



**CONSULTATION ON THE MAINLAND JUDGMENTS IN CIVIL AND
COMMERCIAL MATTERS (RECIPROCAL ENFORCEMENT) BILL
("REJ BILL") AND THE MAINLAND JUDGMENTS IN CIVIL AND COMMERCIAL
MATTERS (RECIPROCAL ENFORCEMENT) RULES**

SUBMISSION

1. The Law Society makes the following submission in response to the consultation by the Department of Justice ("DOJ") on the REJ Bill and its draft Rules. The consultation paper was issued on 17 December 2021.

GENERAL COMMENTS

2. The consultation is on legislative proposals consisting of the REJ Bill and its draft Rules; they are put forward to implement *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* signed between the Supreme People's Court and the Hong Kong SAR Government on 18 January 2019 ("REJ Arrangement").
3. Legislation for the REJ Arrangement is a progress to be welcomed. A regime for reciprocal enforcement of judgments in civil and commercial matters reduces the need for re-litigation of the same disputes across the borders. It saves costs and time. That helps enhance Hong Kong's competitiveness as a regional centre for legal and dispute resolution services.
4. The consultation period for this piece of legislation is notably short; we were asked to respond by 31 January 2022. As time for our study is limited, instead of a line-by-line review of the REJ Bill or the draft Rules, we offer our comments, broadly, from a policy perspective.

THE DRAFTING APPROACH OF THE REJ BILL AND THE DRAFT RULES

5. Our preliminary comments, at this stage, are as follows.
 - 5.1 The policy aim of the REJ Bill is to put in place a mechanism for reciprocal recognition and enforcement of judgments in civil and commercial matters between the Hong Kong SAR and the Mainland. On checking the statutes, there are already the *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap 319) and the *Mainland Judgments (Reciprocal Enforcement) Ordinance* (Cap 597). These two pieces of legislation similarly provide for reciprocal enforcement of foreign judgments, including Mainland judgments. Relevant rules of the Court have also been provided (See Order 71 and Order 71A of the Rules of High Court, Cap 4A). These rules set out the procedure to follow in applications to enforce under both Cap 319 and Cap 597. We have not been advised that there are any difficulties in (or criticism arising from) these two pieces of legislation, or those related High Court Rules.
 - 5.2 If the Government aims to improve the existing mechanism and/or to usher in a more comprehensive mechanism for reciprocal enforcement of judgments, it should be easier to simply expand the current regime provided by the two above pieces of legislation. For example, the Government could consider to add a new part to Cap 597. Or the bill to implement the REJ Arrangement can be a simple “cut and paste” exercise of Cap 597. These suggested approaches would have the advantage of deploying the same legal concepts and approaches which the Courts and the legal profession are already using and are accustomed to.
 - 5.3 Instead of copying direct from the existing legislation, the REJ Bill and its Rules are drafted anew. Different terminologies and approaches (on evidence) are proposed.
 - 5.4 We do not have strong views on the *drafting style* of the REJ Bill but when the Bill is drafted in such a way which is very different from the existing regime provided by the two above instruments, and is separated therefrom, that could cause problems to the Courts and the

Court users.

- 5.5 One disadvantage that we can readily discern on the disconnect of the REJ Bill from the current regime is that case law and authorities under Cap 319 or Cap 597 may not be applicable to the REJ Bill or its rules. There would not be readily available guidance for the Courts or the Court users.
- 5.6 One example is the proposed requirement under the REJ Bill for judgments to be “effective” for the purpose of reciprocal enforcement (see clause 8 of the Bill). This concept is nowhere to be found in either Cap 319 or Cap 597. Instead, both pieces of legislation refer to judgments being “final and conclusive” for the purpose of reciprocal enforcement. (See section 3 of Cap 319 and section 6 of Cap 597).
- 5.7 These different concepts may, or may not, lead to differences in the intended consequences when the Courts come to adjudicate, but the fact that different words are used potentially opens up and invites disputes and litigations.
- 5.8 With the current draft, it would seem unavoidable that there needs to be a period of time for both the Courts and the Court users to get used to and to understand the regime under the REJ Bill.
- 5.9 Incidentally, we note some similarities in the drafting between the *Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance* (Cap 639) and the REJ Bill. Among other things, both refer to requirements that judgments have to be “effective” for reciprocal enforcement (see clause 8 of the REJ Bill and sections 5 and 6 of Cap 639). Moreover, the formulation for the requirement under the Bill is the same as that under Cap 639.
- 5.10 If there is an attempt to model the REJ Bill on Cap 639, such an attempt should be resisted, as that is inappropriate. For one thing, the REJ Bill is on *general* civil and commercial matters, while Cap 639 is *solely on matrimonial* matters. There are differences between the two, insofar as the requirement for finality of judgments is concerned (for reciprocal enforcement). In matrimonial and family matters, it is not unusual that even after a court has handed down its judgment, and

there is no appeal against that judgment, a party could in certain circumstances go back to the Court and asks for a variation of the court's order. This can happen with, for example, the maintenance of the parties' child. The Court hears the application for variation and makes "new" orders where appropriate. For general civil and commercial matters, a party would not expect his opponent to be entitled to go back to the Court to re-open and re-litigate the issues after his judgment has been handed down and the appeal period has lapsed. The differences in the above are significant.

- 5.11 The parameters under the two regimes for a party to seek enforcement of a Mainland Judgment (and for the HKSAR Courts to consider) could also be different. In the case of matrimonial matters, one variable (if applicable) could be whether the child is or will be located in Hong Kong¹. Such is wholly irrelevant and inapplicable for general civil and commercial matters.
- 5.12 As such, the drafting to model the REJ Bill upon Cap 639 is, without disrespect, inapt.
- 5.13 In relation to the draft Rules for the REJ Bill, we note the draft Rules are elaborate and overtly prescriptive. They set out the information and documents required to be stated in and exhibited to the affidavit in support of a registration application in different scenarios (see draft Rules 5 - 12), and they require the applicant to pigeonhole himself into the different scenarios as prescribed. That causes problems if the party could not find any of those prescribed scenarios that fits into his case, either because his case does not appear in any of these scenarios, or because his case "straddles" between two or more scenarios as prescribed.
- 5.14 It would be simpler to have an over-arching provision, as in Order 71 or Order 71A of Rules of High Court, Cap 4A (see O.71 r.42 or O.71A r.11 of RHC).
- 5.15 We also repeat our above observations, *mutatis mutandis*, on the disconnect of the draft Rules from the body of case law and

¹ See paragraph 13 of Legislative Council Brief ([File Ref.: L/M\(5\) to CPA CLU 5037/7/3C](#)) provided by DOJ dated 25 August 2021

authorities currently available, and the loss of guidance thereby (§§ 5.5 and 5.8 supra).

- 5.16 In summary, we think careful thought should be given to redrafting the REJ Bill in similar terms to Cap 319 and particularly Cap 597. The proposed Rules should similarly follow the current rules in Order 71 Rules of the High Court; perhaps in the form of a new Order 71C.

INTELLECTUAL PROPERTY

6. In terms of intellectual property judgments, we note the REJ Arrangement goes beyond the *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, by expressly covering judgments given in respect of disputes over intellectual property rights whilst such judgments are expressly excluded from the said Hague Convention. This arrangement demonstrates the Central Government's support and HKSAR Government's determination to consolidate Hong Kong's position as a regional intellectual property trading centre. We therefore welcome this coverage for intellectual property matters, and that this principle is to be adopted in the REJ Bill.
7. Without prejudice to our above comments on the drafting approach, we note that orders and decisions of the Copyright Tribunal of the Hong Kong SAR are not recognized as enforceable or effective Hong Kong judgments under the REJ Bill. We feel obliged to point out that the Copyright Tribunal can make orders on payment and that the jurisdiction of the Copyright Tribunal and courts are different. The Tribunal has its own jurisdictions and those are statutorily conferred (see section 173 of the Copyright Ordinance, Cap 528) ("Copyright Ordinance"). For example, the Tribunal has exclusive jurisdiction to confirm or vary a proposed licensing scheme or an operating licensing scheme referred to it for determination (respectively Section 155(3) and 156(3) of the Copyright Ordinance).
8. The decisions of the Copyright Tribunal are important and could have far-reaching effects, as in the case of *Neway Music Limited v Hong Kong Karaoke Licensing Alliance Limited* (CT 2/2010), which ended with a confirmation that the karaoke-server licensing scheme in dispute

administered by the respondent copyright licensing body for karaoke operations was fair and reasonable and a decision that the originator should pay over HK\$90 million in accrued licence fees. Also, the Copyright Tribunal can (in special circumstances) make costs orders which it did in the *Neway* case.

9. Importantly, a decision of the Copyright Tribunal may be enforced in the same manner as a judgment, order or direction from the Court that has the same effect, with leave of the Court of First Instance (Rule 44, Copyright Tribunal Rules, Cap 528).
10. All the above support the view that the role of the Copyright Tribunal is not purely administrative and its proceedings ought not be considered as administrative proceedings. In fact, it is an independent quasi-judicial body established under the Copyright Ordinance. If Copyright Tribunal is left out of the REJ regime, that would not be conducive to developing Hong Kong SAR as the regional center for intellectual property trade, as envisioned in the "14th Five-Year Plan for National Economic and Social Development of the People's Republic of China and the Long-Range Objectives Through the Year 2035".

CONCLUSION

11. In conclusion, local legislation to put in place the REJ Arrangement is certainly welcome and is a positive commitment to be taken forward, as this would significantly expand the enforcement of Hong Kong judgments in the Mainland, and vice versa. However, there are important issues that the DOJ needs to carefully look into, in the drafting of the Bill and the related Rules. There is also a lacuna in the REJ Bill, in that it does not include the orders and decisions of the Copyright Tribunal of the Hong Kong SAR. The above merit further discussions and considerations.

The Law Society of Hong Kong
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