

Study of the Enforcement of Mainland Judgments in HK

司法及法律
事務

Administration of
Justice and
Legal Services



李浩然議員辦公室
Office of the Dr. Hon. Hoey Simon Lee

1. I am referring to the engagement letter dated 6th January 2022 where I was asked to render a thorough research on the significances and shortcomings of the existing legal regime relating to the recognition and direct enforcement of mainland judgments in the Hong Kong Special Administrative Region (“HKSAR”) and the possible impacts of the proposed Bill (the “Proposed Legislation”) in connection with the reciprocal recognition and enforcement of judgments between mainland and the HKSAR in civil and commercial matters pursuant to the agreement made by the Supreme People’s Court (“SPC”) and the government of the HKSAR dated 18th January 2019 (the “2019 Agreement”).

2. In furthering this research paper, the documents that have been consulted and studied are listed as follows :-

- a) 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 (See Annexure 2) made on 19th July 2006 by the SPC and the government of the HKSAR (the “2006 Agreement”); **[Annexure I]**
- b) The Mainland Judgments (Reciprocal Enforcement) Ordinance, Cap. 597 (the “Existing Legislation”);
- c) Order 71A of The Rules of the High Court, Cap.4A (the “Existing Rules”);
- d) The 2019 Agreement; **[Annexure II]**
- e) The Proposed Legislation; **[Annexure III]**
- f) The Proposed Subsidiary Legislation under the Proposed Legislation (the “Proposed Rules”). **[Annexure IV]**

Existing Scenario

3. The recognition and enforcement of mainland judgments pronounced by the People’s Court of PRC is currently governed by the Existing Legislation which was enacted in 2008 to implement the 2006 Agreement made on 19th July 2006 between the SPC and the government of the HKSAR.

4. Under the Existing Legislation, an enforceable final judgment of certain PRC Courts requiring payment of money in any civil and commercial matter may, upon application to

the Court of First Instance of the HKSAR, be recognized and enforced thereafter directly without re-litigating the same dispute in Hong Kong.

5. However, most importantly, to be covered by the Existing Legislation, the contract under which a mainland judgment is obtained should contain a written jurisdiction clause whereby the contracting parties had expressly agreed that they would submit to the jurisdiction of a mainland Court for adjudication or resolution of any dispute arising from the contract.

6. Furthermore, in order to invoke the assistance of the Existing Legislation, the following requirements must be satisfied as well :-

a) Time Limitation for Registration

Application shall be brought within two year limit when the monetary part of the related mainland judgment became effective and enforceable;

b) Nature of reliefs covered

Only that monetary part of the mainland judgment would be recognized and enforced;

c) Exhaustive List of Courts

The case shall be initiated in either the Supreme People's Court or a Higher or Intermediate People's Court or a Basic People's Court which has been authorized to exercise jurisdiction of the first instance in civil and commercial cases involving foreign, Hong Kong, Macao and Taiwan parties;

d) The Final and Conclusive Requirement

The judgment obtained shall be final, conclusive and enforceable in mainland.

7. Unfortunately, practical experience showed that the application of the Existing Legislation did meet with lots of challenges from the judgment debtors. In summary, they included the following :-

a) ***locus standi*** (legal right and capacity)

Since the legal system in mainland is different from that in HKSAR, the concept of legal person having capacity to take legal action may be different as well. However, state-owned or quasi-state enterprises may

subject to another set of principles governing their power and capacity to instigate or participate in legal proceedings according to the Civil Procedure Law of PRC to which the HK system may not be compatible. As a result, challenges on this ground may be mounted by judgment debtors in opposing the registration of relevant judgment under the Existing Legislation. [See **Foshan Nanhai Branch of Industrial and Commercial Bank of China Limited v. Foshan Ruifeng Petroleum and Chemical Fuel Company Limited** HCMP 2378 of 2014]

b) **Choice of Court Agreement**

The concerned parties shall by means of writing agree that disputes between the parties shall be resolved by the People's Court of PRC. In this regard, the trial shall be instigated in those People's Courts designated for hearing of matters consisting of foreign elements including HKSAR and Macau. In practice, many judgment creditors in mainland have either overlooked or even failed to recognize the importance of including such a Choice of Court Clause in the written contract. As a result, they cannot be benefitted by the bilateral agreement of 2006.

[See **BOC Limited v. Yan Fan** HCMP1797 of 2015; while **Industrial and Commercial Bank of China (Asia) Limited v. Wisdom Top International Limited** HCA 278 of 2019 concerning intended registration of HK Judgment in mainland China]

c) **Final and Conclusive**

One of the most important factors for the enforcement of non-domestic judgment is that the adjudication must be final and conclusive between the contesting parties. Such condition would usually be fulfilled if either the right to appeal has been extinguished, such as the time specified for lodging appeal has been expired, or the appeal procedures have been exhausted, for example the case has already reached the highest level of the judiciary. However, the situation in mainland China is rather complicated. Chapter XVI of the PRC Civil Procedure Law (Articles 177 to 188) provides for a "trial supervision" system under which for specified circumstances the following person, namely :-

- i) a party to a case;
- ii) the president of the People's Court at which the trial took place ("the Trial Court");
- iii) a People's Court higher in hierarchy than the Trial Court;
- iv) the Supreme People's Court;
- v) a People's Procuratorate at a level corresponding to or above the Trial Court; or
- vi) the Supreme People's Procuratorate

can respectively lodge or direct or apply a protest with the Trial Court or a People's court at the next higher level for a re-trial of the case. This procedure renders a judgment uncertain in relation to the final and conclusive element.

The above mentioned specified circumstances include the following :-

- i) the judgment pronounced is erroneous;
- ii) there is sufficient new evidence to set aside the judgment;
- iii) the judgment was based on insufficient evidence;
- iv) there was definite error in the application of the law in the judgment;
- v) there was violation by the trial court of the legal procedure which may have affected the correctness of the judgment; or
- vi) the judicial officers conducting the trial were guilty of embezzlement, corruption or other malpractices for personal benefits and perversion of the law in the adjudication of the case.

The issue of whether the "trial supervision" system *per se* would render a PRC judgment inconclusive and not final has been raised in the Hong Kong courts on a number of occasions as a ground of defence to actions for the enforcement of PRC judgments.

In Chiyu Banking Corporation Limited v. Chan Tin Kwan [1996] 2 HKLR 395, the “trial supervision” procedure had been invoked by the defendant therein to challenge the conclusiveness of the judgment. The Court eventually held that the relevant PRC judgment was not final and conclusive for the purpose of recognition and enforcement in Hong Kong because the People’s Court that pronounced the judgment under the “trial supervision” system could still alter or modify its own decision subsequently.

[See also Jiang Xi An Fa Da Wine Company Limited v. Zhan King HCMP 1574 of 2017]

d) **Monetary Claims**

Only the monetary part of a mainland judgment can be registered and enforced in Court of HKSAR under the Existing Legislation.

[See also Foshan Nanhai Branch of Industrial and Commercial Bank of China Limited v. Foshan Ruifeng Petroleum and Chemical Fuel Company Limited HCMP 2378 of 2014]

Proposed Legislation

8. The 2019 Agreement contains a more comprehensive mechanism than the 2006 Agreement. Hence, the abovementioned shortcomings or problems of the Existing Legislation to some extent have been abated by the Proposed Legislation.

9. Instead of restricting to *claim for monetary relief*, the Proposed Legislation covers most contractual and tortious actions consist of mandatory performance which are usually regarded as “civil and commercial” in nature (including civil damages awarded in criminal cases). Only matters which are administrative or regulatory in nature are being excluded. They briefly involve the following :-

- a) Corporate insolvency and personal bankruptcy, etc.;
- b) Succession and inheritance arrangements save disputes on asset division among family members;
- c) Matrimonial disputes save those on property arising from engagement agreements;
- d) Specific contentions on intellectual property rights;

- e) Maritime matters;
- f) Arbitral matters; and
- g) Other administrative measures against natural person.

10. Regarding the *Final and Conclusive Requirement*, the Proposed Legislation clearly defines the following mainland judgment is enforceable in HKSAR , namely :-

- a) any judgment of the second instance (after appeal);
- b) any judgment of the first instance where no appeal is allowed or the time specified for an appeal has expired without any appeal has been lodged; and
- c) any judgment of (a) or (b) above made in accordance with the procedure for trial supervision mentioned in paragraph 6(c) above.

However, similar to the Existing Legislation, the application for registration under the new regime shall also include a certificate issued by the original court that the relevant judgment is legally effective and enforceable in mainland China but short of depicting as final and enforceable.

11. Turning to the issue of *Choice of Court Agreement*, it is no longer a prerequisite to register and enforce a mainland judgment under the new regime. This jurisdictional issue would be resolved according to the general legal principles and the relevant law of procedures under the general principles of *forum conveniens*. Factors to be taken into consideration include the “place of residence” of a defendant, the substantial place of performance of a contract, the place of infringement of a tortious action and the location of properties being disputed etc.. However, according to the 2019 Agreement, the parties’ right to choose a court for future dispute resolution is significantly curtailed. The place in where the court being chosen locates must at least have certain connection with the subject matter of the dispute such as the place of performance of a contract or the location of the interested properties.

Anticipated Problems

Requirement of Certification of Effective and Enforceable

12. Based on past experience, a judgment creditor or claimant of a case always encountered great difficulties to obtain such certification according to the prevailing PRC

judiciary practice.

13. It is noted that under Article 6(3) of the 2006 Agreement and Article 8(3) of the 2019 Agreement, a certificate, though only needed to be described as effective and enforceable instead of final and enforceable, shall still be submitted in the application for registration. This requirement is also being reflected in Order 71A, rule 3(1)(a)(iii) of the Existing Rules. However, such a requirement is not a prerequisite for registration by the Existing Legislation. S.6(2) of it only provided that

“a Mainland judgment is deemed, until the contrary is proved, to be enforceable in the Mainland if a certificate is issued by the original court certifying that the judgment is final and enforceable in the Mainland”.

In the case The Export - Import Bank of China v. Taifeng Textile Group Company Limited HCMP 3012 of 2015, the Court there held that the requirement of this certification by the original Court is not a must and provision of it is merely a matter of evidence only. **[See paragraphs 85 & 86 of the said judgment]**

14. Clause 13(2) of the Proposed Legislation adopts similar structure as s.6(2) of the Existing Legislation and Rule 5(2)(b) of the Proposed Rules also makes the submission of the certificate necessary for the application similar to Order 71A, rule 3(1)(a)(iii) of the Existing Rules. Hence, it is therefore unclear in view of the ruling of The Export – Import Bank of China mentioned above whether or not a certificate from the original Court regarding the judgment pronounced is legally effective and enforceable shall be a necessary piece of information that an applicant must file for the registration process.

15. Coupling with the fact that the judgments registrable are not restricted to courts from an exhaustive list as contained in the 2006 Agreement, it is therefore anticipating that many applicants may experience difficulties to obtain it from courts situated in less modernized areas of mainland China. ***A clear and cogent judiciary interpretation from the SPC may be necessary.***

Re-Litigation upon Failure of Registration

16. Article 23 of the 2019 Agreement provided that :-

“Where the recognition and enforcement of a judgment has been refused in whole or in part, the applicant shall not file another application for recognition and enforcement, but the *applicant may bring an action regarding*

the same dispute before the court of the requested place.” (emphasis added)

However, it is not clear whether this article covers the situation where application was granted but subsequently being set-aside upon challenges mounted by the judgment debtors.

17. Clause 25(1) of the Proposed Legislation provided that :-

“If the Court sets aside the registration of a registered judgment, or any part of such a judgment, (*original registration*) under section 22, the person who made the registration application for the original registration may not make a further registration application to register the judgment or part.”

18. While Clause 30(3) thereof further stated that :-

“If the registration of the Judgment or part as mentioned in subsection (1)(b) has been set aside under section 22, that subsection does not prevent the party from bringing the proceedings in a court in Hong Kong.”

19. In any event, the Proposed Legislation only covers the situation of setting aside a registration but fails to reflect the right to re-litigate when the application was refused at the very first stage.

20. Clarification of the following matters are highly desirable :-

- a) Has there been an effective and enforceable mainland judgment but application has not been taken out within the 2 year time limitation, can the judgment creditor resort to Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap. 319 or re-litigate the same dispute in HKSAR? **[Bear in mind on the status of HKSAR which is not an independent country]**
- b) Whether the wording “refuse” includes “application being refused at the first place” and “application being finally set-aside”?

Preservation of Assets against Dissipation

21. According to Article 24 of the 2019 Agreement, it provided that :-

“A court of the requested place may, before or after accepting any application for recognition and enforcement of a judgment, impose property preservation or mandatory measures in accordance with the law of that place.”

22. Under the present regime, there is no separate interlocutory procedure to achieve such preservation purpose and the applicant or judgment creditor must rely on the High Court Ordinance, Cap. 4 and the provisions contained in The Rules of the High Court, Cap. 4A. In general, an applicant who is anxious that assets may be channeled away or dissipated by the judgment debtor before execution can be carried out would rely on s.21L of the High Court Ordinance and Order 29 rule 1 of The Rules of the High Court for an injunction to restraint the judgment debtor from dealing with his assets to the jeopardy of the judgment creditor.

23. Such procedures as mentioned in the preceding paragraph are not only complicated but also extremely costly. Given the fact that there has already been a subsisting mainland judgment obtained by the judgment creditor, a simple set of procedures for the purpose of preserving properties of the judgment debtor capable of satisfying the judgment shall be deployed instead.

24. However, as shown in the Proposed Rules, the envisaged proceedings for properties preservation or execution of registered judgments are still basing on The Rules of High Court without being separately provided or supplemented in the proposed subsidiary legislation.

Conclusion

25. In summary, the Proposed Legislation is a marked improvement over the Existing Legislation and shall be welcomed.

26. However, there are still issues which are required specific attention so as to make the implementation of the 2019 Agreement more effective and successful.

27. Please feel free to approach the undersigned for further clarification.

Dated this 28th day of January 2022

1. Foshan Nanhai Branch of Industrial and Commercial Bank of China Limited v. Foshan Ruifeng Petroleum and Chemical Fuel Company Limited HCMP 2378 of 2014
2. BOC Limited v. Yan Fan HCMP1797 of 2015
3. Industrial and Commercial Bank of China (Asia) Limited v. Wisdom Top International Limited HCA 278 of 2019
4. Chiyu Banking Corporation Limited v. Chan Tin Kwan [1996] 2 HKLR 395
5. Jiang Xi An Fa Da Wine Company Limited v. Zhan King HCMP 1574 of 2017
6. The Export - Import Bank of China v. Taifeng Textile Group Company Limited HCMP 3012 of 2015