HKSAR, not being a "foreign" country, may not benefit from the Article.