

# Review

A regular update on developments

ALLEN & OVERY

Litigation

## Reciprocal Enforcement of Judgments between Hong Kong and the Mainland

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### SPEED READ

A reciprocal enforcement regime providing for the mutual recognition of qualifying judgments between the Mainland and Hong Kong took effect on 1 August 2008.

The regime applies to contracts entered into after 1 August 2008, which contain an exclusive jurisdiction clause in favour of either the Hong Kong or Mainland courts. It is important to start considering whether your commercial contracts should be drafted to take account of the benefits under the new regime.

### BACKGROUND

After several years of legislative debate, the Secretary for Justice in Hong Kong announced that the Arrangement between the People's Republic of China ("**Mainland**") and Hong Kong on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters ("**Arrangement**") will be implemented through the Mainland Judgments (Reciprocal Enforcement) Ordinance ("**Ordinance**") which came into force on 1 August 2008 in Hong Kong. Similarly, the Supreme People's Court of the People's Republic of China ("**SPC**") has promulgated a judicial interpretation ("**SPC Interpretation**") to give effect to the Arrangement in the Mainland from 1 August 2008. The aim of the Ordinance and the SPC Interpretation is to allow for the mutual recognition and enforcement of judgments between the Mainland and Hong Kong and to alleviate some of the problems

that have arisen under the current enforcement regime.

### CURRENT REGIME

Under the current enforcement regime in Hong Kong, foreign judgments may be enforced either (a) through a registration system pursuant to the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) or (b) under the common law. Enforcement through registration is only available to certain designated jurisdictions and does not include the Mainland. Accordingly, prior to implementation of the Ordinance, Mainland judgments could be enforced in Hong Kong only under the common law.

There are various disadvantages of enforcing a judgment under the common law because (i) the proceedings will generally take longer than enforcement by registration (ii) they will involve higher costs than the simple registration procedure and (iii) a fresh action will need to be commenced using the Mainland judgment as evidence.

Prior to the SPC Interpretation, the Mainland provided no legislative basis for the recognition and enforcement of Hong Kong judgments. Under the Mainland Civil Procedure Law, to enforce a Hong Kong judgment in the Mainland, the judgment creditor was required to commence fresh proceedings to rehear the merits of the case, with the foreign judgment being admitted as evidence only.

## **ENFORCEMENT IN HONG KONG AFTER 1 AUGUST 2008**

In future, the enforcement of Mainland judgments in Hong Kong should be more straightforward, subject to the following requirements. The Mainland judgment must:

- i. be given by a designated court *on or after* 1 August 2008;
- ii. be final and conclusive;
- iii. be enforceable in the Mainland; and
- iv. be for the payment of a sum of money (not being a sum payable in respect of taxes or for fines or other penalties) arising from *commercial agreements* and;
- v. the parties must have entered into a "choice of Mainland court agreement" *on or after* 1 August 2008.

## **ENFORCEMENT IN THE MAINLAND AFTER 1 AUGUST 2008**

Similarly, for a Hong Kong judgment to be enforced in the Mainland under the new regime, the following requirements must be met. The Hong Kong judgment must:

- i. be given by the Hong Kong Court of Final Appeal, the Court of Appeal of the High Court the Court of First Instance or the District Court *on or after* 1 August 2008;
- ii. be final and conclusive;
- iii. be enforceable in Hong Kong; and
- iv. be for the payment of a sum of money (not being a sum payable in respect of taxes or for fines or other penalties) arising from *commercial agreements* and;
- v. the parties must have entered into a "choice of Hong Kong court agreement" *on or after* 1 August 2008.

Accordingly, the new regime applies only to money judgments arising from commercial contracts (excluding employment, personal and family related contracts) entered into on or after 1 August 2008. Equitable relief such as injunctions and orders for specific performance are excluded.

The requirement for a "*choice of Mainland or Hong Kong court agreement*" is intended to prevent the risk of parallel proceedings being commenced in the courts of both Hong Kong and the Mainland in the

same action. It is akin to a requirement for an exclusive jurisdiction clause either in favour of the Mainland courts or the Hong Kong courts.

Care must be taken when specifying the choice of jurisdiction, as contracts over certain matters will still be subject to the exclusive jurisdiction of the Hong Kong courts, for example contracts affecting land or intellectual property rights registered in Hong Kong. In these circumstances, a clause providing that disputes be governed by the exclusive jurisdiction of the Mainland courts would be invalid. Similarly, in the Mainland, disputes arising from contracts relating to certain subject matters, for instance, land, must be resolved by the Mainland courts.

## **ENFORCEMENT OF ARBITRAL AWARDS**

A reciprocal enforcement regime in respect of the enforcement of arbitral awards as between Hong Kong and the Mainland has been in place since 2000. Under this regime an arbitral award made in Hong Kong may be enforced in the Mainland, and vice versa, in the same way as a New York Convention award. The grounds for refusal of recognition and enforcement are limited (and do not allow a review of the merits) and the procedure is relatively straightforward. Nonetheless, in the Mainland, delay and problems with the execution of arbitral awards persist in practice. It remains to be seen whether, following the introduction of the new reciprocal enforcement regime for court judgments, it will be quicker and easier to enforce a Hong Kong court judgment or a Hong Kong arbitral award in the Mainland.

## **COMMENT**

The intention of the Ordinance and the SPC Interpretation is to create a more convenient and efficient framework for the reciprocal enforcement of monetary judgments arising from commercial contracts made in the Mainland or in Hong Kong after 1 August 2008. Given the volume of commercial activity between the Mainland and Hong Kong, the implementation of the reciprocal regime is a positive and welcome development.

It remains to be seen how effective the new regime will be in practice and in particular whether it will be easier and quicker to enforce a Hong Kong judgment or an arbitral award in the Mainland in future. For contracts to which the new law applies, it is hoped that the new regime will afford parties the desirable degree of independence and quality of the Hong

Kong judiciary, whose judgments should then be recognised and enforced by the Mainland courts.

The new law has no retrospective effect. Contracts entered into prior to 1 August 2008 will be subject to the old regime. Businesses and in-house counsel should consider whether amendments to their standard form contracts may be appropriate to take account of the new framework for enforcement by including an exclusive jurisdiction clause in favour of either the Hong Kong or the Mainland courts.

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