



**PROPOSED ARRANGEMENT BETWEEN HONG KONG AND THE
MAINLAND ON RECIPROCAL RECOGNITION AND ENFORCEMENT
OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

SUBMISSIONS

1. The Department of Justice ("DOJ") in July 2018 released a Consultation Paper on the *Proposed Arrangement between Hong Kong and the Mainland on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* ("Proposed Arrangement") for public views.
2. The Consultation Paper sets out a proposal by the DOJ for Hong Kong to enter into an arrangement with the Mainland on reciprocal recognition and enforcement of judgments ("REJ") in civil and commercial matters. In the Consultation Paper, among other things, the DOJ has identified five specific types of civil and commercial matters for comment (§19-20, Consultation Paper).
3. The Law Society has studied the Consultation Paper and produced this submission. We first set out our *general* comments, followed by our observations on the five *specific* civil and commercial matters raised by the DOJ.

GENERAL COMMENTS

I. Reference to "civil and commercial matters"

4. Regarding the ambit of "civil and commercial" matters for the purpose of

the Proposed Arrangement (§13-17), we agree to the proposal that the Proposed Arrangement should cover only matters which are considered to be "civil and commercial matters" *under both Hong Kong and Mainland law*. We acknowledge that this approach is consistent with the principle reflected in the previous "Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region" (《關於內地與香港特別行政區法院就民商事案件相互委託提取證據的安排》) which was signed between Hong Kong and the Mainland in December 2016 and came into effect on 1 March 2017.

5. We also agree that administrative proceedings in the Mainland as well as judicial reviews and regulatory proceedings (such as proceedings before the Market Misconduct Tribunal and the Competition Tribunal) in Hong Kong are to be *excluded* from the Proposed Arrangement. However, and for the avoidance of doubt, decisions made by the Labour Tribunal and the Lands Tribunal in Hong Kong should *not* be excluded, given that the Labour Tribunal and the Lands Tribunal hear and adjudicate respectively employment-related claims, and landlord and tenant / building management disputes etc; these claims are common and are closely related to the livelihood of Hong Kong people. For completeness, we should also mention that claims in the Small Claims Tribunal are of "civil and commercial" in nature. While as a matter of principle we see no reason why such awards should be excluded, practically we appreciate that taking steps to enforce such awards in the Mainland may be costly in comparison to the amount of the award, and so usage of the Proposed Arrangement for such awards could prove to be infrequent in practice.

II. Principle of enforceability and level of courts to be covered

6. We agree to the general principle that a judgment shall be recognized only if it has effect in the place where it is made, and shall be enforced only if it is enforceable in the place where it is made (§22).
7. We also agree to the proposal that judgments given by the Basic People's Courts in the Mainland or above are to be covered and in the case of Hong Kong, judgments from the District Court or above but not judgments

(decisions) from administrative appeal boards or tribunals dealing with administrative and regulatory matters. For the avoidance of doubt, decisions in the Labour Tribunal, the Lands Tribunal and the Small Claims Tribunal should be included in the Proposed Arrangement (see our above comment).

III. Jurisdictional basis

8. The DOJ offers three approaches on proving jurisdiction for the purpose of REJ (§27-29). We prefer the second approach offered, i.e. in addition to excluding judgments made in violation of the exclusive jurisdiction of the courts of the requested place, detailed indirect jurisdictional rules should be devised in the Proposed Arrangement so that a judgment would only be eligible for recognition and enforcement thereunder if it meets one of the requirements of such rules.
9. The above would offer a high degree of certainty and a clear guidance to the parties in their choice of forum and litigation strategies. That is clearly relevant and important.
10. As for judgments relating to intellectual property rights (§28(2)(b)), we shall provide comments in the latter part of this submission.

IV. Grounds for Refusal

11. We agree to the proposed grounds of refusal with reference to the existing REJ arrangements with the Mainland, the current Hong Kong laws and the “Hague Judgments Project” (as defined in footnote 11 of the Consultation Paper). For the sake of completeness, these grounds of refusal are excerpted from the Consultation Paper and are re-produced below:

- (1) the respondent (meaning the party against whom recognition or enforcement is sought) was not summoned according to the law of the requesting place, or although the respondent was summoned, the respondent was not given a reasonable opportunity to make representations or defend the respondent’s case;

- (2) the judgment was obtained by fraud;
 - (3) the judgment was rendered in a cause of action which was accepted by the requesting court after the requested court had already accepted the cause of action on the same dispute;
 - (4) an arbitral award has already been made in the requested place on the same dispute, or a court of the requested place has rendered a judgment on the same dispute; or has recognized or enforced a judgment on the same dispute given by a court of another country or place, or has recognized or enforced an arbitral award on the same dispute given in another country or place;
 - (5) the bringing of the relevant proceedings in the requesting court is contrary to an agreement under which the dispute in question is to be settled otherwise than by proceedings in the requesting court, and the respondent:
 - (a) did not bring or agree to the bringing of those proceedings in that court; and
 - (b) did not counter-claim in the proceedings or otherwise submit to the jurisdiction of the requesting court. However, the requested court shall not be bound by any decision of the requesting court on the validity of the said agreement; and
 - (6) according to the law of the requested place, the judgment is rendered in respect of a matter which is within the exclusive jurisdiction of the courts of the requested place.
12. We note the other proposal by the DOJ, i.e. “recognition and enforcement must be refused if the requested Mainland court considers that the recognition and enforcement of the Hong Kong judgment is manifestly contrary to the basic legal principles of Mainland law or the social and public interests of the Mainland; or the requested Hong Kong court considers that the recognition and enforcement of the Mainland judgment is manifestly contrary to the basic legal principles of Hong Kong law or the public policy of Hong Kong” (§31).
13. In the *“Arrangement on Reciprocal Recognition and Enforcement of Judgments 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” 《關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排》 (“Choice of Court Arrangement”) which was signed in July 2006, similar reference to “social and public interests of the Mainland” is made out as a ground of refusal (see Article 9 thereof). This proposal may require further consideration.

V. *Types of relief*

14. We consider that save and except for intellectual property and maritime matters, *only monetary relief* (i.e. an order for payment of a definite sum of money), not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, or multiple or punitive damages, should be provided for in the Proposed Arrangement (§33(1)).
15. As for intellectual property and maritime matters, comments are to be provided in the latter part of this submission.

VI. *Relationship with the Choice of Court Arrangement*

16. We consider that the Proposed Arrangement should cover also those judgments eligible for recognition and enforcement under the Choice of Court Arrangement signed in July 2006. This Choice of Court Arrangement should thereby be superseded (§39(2)) upon the Proposed Arrangement coming into force.
17. We are going to set out below our comments on the five types of civil and commercial matters raised in the Consultation Paper.

SPECIFIC COMMENTS

VII. Corporate insolvency and restructuring as well as personal bankruptcy (§ 20A (1)-(5))

18. We agree with the DOJ's proposal to conduct a stand-alone consultation exercise on REJ on cross-border insolvency with the Mainland. By agreeing that corporate and personal insolvency matters would not be covered by the Proposed Arrangement, we are however not suggesting that this matter be shelved or delayed. On the contrary, cross-border insolvency with the Mainland has become more important and REJ for that purpose should be thoroughly examined. The matter is both significant and urgent, and should be looked into without delay.
19. We are not aware of any working party the DOJ has set up or is going to set up to look into this matter. We are prepared to work with the DOJ in its deliberations and offer to join any such working party. As an alternative, we look forward to a full consultation shortly.

VIII. Succession of the estate of a deceased person and other related matters (§20B(1)-(11))

20. The DOJ asserted in the Consultation Paper that, "a successor to any Mainland property (movable or immovable) would apply to the relevant notary office in the Mainland for a notarial certificate on succession and such certificate would be presented ... to effect the transfer of ownership of the relevant property to the successors". (§20B(8)). As a matter of practice, a successor to movable Mainland property does not need to apply for a notarial certificate for the above purpose.
21. As for the DOJ's proposal set out in sub-paragraph 20B(9) of the Consultation Paper, we have no comments at this stage.

IX. Matrimonial or family matters not covered by the Matrimonial Arrangement (§20C(1)-(7))

22. The DOJ in the Consultation Paper has identified the following matters

which are not covered in the *Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (《關於內地與香港特別行政區法院相互認可和執行婚姻家庭民事案件判決的安排》) (“Matrimonial Arrangement”) signed in June 2017, i.e.

- (a) disputes after divorce on liability for damages for personal injuries and mental suffering;
- (b) disputes on property arising from co-habitation relationship;
- (c) disputes on maintenance between siblings;
- (d) disputes on maintenance arising out of the obligation of a child to support his/her parent(s) and grandparent(s);
- (e) disputes on dissolution of an adoptive relationship;
- (f) disputes on rights over guardianship involving adults with mental incapacity;
- (g) disputes between family members on division of property; and
- (h) disputes on property arising from engagement agreements.

23. We agree with the DOJ that items (a) to (f) above should be *excluded* from the Proposed Arrangement, for the reasons the DOJ has proffered, i.e. the type of relationship as specified or the underlying cause of action are not recognized under the Hong Kong law (items (a) – (e) above); legal policy considerations (item (f) above).

24. For items (g) and (h) above, we have no objection for them to be included in the Proposed Arrangement as the remedies sought are available under Hong Kong law (although with causes of action which are not necessarily related to matrimonial practices).

X. *Intellectual Property Rights* (§20D(1)-(10))

25. On reciprocal enforcement of judgments relating to intellectual property rights (‘IPR’), we favour:-

- (a) *certainty* – the DOJ’s Proposal suggests three approaches (§28(1)-(3)) on proving the jurisdiction of the Mainland courts, for the purpose of

enforcement of judgments in Hong Kong. Of these and insofar as IPRs are concerned, we prefer the approach which offers a high degree of certainty and clear guidance on what will be recognised and enforced. Hence we are inclined to accept the second approach set out in §28(2)(b) and (c) of the Consultation Paper.

At the same time, we ask that the type of IP cases that will be included in the Proposed Arrangement *specifically* be listed out. In this regard, we are aware the Judiciary is already working on the type of cases that will be adjudicated in the IP Specialist List to be set up. For example, it has been suggested that breach of confidence in general, other than trade secrets, may not be included. Another example is the right of portrait which is a civil right recognized in the Mainland but not in Hong Kong, as it is not clear if it is an IP right in the Mainland regime. It therefore seems logical that the types of IP cases for reciprocal recognition and enforcement should synchronise with those recognised for inclusion in the intended IP Specialist List.

- (b) *coverage* – the Proposal proposes that only monetary relief in a judgment relating to an IPR be enforced (§34). Monetary relief is explained in the Consultation Paper as "an order for payment of a definite sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, or multiple or punitive damages" (§33(1)). This is not entirely clear, and for the avoidance of doubt, we consider that the monetary relief as defined should include costs and interest. We agree that, for IPR, non-monetary relief such as injunction and specific performance should not be included and this is in line with the approach for IP in the Draft Hague Judgments Convention.
- (c) *interim relief* – besides interim injunctions, for IPR, the Mainland has asset preservation orders and evidence preservation orders which are executed by the Mainland courts (§36). As the manner these are applied for, what they cover and how they are executed seem very different from those in Hong Kong, in the absence of comprehensive research to understand the frequency these reliefs are applied for and the criteria by which these may be granted, executed and overturned, we are not inclined to support the proposal to include interim relief.

XI. Maritime matters

26. We agree in principle that general contractual and tortious claims in maritime matters should be included in the Proposed Arrangement.
27. In relation to whether certain types of maritime matters are to be excluded in the Proposed Arrangement, that merits careful consideration. Subject to the production of the "*international conventions and the relevant Hong Kong legislation that (may) contain provisions on jurisdictional rules and reciprocal enforcement of the relevant judgments*" (§20E(1)) by the DOJ for our consideration, our preliminary views are that, as a matter of general principle, if the international convention contains an enforcement mechanism, such matter may be excluded. In this regard, reference could be made to the aviation regime where the suitable jurisdictions for the making of claims (including the relevant procedural matters) regarding air carriers' liabilities are specified in the Warsaw Convention and the Montreal Convention, that are applicable to Hong Kong by the Carriage by Air Ordinance (Cap.500).
28. We also note that the Draft Hague Judgments Convention currently excludes five maritime matters: marine pollution, limitation of liability for maritime claims, general average, emergency towage and emergency salvage. As explained in a Preliminary Document prepared for the meeting of the Special Commission on the Hague Judgments Project held in May 2018, the reasons for the exclusion is that "*Because of the highly specialised nature of this field and that not all States have adopted the relevant international instruments, the 2005 Choice of Court Convention introduced this exclusion, which has been maintained in the draft Convention. Subject to the limitation of liabilities, other maritime matters, such as marine insurance, nonemergency towage and salvage, shipbuilding or ship mortgages and liens are included in the scope of the draft Convention.*"¹

¹ Paragraph 48 of the Judgments Convention: Revised Preliminary Explanatory Report (Preliminary Document No.10 of May 2018) , available at: <https://assets.hcch.net/docs/7cd8bc44-e2e5-46c2-8865-a151ce55e1b2.pdf> (last access: 20 September 2018).

29. We therefore consider that the scope of application in relation to "maritime matters" and the definition of "maritime matters" should be clearly specified in the Proposed Arrangement for certainty and clarity.
30. Regarding the types of relief, we received concerns and mixed views. There have been suggestions that the inclusion of non-monetary relief for maritime matters may potentially cause difficulties and open up arguments with limitation actions as when non-monetary judgments are to be covered. Due to the short time available for this consultation, we are not able to procure researches and/or have further deliberation on the above. We shall however be prepared to have further discussion with the DOJ in this regard.
31. Consideration should also be given to include matters which are subject to the admiralty jurisdiction (e.g. claims under section 12A of the High Court Ordinance, Cap.4) into the Proposed Arrangement. Experience shows that in a number of cases after legal proceedings have been instituted in Hong Kong, one of the parties then proceeds with a claim in the Mainland. That ends up in parallel proceedings in both Hong Kong and Mainland. If the Proposed Arrangement is in place to cover claims in relation to admiralty jurisdiction, it may prevent the above intentional parallel proceedings in both jurisdictions, that result in a waste of judicial resources as well as time and costs of the parties.

CONCLUSION

32. We echo the views in the community that there is a need to widen the scope of the reciprocal recognition and enforcement of judgments in civil and commercial matters between Hong Kong and the Mainland (§4). There should be a more comprehensive arrangement for reciprocal recognition and enforcement of judgments with the Mainland to reduce the need for re-litigation of the same disputes in both places. That will offer better protection to the parties' rights in a wider range of civil and commercial matters.
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33. Given the substantial benefits which are expected to be yielded to the Hong Kong society, we advocate for an as early as practicable implementation of such comprehensive reciprocal enforcement arrangements with the Mainland. If practicable, we would like to be kept informed of the progress of its implementation. In this connection, for the Matrimonial Arrangement, the Law Society is keenly looking forward to the earliest publication of the ‘Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill’ or any related consultation. As we note from a statement by the Administration to the Legislative Council in March 2018 that the above-mentioned bill would be introduced to the Legislative Council in mid 2018², we should be most grateful if we could be apprised of the progress. If there is any matter that we could assist, the Law Society would be most willing to do so.

**The Law Society of Hong Kong
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² See <http://www.legco.gov.hk/yr17-18/english/panels/ajls/papers/ajls20180326cb4-762-5-e.pdf>