

HONG KONG: BREAKING DOWN BARRIERS - ENFORCEMENT OF MAINLAND JUDGMENTS

Hong Kong further benefits from its status as a Special Administrative Region of the People's Republic of China with an enhanced regime for the enforcement of civil and commercial judgments granted by Courts in the Mainland.

Civil and Commercial Judgments: The New Regime

On 18 January 2019, the Supreme People's Court and the Hong Kong SAR government signed the 'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the Hong Kong Special Administrative Region' (**2019 Arrangement**)¹.

The 2019 Arrangement substantially expands the range of Mainland judgments which are enforceable in Hong Kong. This is welcome news for greater China and the wider region. As the Hong Kong government commented in April 2022:

*"...the... Arrangement goes beyond the Hague Judgments Convention by not only covering a wide range of judgments on contractual and tortious disputes, but also expressly includes judgments given in respect of certain types of disputes over intellectual property rights. This major breakthrough makes Hong Kong the first jurisdiction to have an arrangement with the Mainland on [recognition and enforcement of judgments] with such a wide coverage, reflecting the unique advantages of "one country, two systems", and complementing Hong Kong's development into a regional intellectual property trading centre."*²

On 29 January 2024, a new **Ordinance**³ and accompanying **Rules**⁴ giving effect to the 2019 Arrangement (together, the **New Regime**) will come into force in Hong Kong, superseding the recognition and enforcement regime laid out in the **2008 Ordinance**⁵ in respect of civil and commercial disputes⁶ and marking the beginning of a new era in relation to the enforcement of Mainland judgments in Hong Kong.

The New Regime: Key Aspects

1. In addition to recognition and enforcement of monetary judgments (permitted under the 2008 Ordinance), the New Regime permits recognition and enforcement of non-monetary Mainland judgments, such as:

- injunctions;
- declaratory relief;
- specific performance; and
- judgments relating to "specified intellectual property rights" (i.e. copy right claims and patent disputes).

Interim measures are, however, excluded⁷ and other exclusions are discussed below.

2. Contractual claims: unlike the 2008 Ordinance, the New Regime does not require prior agreement that the Hong Kong or Mainland Courts have exclusive jurisdiction over disputes arising in relation to the contract.

¹ [Department of Justice - Mainland and Macao SAR Related Topics - Reciprocal Recognition and Enforcement of Civil and Commercial Judgments between Hong Kong and the Mainland](#)

² [Mainland Judgments in Civil and Commercial Matters \(Reciprocal Enforcement\) Bill to be introduced into LegCo \(info.gov.hk\)](#)

³ Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) gazetted on 10 November 2023.

⁴ Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Rules (Cap 645A) gazetted on 10 November 2023.

⁵ Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597). The 2008 Ordinance, as amended, will remain in force and continue to regulate the recognition and enforcement of other Mainland judgments (discussed below).

⁶ Plus criminal matters where the defendant has been ordered to pay compensation or damages to another party (section 3(1)(a)(ii) of the Ordinance).

⁷ Section 2(1) of the Ordinance.

3. Under the New Regime, the applicant must satisfy the Hong Kong Court that the Mainland Court had jurisdiction to hear the original matter, which is assessed with reference to factors such as:
 - the defendant's place of residence;
 - the defendant's place of business or office;
 - the place where the disputed contract was to be performed, or the negligent act committed;
 - whether there is an exclusive jurisdiction agreement in favour of the Mainland Courts and / or any objections to the jurisdiction of the Mainland Court were raised; and
 - if all of the parties are resident in Hong Kong, the applicant will have to show an "*actual connection between the Mainland and the dispute*".
4. When applying for recognition and enforcement in Hong Kong under the 2008 Ordinance, the applicant must satisfy the Court that the Mainland judgment is "*final and conclusive*".⁸ By contrast, the New Regime merely requires that civil and commercial judgments be "*effective*".⁹ allowing parties to apply for recognition and enforcement of Mainland judgments in Hong Kong at an earlier stage in some cases (i.e. without the need to exhaust their right of appeal in the Mainland proceedings).

The New Regime: Exclusions

The Ordinance expressly excludes judgments concerning:

- matrimonial / family law;
- administration or distribution of an estate;
- personal and corporate insolvency;
- administrative matters;
- recognition of a foreign judgment;
- certain arbitration matters (e.g. disputed arbitration agreements and set aside applications);
- excluded intellectual property matters (e.g. infringement of an invention patent); and
- certain maritime law issues (e.g. maritime pollution and liens).

However, existing cross-border arrangements and corresponding implementing Hong Kong law can be used to seek recognition and enforcement in some of those cases, e.g.:

- the 2008 Ordinance can be used to seek recognition and enforcement of certain civil and commercial Mainland judgments issued by designated Mainland Courts which order payment of a sum of money and meet other requirements (i.e. agreement as to the exclusive jurisdiction of the Mainland Courts);
- the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap 639) (**Matrimonial Ordinance**), which came into force in February 2022 and was enacted to implement 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' which was signed in June 2017; and
- the 'Record of Meeting of the Supreme People's Court and the Government of the HKSAR on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the HKSAR' (**Insolvency Arrangement**), which was signed in May 2021 and the accompanying Practical Guide issued by Hong Kong's Department of Justice and the Opinion promulgated by the Supreme People's Court.

Finance Transactions: The Return of Asymmetric Jurisdiction Clauses?

An asymmetric jurisdiction clause allows lenders to file proceedings against the borrower in multiple jurisdictions. Such clauses were common in Mainland-associated finance transactions at one time. However, in March 2020 the Hong Kong Court of First Instance (**HKCFI**) held that the asymmetric jurisdiction clause in the facility agreement in question was not an exclusive jurisdiction clause, as required under the 2008 Ordinance and, as such, was ineffective for the purposes of the relevant recognition and enforcement arrangements¹⁰.

Given the wording of the relevant provision in the New Regime, we anticipate that asymmetric jurisdiction clauses may, once again, be seen in finance transactions involving Mainland lenders.

⁸ Section 5(2)(c) of the 2008 Ordinance.

⁹ Sections 2(1) and 8 of the Ordinance.

¹⁰ *Industrial and Commercial Bank of China (Asia) Limited v Wisdom Top International Limited* [2020] CFI 322.

Security for Costs and Mainland Plaintiffs: Change Ahead?

The introduction of the New Regime may make it more difficult to obtain security for costs against Mainland plaintiffs in Hong Kong proceedings.

The Hong Kong Court generally requires defendants seeking an order for security for costs against plaintiffs who are ordinarily resident outside of Hong Kong to demonstrate that they would experience "*genuine difficulties*" enforcing judgments / costs orders in the plaintiff's resident jurisdiction. This test applies whether or not the plaintiff is domiciled in a common law jurisdiction (like Hong Kong) or a civil law jurisdiction, such as Mainland China¹¹.

When assessing whether such difficulties are present in a particular case, the Hong Kong Court will consider the existence of any agreement for reciprocal enforcement of judgments between Hong Kong and the plaintiff's jurisdiction¹². However, in late 2022 the HKCFI held that the 2019 Arrangement - on its own - was insufficient to eliminate such difficulties because "*no date has been appointed for it to become effective*"¹³ albeit the Court indicated that its position may change when the 2019 Arrangement became Hong Kong law¹⁴.

After the New Regime comes into force in late January 2024, it will (in our view) be harder to argue that "*genuine difficulties*" exist in relation to enforcing Hong Kong judgments in the Mainland and therefore to persuade the Hong Kong Court to exercise its discretion and grant an order for security for costs against Mainland-resident plaintiffs.

However, any difficulties created in relation to costs are likely to be outweighed by the clear benefits of the New Regime, with its expansive scope and pragmatic approach to effective cross border recognition and enforcement. Given the detailed registration mechanism set out in the Rules and the judicial interpretation which will be promulgated by the Supreme People's Court¹⁵, we anticipate that the volume of Hong Kong judgments recognised in the Mainland (and vice versa) will increase markedly in the near future.

Safeguards: Court Supervision

Recognition and enforcement of Mainland judgments in Hong Kong will continue to be supervised by the Hong Kong Courts. There will be no automatic right of recognition / enforcement, a point which was emphasised by Mr. Paul Lam, Secretary for Justice, in a statement on 18 November 2023¹⁶.

Indeed, any judgement registered under the New Regime can be set aside by the Hong Kong Court on a variety of grounds (such as public policy, or the Mainland Judgment having been reversed on appeal)¹⁷. This is in keeping with international standards (such as the relevant Hague Convention and common law recognition and enforcement regimes), as noted by Mr Lam¹⁸.

The safeguards set out in the New Regime, and the diligent supervision of the Hong Kong Court, ensures that Hong Kong's recognition and enforcement arrangements "*fully protect and fairly balance the legitimate rights and interests of parties involved in cross-border business, whether creditors or debtors*"¹⁹.

Commentary

HFW has extensive experience of acting for clients involved in cross border litigation, including the law as it relates to the reciprocal enforcement of judgments awarded by Courts in the Mainland and in Hong Kong.

The introduction of the New Regime represents a significant change to Hong Kong law, and we are advising clients on its impact. We would be pleased to share our expertise with you and to assist your business to adapt to the new legal framework. Some initial points to consider:

- Parties commencing claims in the Mainland will need to assess whether any judgments obtained will be eligible for registration in Hong Kong (and vice versa) and adjust their litigation and enforcement strategies accordingly.
- Individuals and corporate entities involved in disputes in Hong Kong and in the Mainland should be mindful of the new approach to reciprocal recognition and enforcement of judgments and factor in the potential risk of applications seeking to register and / or set aside registration of judgements (and consequential legal costs and other risks).

¹¹ See *Kaefer AG v Winfield Marine Services Co Ltd* [2021] HKDC 1442.

¹² *Tronic International Pte Ltd v Topco Scientific Co Ltd & Ors*, CACV 235 / 2013.

¹³ *Du Guorong v Bank of China International Limited and BOCI Securities Limited* [2022] HKCFI 2777 (**Du Guorong**) at [9].

¹⁴ *Du Guorong* at [12].

¹⁵ [Department of Justice - Mainland and Macao SAR Related Topics - Reciprocal Recognition and Enforcement of Civil and Commercial Judgments between Hong Kong and the Mainland \(doj.gov.hk\)](https://www.doj.gov.hk)

¹⁶ [林定國 Paul Lam - 對即將生效的內地與香港民商事判決互認安排謬誤的一兩點澄清...](#)

¹⁷ Section 22 of the Ordinance.

¹⁸ [林定國 Paul Lam - 對即將生效的內地與香港民商事判決互認安排謬誤的一兩點澄清...](#)

¹⁹ [林定國 Paul Lam - 對即將生效的內地與香港民商事判決互認安排謬誤的一兩點澄清...](#)

- Respondents in disputes involving Mainland parties should consider the position regarding costs, in particular the reduced likelihood of obtaining security for costs orders against Mainland plaintiffs.

This article provides a high-level overview of enforcement and recognition of Mainland judgments in Hong Kong under the New Regime.

If you would like to discuss recent developments or require specific advice, please contact the authors or your usual HFW contacts.

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