

China / Hong Kong: Recognition and Enforcement of Judgments and Arbitral Awards

5th September 2005

Good morning, distinguished speakers, ladies and gentlemen

My presentation will focus mainly on the position in Hong Kong rather than that in Mainland China as my practice is in Hong Kong law. Under the principle of “one country, two systems”, I would not venture to give my opinion on the laws of People’s Republic of China (“PRC”).

Legal System in Hong Kong

The Hong Kong legal system, which was an offshoot of England’s common law system, has continued in place as the rule of law of the Hong Kong Special Administrative Region since the People’s Republic of China resumed sovereignty on 1st July 1997. Perhaps the major change in the Hong Kong legal system is the increasing use of Chinese in courts whilst English remains widely used. Chinese and English are both official languages in Hong Kong.

The Basic Law, which is regarded as the “mini-constitution” of Hong Kong, guarantees that the laws previously in force in Hong Kong prior to the Reunification, that is the common law, rules of equity and customary law, together with the Ordinances and subsidiary legislation which have been adopted as the laws of the Hong Kong Special Administrative Region, shall continue to apply.

Legal System in Mainland China¹

The legal system in Mainland China is based on the Constitution of the People's Republic of China. The highest state organ of the PRC is the National People's Congress which exercises powers including amending the Constitution, enacting and amending the more important laws and supervising other state organs such as the Standing Committee of the National People's Congress, the State Council, the Supreme People's Court and the Supreme People's Procuratorate.

The Standing Committee of the National People's Congress exercises powers as listed in the Constitution, such as the power to interpret the constitution and law, to enact and amend laws and to approve international treaties entered into by the Government.

The State Council (the Central People's Government) is the highest executive organ in the Mainland. Under the State Council, there are various Ministries and

¹ Source from ‘The Legal System in Hong Kong’ published on the website of the Department of Justice www.doj.gov.hk.

Commissions. At the local level, there are local people's governments at provincial, county and township levels which are responsible to the State Council.

In the Mainland, the Supreme People's Court, together with lower people's courts, adjudicate cases, whereas the Supreme People's Procuratorate, together with lower people's procuratorates, is responsible for approving arrest, instituting and conducting prosecutions, investigating a number of specific cases provided by law and exercising the power of legal supervision over the judgments of the people's courts.

Laws in the Mainland are enacted by the National People's Congress and its Standing Committee, whereas the State Council is authorised to issue administrative regulations. Local people's congresses may, in accordance with the constitution, laws and administrative regulations, enact local regulations to be applied in the local levels. Ministries and Commissions under the State Council, as well as local people's governments, may issue governmental orders in implementing laws and administrative regulations.

Recognition and Enforcement of Judgments – General

Prior to the Reunification, civil and commercial judgments given in the superior courts of the other parts of the Commonwealth and foreign countries which afford reciprocal treatment to judgments given in Hong Kong were registerable in the High Court of Hong Kong at any time within 6 years after the date of last judgment. This was and still is governed by the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) and Order 71 of the Rules of High Court.

Pursuant to section 4(1) of the Foreign Judgment (Reciprocal Enforcement) Ordinance, Hong Kong Courts may reject registration of a judgment if at the date of the application –

- (a) it has been wholly satisfied; or
- (b) it could not be enforced by execution in the country of the original court.

Commencing on 1st July 1997, Hong Kong is no longer part of the Commonwealth. As a result, the bilateral agreements concluded by the United Kingdom in regard to reciprocity have ceased to apply to Hong Kong. In order to clarify the equivocal position of reciprocity, the Department of Justice wrote to various countries to confirm whether Hong Kong judgments remained recognised and enforced therein.

At present, the Commonwealth countries which maintain reciprocal enforcement of judgments with Hong Kong are Australia, Bermuda, Brunei, India, Malaysia, New Zealand, Singapore and Sri Lanka. Austria, Belgium, France, Germany, Italy, Israel and the Netherlands are among the non-Commonwealth which have continued to recognise Hong Kong judgments.

According to the Secretary for Justice of Hong Kong, Hong Kong may be able to extend the reciprocal enforcement of judgments more widely once the draft Hague Convention on Exclusive Choice of Court Agreements is concluded. The draft Convention aims to provide a global convention that would harmonise international rules of jurisdiction and facilitate the recognition and enforcement of foreign judgments in civil and commercial matters. This would not, however, be applicable between the Mainland and Hong Kong which are two parts of one country.

Prior to the handover in 1997, judgments given in Hong Kong, which was then part of the Commonwealth, were enforceable in the United Kingdom by virtue of the provisions in Part II of the Administration of Justice Act 1920 and the Judgments (Facilities for Enforcement) Ordinance (Cap 9). As Hong Kong ceased to be a Colony of the United Kingdom on 1st July 1997, the reciprocity between the United Kingdom and Hong Kong has inevitably relinquished since then.

Notwithstanding the absence of any reciprocal arrangements, judgments of the United Kingdom and other jurisdictions may still be recognized and enforced in Hong Kong under the common law doctrine.

In *Korea Data Systems Co Ltd & Anor v Chiang Jay Tien & Anor* [2001] 3 HKC, the judge followed *Nouvion v Freeman* (1889) 15 App Cas 1 and summarised the requirements for enforcement of a non-Hong Kong judgment:-

It is well-established that a foreign judgment for a monetary sum may be enforced at common law in Hong Kong if:

- (a) the foreign court granting the judgment has the requisite jurisdiction to adjudicate upon the cause or matter that gave rise to the judgment.
- (b) The judgment is final and conclusive.
- (c) The judgment is not impeachable according to the rules on conflict of laws in Hong Kong.

Do the common law principles apply to a judgment of a court in Taiwan? The answer is yes. There have been some cases where parties opposing enforcement of a Taiwan judgment argued that in light of one China policy, Hong Kong should not recognise a Taiwan judgment as that would mean Hong Kong recognised the status, existence or competence of any court in Taiwan as an independent entity.

However, in *Chen Li Hung & Anor v Ting Lei Miao & Ors* [2000] 1 HKC 461, the Court of Final Appeal clarified that Taiwan court orders may be recognised and enforceable in Hong Kong where:-

- (i) the rights covered by the orders are private rights;
- (ii) it is in the interests of justice to give effect to the orders;
- (iii) it will not be inimical to the sovereign's interests or otherwise contrary to public policy to give effect to the orders.

In other words, orders given in non-recognized courts including courts sitting in foreign states the governments of which the People's Republic of China does not recognize as well as courts sitting in territory under the *de jure* sovereignty of the People's Republic of China but presently under the *de facto* albeit unlawful control of a usurper government are recognizable and enforceable. This does not equate to recognising an unrecognised entity. It simply protects private rights.

In *CEF New Asia Co Ltd v Wong Kwong Yiu John* [1999] 3 HKC 1, the judge held that it was neither contrary to public policy nor inimical to the rights of sovereignty as long as the order of the Taiwan court involves no more than private rights of a person.

Reciprocity between Hong Kong and the Mainland

The economic ties between Hong Kong and the Mainland have grown stronger. It is envisaged that business relations will become even closer with the implementation of CEPAs, the two Closer Economic Partnership Arrangements. In addition, China's accession to the World Trade Organization will provide ample business opportunity.

This leads to the question of how the legal systems in both places may cooperate to accommodate business and personal requirements and raises the question whether the two jurisdictions recognise and enforce each others' court judgments. Currently, only arbitral awards are enforceable between Hong Kong and the Mainland and there are no arrangements set in place between Hong Kong and the Mainland for the reciprocal enforcement of judgments.

I will first discuss reciprocal enforcement of arbitral awards before I go on to discuss reciprocal enforcement of judgments between Hong Kong and the Mainland.

Recognition and Enforcement of Arbitral Awards – Between Hong Kong and the Mainland

Pre-Reunification

Arbitral awards were enforceable between Hong Kong and the Mainland by virtue of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") before Reunification.

The Arbitration Ordinance (Cap. 341) in Hong Kong has given effect to enforcement of an arbitral award of a state or territory which is a party of the New York Convention in Hong Kong. Section 42(1) of the Ordinance states that:-

“A Convention award shall, subject to this Part, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 2GG.”

Section 2GG states that:-

“An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.”

Post-Reunification – 1st July 1997 to February 2000

The position became unclear when Hong Kong became part of China on 1st July 1997. Under the Arbitration Ordinance, a Convention award is defined as:-

“... an award to which Part IV applies, namely, an award made in pursuance of an arbitration agreement in a State or Territory, other than Hong Kong, which is a party to the New York Convention.”

In other words, a Convention award means an award made in a party state or territory of the New York Convention which is outside Hong Kong. As Hong Kong became an inalienable part of PRC on 1st July 1997, the definition of the said Convention awards did not fit in with the enforcement of an arbitral award granted within the same state or territory.

It was, therefore, held in *Shangdong Textiles Import and Export Corp v DA Hua Non-Ferrous Metals Co. Ltd.* [2002] 2 HKC 122 that Mainland awards could not be enforced in Hong Kong as Convention awards for the period from 1st July 1997 up to February 2000 when the ‘Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region’ had not yet come into force.

Post-February 2000

The Arbitration Ordinance was subsequently amended to give effect to the said Arrangement. A new Part IIIA – Enforcement of Mainland Awards – and s.2GG(2) were added. A Mainland award shall now be enforceable in Hong Kong either by action in the Court or by virtue of section 2GG (s.40B of the Ordinance) where an arbitral award is made on the Mainland by a recognized Mainland arbitral authority and is in accordance with the Arbitration Law of the People's Republic of China.

It is, nevertheless, worth noting that a Mainland award granted before the Arbitration Law of the PRC was passed on 30th August 1994 and came into force on 1st September 1995 will not be enforceable if it contravenes the new Arbitration Law. This was the ruling in *Shenzhen Kai Loong Investment & Development Co Ltd v CEC Electrical Manufacturing (International) Co Ltd*. [2003] 3 HKLRD 774.

A Mainland award is also not enforceable if an application has been made on the Mainland for enforcement of the award (s.40C of the Ordinance). In *Shenzhen Kai Loong case*, the judge held that a Mainland award was also not enforceable if enforcement of such award was sought in the Mainland and Hong Kong at the same time.

Nevertheless, if an application has been made on the Mainland for enforcement and the award has not been fully satisfied by way of enforcement, the unsatisfied part or parts of the award may be enforceable in Hong Kong (s.40C(2)).

Section 40E of the Ordinance further provides 6 grounds for a resisting defendant to oppose an enforcement of a Mainland award if he is able to prove that:-

- (a) a party, under the law applicable to him, to the arbitration agreement was under some incapacity; or
- (b) the arbitration agreement was invalid under the law of the Mainland; or
- (c) he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (d) the award deals with a difference which is not within the terms or scope of the submission to arbitration; or
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or invalid under the law of the Mainland; or
- (f) the award has not yet become enforceable, or has been set aside or suspended in the Mainland.

Of course, a Mainland award is invalid if it is not granted by an arbitral authority which is not specified in the list of Mainland arbitral authorities. Such list shall from time to time be published in the Gazette of Hong Kong.

Arbitration is now a popular method in resolving commercial disputes in the Mainland. One possible reason is that parties who intend to keep their business relationships and information confidential are able to do so in arbitration proceedings as opposed to the adversarial system in civil proceedings in the Mainland. It is also considered that arbitrators are less influenced by government than judges.

According to statistics, the total number of domestic and international arbitrations handled by CIETAC (China International Economic and Trade Arbitration Commission) in 2001 to 2004 was 731, 684, 709 and 850 respectively². The total number of cases in regard to enforcement of Mainland awards in Hong Kong in 2000 to 2004 was 42, 16, 7, 11 and 3 respectively. However, according to the reply from the Secretary for Justice to the Legislative Council on 26th January 2005, Hong Kong has yet to be provided with a record of enforcement of Hong Kong arbitral awards in the Mainland.

In the meantime, the benefits and problems of mutual enforcement of arbitral awards between Hong Kong and the Mainland since the said Arrangement was implemented remain to be seen.

Recognition and Enforcement of Judgments – Between Hong Kong and the Mainland

As mentioned earlier, there is no reciprocal enforcement of judgments between Hong Kong and the Mainland. Hong Kong judgments are not enforceable in the Mainland whereas Mainland judgments may only be enforceable in Hong Kong under the common law doctrine.

In response to the Hong Kong Government's invitation, my colleagues and I have put forward various proposals. We were also invited to present our comments to the Legislative Council in February 2002.

In March 2002, the Hong Kong Government published a set of proposed arrangements in respect of the reciprocal enforcement of commercial judgments between Hong Kong and the Mainland in March 2002 ("Proposed Arrangements").

Proposed Arrangements

The Proposed Arrangements put forward by the Hong Kong Government are restricted to cover only monetary judgments on commercial contracts, with a valid choice of forum provision, given by the Intermediate People's Court or superior court in the Mainland or the District Court or superior court in Hong Kong. The Proposed Arrangements do not cover court orders or injunctions and exclude other civil cases such as matrimonial, probate, bankruptcy and liquidation, lunacy, employment and consumer matters.

The proposal further requires that only final and conclusive judgments are enforceable. This seems to embody the common law principle as I mentioned earlier. It also goes in tandem with sections 3(2)(a) and (3) of the Foreign Judgments (Reciprocal Enforcement) Ordinance where:-

² Statistics posted by Hong Kong International Arbitration Centre on its website www.hkiac.org.

- (2) Any judgment of a superior court of any foreign country to which the provisions of this Ordinance extend, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which the provisions of this Ordinance apply, if-

(a) it is final and conclusive as between the parties thereto;

.....

- (3) For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal is pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

Finality and Conclusiveness

There have been some cases where parties argued on whether the judgment is final and conclusive. In *Chiyu Banking Corporation Ltd. v. Chan Tin Kwun* [1996] 2 HKLR 395, the judge ruled that the judgment given by the Fujian Intermediate People's Court ("the Intermediate Court") in favour of the Plaintiff was not final and conclusive despite the fact that the Defendant had lost in his appeal to the Fujian Higher People's Court.

The reason given by the judge was that in light of the protest system available to the Procuratorate under the Civil Procedure Law of 1991 in PRC, proceedings are pending in PRC even though the Intermediate Court has already given judgment in the action. According to Article 14 of the Civil Procedure Law, the Procuratorate exercises a supervisory function over civil adjudication by the courts. As the Defendant in the case had presented a petition to the Fujian People's Procuratorate for a retrial of the action conducted by the Intermediate Court, a retrial would be granted by the court upon receipt of the protest lodged by the Supreme People's Procuratorate under Article 197 of the Civil Procedure Law.

The judge further discussed whether for the purpose of recognition and enforcement by the Hong Kong Courts, a judgment must be unalterable. Notwithstanding that "*a foreign judgment may be final and conclusive though it is subject to an appeal and though an appeal against it is actually pending in the foreign country where it was given*"³, Hong Kong Courts will still consider whether a judgment is final and conclusive according to the law of the court granting the foreign judgment.

As the protest system in PRC provides that a judgment is appealable and alterable, the judge in the case granted a stay of the Hong Kong proceedings.

³ Dicey & Morris in the Conflict of Laws at page 461.

Having said that, I anticipate that finality will be a technical but difficult issue to be resolved before agreement can be reached, let alone other issues such as jurisdiction of courts, limitation of actions and public policy.

Proposed Arrangements – Grounds for refusal

I now return to the Proposed Arrangements and the circumstances in which registration of a judgment may be refused or set aside. Hong Kong proposes that if:-

- (i) it has been wholly satisfied;
- (ii) it was obtained by fraud;
- (iii) it was made against justice;
- (iv) it shall be contrary to public policy of the registering court if enforced;
- (v) it is inconsistent with a prior judgment made in the registering court;
- (vi) the judgment debtor, being the defendant in the proceedings in the original court, did not receive sufficient notice; or
- (vii) the registering court is of the view that the judgment debtor is entitled to immunity in the place of the registering court or was entitled to immunity in the original court and was not submitted to the jurisdiction of the original court.

I do not intend to discuss the pros and cons of the said proposal. Although it was said that an arrangement would very likely be reached this year, I envisage that the Proposed Arrangements will have a long way to go in light of the differences between the two legal systems, their different legal terms, expressions and concepts before final agreement is reached.

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