

Revolutionizing Cross-Border Judgment Enforcement

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Introduction

As many in both Mainland and Hong Kong legal industry would be aware, a new regime for the mutual recognition of Mainland and Hong Kong judgments will take effect on 29 January 2024 (the "[New Arrangement](#)").

This represents a significant milestone for creditors and debtors engaged in cross-border transactions, not only between Hong Kong and Mainland but also extending to enterprises registered in other jurisdictions that conduct business in both Hong Kong and the Mainland. This legislative advancement expands the scope of enforceable Mainland judgments in Hong Kong, bolstering the legal framework for creditors seeking to safeguard their rights and for debtors grappling with obligations across the territorial divide.

Much has been said and written about the New Arrangement since it was introduced in January 2019. At the cusp of its implementation, this article will address 3 ways in which the New Arrangement may feature in our everyday legal practice: (1) Resurgence of asymmetric jurisdiction clauses in finance documents. (2) Challenges in obtaining security for costs in Hong Kong Courts against Mainland plaintiffs. (3) Continued Court supervision of the recognition and enforcement of Mainland judgments in Hong Kong.

Previous Regime – Choice of Court Arrangement

The history of mutual recognition between the two jurisdictions began in July 2006. The Supreme People's Court of China and the Hong Kong Government entered into 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 (the "[Choice of Court Arrangement](#)"). This agreement took effect on 1 August 2008, with the implementation in Hong Kong facilitated by the Mainland Judgments (Reciprocal Enforcement) Ordinance, Cap. 597 ("[MJRO](#)").

Under the Choice of Court Arrangement, judgments can be reciprocally enforced if they meet the following criteria:

- (1) They arise from contractual disputes.
- (2) They are based on the parties' agreement to the exclusive jurisdiction of specific designated courts in the Mainland and Hong Kong as stated in the underlying contract.
- (3) They solely pertain to monetary payments.

Over the past 17 years, the Choice of Court Arrangement has effectively facilitated the enforcement of civil and commercial judgments between Hong Kong and the Mainland. However, a notable flaw lies in its limited scope of application, as outlined above. This limitation has resulted in the inability to enforce many judgments that fail to satisfy the specified conditions.

For judgments that do not meet such conditions, the enforcement process becomes complex. The judgment creditor is typically required to initiate a separate legal action in Hong Kong based on the Mainland judgment, treating it as a debt owed. This common law procedure involves treating the Mainland judgment as a separate cause of action and initiating legal proceedings to enforce it as a debt in Hong Kong courts. The judgment creditor would need to follow the standard legal process, including filing a claim,

presenting evidence, and seeking a court order to enforce the Mainland judgment. The requirement to pursue these judgments through common law procedures adds an additional layer of complexity and can be time-consuming and costly for the judgment creditor. It highlights the challenges and limitations in enforcing judgments that fall outside the specific conditions covered by the Choice of Court Arrangement.

Asymmetric jurisdiction clauses

Another example that highlights the limitations of the Choice of Court Arrangement is when a contract includes an asymmetric exclusive jurisdiction clause, which is commonly found in financial agreements. This type of clause designates one jurisdiction as the exclusive forum for legal disputes, while allowing the other party the freedom to initiate legal actions in any appropriate jurisdiction. Typically, such clause restricts the borrower to bringing claims in Hong Kong only, while granting the lender bank the option to bring claims in either Hong Kong or an overseas court of competent jurisdiction.

However, it is important to note that such asymmetric jurisdiction clauses have been held non-exclusive when the plaintiff is the lender bank. This was illustrated in the case of *Industrial and Commercial Bank of China (Asia) Limited v Wisdom Top International Limited* [2020] HKCFI 322, where Au-Yeung J held that such clauses did not satisfy the need for a "choice of Hong Kong court agreement" under the Choice of Court Arrangement. In this case, the lender bank obtained a default judgment against the borrower in Hong Kong courts, and sought a certificate from the Registrar pursuant to s.21 of the MJRO. Under s.3(1) of the MJRO, "a choice of Hong Kong court agreement" meant that the agreement to explicitly specify the Hong Kong courts as the sole judiciary to determine the dispute in question, excluding other jurisdictions. However, this requirement is not met if the lender bank has the ability to choose various jurisdictions, including Hong Kong.

This decision has significantly raised concerns among lenders and created a sense of uncertainty within the financial sector. The lenders' hesitation to initiate legal action against defaulted borrowers stems from the fear of potential failure to enforce judgments obtained under those asymmetric jurisdiction clauses. Given the practical challenges and risks associated with enforcing judgments under such circumstances, it was widely anticipated that the requirement for an exclusive jurisdiction clause would be abolished or at least subject to a more flexible interpretation.

Security for costs applications in Hong Kong courts

In Hong Kong, when defendants seek an order for security for costs against plaintiffs who are ordinarily resident outside of Hong Kong, they are generally required to demonstrate genuine difficulties in enforcing costs orders in the plaintiffs' resident jurisdiction. When assessing the presence of such difficulties in a specific case, the Hong Kong courts take into account the existence of any agreement for reciprocal enforcement of judgments between Hong Kong and the plaintiffs' jurisdiction.

Therefore, there may be procedural "advantages" to such a restrictive regime under the Choice of Court Arrangement. For instance, defendants in Hong Kong court proceedings who are defending claims against Mainland plaintiffs, may have greater ease obtaining security of costs if the claims sought fall outside of the Choice of Court Arrangement conditions. Those defendants would typically argue genuine difficulty in enforcing the costs orders granted by the Hong Kong courts against the plaintiffs in the Mainland.

New Arrangement – Reciprocal Recognition and Enforcement

On 18 January 2019, the Mainland and Hong Kong authorities signed the New 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. To implement the New Arrangement, the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance is set to take effect on 29 January 2024.

The New Arrangement encompasses several noteworthy amendments, with four in particular deserving emphasis.

First, the exclusive jurisdiction requirement has been abolished. Under the New Arrangement, the exclusive jurisdiction requirement stated in the Choice of Court Arrangement will be replaced by a jurisdictional test. This new test will consider whether the Mainland or Hong Kong court had jurisdiction at the time the proceedings were accepted. The jurisdictional test will be based on several factors, including:

- (1) The defendant's place of residence.
- (2) The place of the defendant's business.
- (3) The place of performance of the disputed contract.
- (4) The place of commission of the infringing act of a tort.
- (5) Any actual connection between the dispute and the requesting place, for example where the contract was performed or signed, or where the subject matter was situated etc.

Returning to the earlier discussion on asymmetric jurisdiction clauses, given that there no longer needs to be an exclusive choice of court in the agreement, it is possible that a resurgence of asymmetric jurisdiction clauses will be seen in financing documents involved both jurisdictions. In other words, parties who seek to enforce judgments will instead of having to provide a written agreement with an exclusive jurisdiction clause, will have to show as a matter of fact whether the above stated elements are satisfied in demonstrating that the original court of judgment had sufficient jurisdictional nexus.

Second, the number of subject matters covered have been expanded. The New Arrangement, in its coverage of judgments, will encompass a wider range of civil and commercial matters recognized under both Hong Kong and Mainland laws. However, there are notable exceptions to the scope of the New Arrangement, which include:

- (1) Arbitration-related matters: Matters related to arbitration, such as the validity of arbitration agreements and the setting aside of arbitral awards, are excluded from the New Arrangement. These matters can be addressed and enforced under the relevant arrangements between Hong Kong and the Mainland governing arbitration.
- (2) Corporate insolvency, debt restructuring, and personal bankruptcy: Unless otherwise specified in future arrangements, the New Arrangement does not cover these areas. However, it is worth noting that mutual recognition and assistance in insolvency proceedings have been established between Hong Kong and the Mainland in three cities in the Mainland, which are Shanghai, Xiamen and Shenzhen.
- (3) Non-judicial and administrative proceedings: The New Arrangement does not apply to non-judicial and administrative proceedings. This includes administrative litigation in the Mainland and judicial reviews in Hong Kong, which are not covered by the reciprocal recognition and enforcement mechanisms.
- (4) Certain intellectual property matters: The New Arrangement excludes certain intellectual property matters, such as the validity of intellectual property rights, infringement of inventions and utility models, determination of FRAND royalty rates for Standard Essential Patents (SEPs), and infringements of standard patents and short-term patents. These matters are not within the scope of the New Arrangement's provisions for reciprocal recognition and enforcement of judgments.

Returning to the earlier discussion on security of costs before Hong Kong courts, given the broader range of judgements that can be enforced in Hong Kong, it would be conceivably harder for defendants to argue that they require security for costs due to "genuine difficulties" in enforcing Mainland judgments locally. By way of an example, the Hong Kong Court of First Instance in *Du Guorong v Bank of China International Limited and BOCI Securities Limited* [2022] HKCFI 2777, held that a defendant's generic reference to the Choice of Court Arrangement, was insufficient to satisfy the Court that a Hong Kong costs order would be enforceable in the Mainland. This was particularly so when the defendant in that case failed to present any evidence showing that a choice of court

agreement had been entered into. Worth mentioning is that the defendant made reference to the New Arrangement (which would likely have come into effect by the end of the trial) as further support of enforceability. The application was heard in September 2022, and the Court was not prepared to speculate on what the details of the New Arrangement might be at the time of enforcement. Had this case been heard today, the defendant might be able to argue that no genuine difficulties exist under the New Arrangement, provided that the defendant properly substantiate its application with regards to the various elements to show the jurisdiction nexus.

Further, such arguments of "genuine difficulties" would also be harder in light of the increased categories of relief that can be recognised discussed below.

Third, under the New Arrangement, various forms of legal decisions issued by Mainland courts, including judgments, rulings, conciliatory statements, and orders for payment, will be enforceable in Hong Kong. The scope of enforceable rulings under the New Arrangement includes both monetary relief (excluding exemplary or punitive damages, except in intellectual property and unfair competition matters) and non-monetary relief. Non-monetary relief can include declarations and orders for specific performance.

While certain measures, such as preservation measures decided in the Mainland and anti-suit injunctions and interim orders in Hong Kong, are excluded from reciprocal recognition and enforcement under the New Arrangement, interim measures will be available for arbitrations seated in the other region under a separate interim measure arrangement.

Last but not least, the New Arrangement departs from the Choice of Court Arrangement by not requiring judgments to be "final" and "enforceable". Instead, it only necessitates judgments to be "legally effective". This change acknowledges the challenge of determining the finality of Mainland judgments, as they are subject to trial supervision procedures and are therefore not considered "final" in a strict sense.

Robust supervision by the Hong Kong Courts

It is important to note that the New Arrangement ensures that robust supervision by the Hong Kong courts remains intact in the enforcement of Mainland judgments. Despite the cooperative framework established by the New Arrangement, the Hong Kong courts retain the authority to refuse recognition of a Mainland judgment under specific circumstances. One such circumstance is when the judgment was obtained through fraudulent means or is blatantly inconsistent with the fundamental principles of law or public policy.

These standards align with international norms, such as the relevant Hague Convention and recognition and enforcement regimes under common law. These are also comparable to the provisions outlined in the Arbitration Ordinance (Cap.609) concerning the enforcement of arbitral awards. By maintaining these stringent standards, the Hong Kong courts ensure that the enforcement process remains transparent, accountable, and in accordance with legal principles under Hong Kong law.

Looking Ahead

Indeed, with the forthcoming implementation of the New Arrangement, there will be a significant expansion in the scope of enforceable judgments and relief between Mainland and Hong Kong. This expansion provides creditors with a broader range of legal decisions that can be used as a basis for pursuing assets in Hong Kong, thereby enhancing their ability to enforce Mainland judgments.

On the other hand, debtors must exercise greater caution as an expanded range of causes of action from the Mainland can now be enforced against their assets in Hong Kong. This recalibration of enforcement capabilities necessitates a closer examination of asset protection strategies for debtors.

The Haiwen Hong Kong dispute resolution team possesses extensive expertise in representing clients in cross-border litigation, particular in matters concerning the reciprocal enforcement of judgments issued by Mainland and Hong Kong courts.

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