



JONES DAY  
**COMMENTARY**

## ARRANGEMENTS FOR RECIPROCAL ENFORCEMENT OF COMMERCIAL JUDGMENTS BETWEEN MAINLAND CHINA AND HONG KONG

For a long time, businesses in Mainland China and Hong Kong have proceeded on the belief that judgments obtained in the courts of Hong Kong are unenforceable on the Mainland and vice versa.

Up to now, no laws or treaties existed that permitted courts in Mainland China to recognize and enforce Hong Kong judgments. Similarly, although Mainland judgments may be enforced in Hong Kong through common law, the Hong Kong courts have been reluctant to recognize Mainland judgments because of the perceived lack of finality of these judgments. As a result, litigants have long been aware that Mainland and Hong Kong judgments have little bite on assets located on the other side of the border. This is about to change.

On July 14, 2006, the Supreme People's Court of the People's Republic of China and the Secretary of Justice of the Hong Kong Special Administrative

Region (HKSAR) signed an agreement to put in place an arrangement for the reciprocal recognition and enforcement of judgments in civil and commercial matters by the courts of the Mainland and the HKSAR ("the Arrangement").

Under the Arrangement, when a designated court in Mainland China or Hong Kong has made a final judgment requiring the payment of money in a civil or commercial case pursuant to a choice of court agreement in a commercial contract, any party concerned may apply to the People's Court of the Mainland or a court in Hong Kong for recognition and enforcement of the judgment.

The Arrangement is likely to have significant consequences for anyone doing business in Mainland China and Hong Kong, especially those who have assets in these countries. Judgment creditors will soon be free to enforce judgments that meet the requirements of

the Arrangement against assets located in either Mainland China or Hong Kong. Judgment debtors, on the other hand, will no longer be able to shield their assets from cross-border judgments.

When the Arrangement is implemented, Hong Kong will be the first common law jurisdiction in the world whose court judgments are recognized on the Mainland and vice versa.

In this *Commentary*, we discuss the features and limitations of the Arrangement.

## CHOICE OF COURT CLAUSE

One of the key features of the Arrangement is that it applies only to judgments that have been rendered pursuant “to an agreement in writing in which a court of the Mainland or a court of the HKSAR is expressly designated as the court to have sole jurisdiction for resolving the dispute concerned.” (This concept is in line with the Hague Convention on Choice of Court Agreements.) Parties wishing to rely on the Arrangement must therefore ensure that such a choice of court clause exists in their commercial contracts.

A choice of court agreement in writing may exist in one or several documents in written form.

## ONLY MONEY JUDGMENTS

The Arrangement covers only judgments requiring the payment of money in a commercial contract dispute. This includes damages that have been quantified.

The Arrangement excludes disputes concerning employment contracts, consumer contracts, and family and noncommercial matters. Equitable relief such as injunctions and orders for specific performance are also excluded.

## LEVELS OF COURT

In the case of Hong Kong judgments, the Arrangement applies only to those given by the District Court or above.

As for the Mainland, the Arrangement covers judgments given by the Intermediate People's Courts and above as well as certain judgments of Basic People's Courts that have been authorized to adjudicate foreign civil and commercial cases. The authorized Basic People's Courts are specifically identified in the Arrangement.

## FINALITY OF JUDGMENTS

For many years, one of the main impediments to the finalization of the Arrangement was the difficulty in ascertaining whether a Mainland judgment was final. Under Hong Kong's common law, a judgment is enforceable only if it is “final and conclusive.” A judgment was not “final and conclusive” if it could be varied by the original trial court. However, the trial supervision system of the Mainland allows judgments to be opened by the original trial court on very broad grounds, raising doubts as to the finality of such judgments. Indeed, in a number of cases, the Hong Kong courts have refused to enforce Mainland judgments on these grounds.

The Arrangement will put in place special procedures to address the common law requirements of finality. Under the Arrangement, when an application to enforce a Mainland court judgment has been made in Hong Kong and the trial supervision procedure for retrial is subsequently invoked on the Mainland, the case can be brought up for retrial only in a higher court. This ensures that the lower court will not have the opportunity to vary or abrogate the very judgment of which enforcement is sought.

Under the Arrangement, the courts of Hong Kong will be able to suspend enforcement if a retrial is underway. Similarly, Mainland courts may also suspend enforcement if a Hong Kong judgment is on appeal.

## PLACE OF ENFORCEMENT

In Hong Kong, an application for recognition and enforcement of a judgment meeting the requirements of the Arrangement must be made to the High Court of the HKSAR.

On the Mainland, such an application can be made to the Intermediate People's Court at the place of domicile of the judgment debtor, or at the place where the judgment debtor's assets are located. If the place of domicile and the location of assets fall within the jurisdiction of different People's Courts, the applicant may elect to apply to any one of such courts for enforcement.

When the judgment debtor's domicile and the location of assets both fall within Mainland China and Hong Kong, a judgment creditor may file separate applications with the courts of both jurisdictions for enforcement. In such an event, the total amount recovered from enforcing the judgment in both jurisdictions shall not exceed the judgment debt.

## TIMING

The time limit for an applicant to apply for recognition and enforcement of a judgment is one year if either one of the parties is an individual. If the parties are both companies, the limitation period is only six months.

The Arrangement will apply only to judgments made after July 14, 2006.

## GROUND FOR REFUSAL

The Arrangement sets out grounds for refusal of enforcement that are similar to the grounds set out under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319). Enforcement will be refused if:

- (i) The choice of court agreement is invalid under the law of the place chosen by agreement of the parties where the original trial was conducted, unless the chosen court has determined that the choice of court agreement is valid;
- (ii) The judgment has been fully executed;
- (iii) The court of the place where enforcement is sought has exclusive jurisdiction over the case according to its law;
- (iv) The losing party has not been given sufficient time to defend his case;

- (v) The judgment has been obtained by fraud;
- (vi) The court of the place where enforcement is sought has made a prior judgment on the same cause of action; or
- (vii) Enforcement would be contrary to the social and public interests of the Mainland or the public policy of the HKSAR.

## NOT LAW YET

The Arrangement will not have force of law until implementing legislation is passed in Hong Kong and the Supreme People's Court has promulgated a judicial interpretation to give effect to the Arrangement. Commentators have indicated that there are still implementation issues that have to be ironed out, and it may be a while before the Arrangement comes into effect.

## ARBITRATION

Since February 2000, arbitral awards rendered in Hong Kong and by designated Mainland arbitral commissions have been mutually enforceable in both jurisdictions. Accordingly, contracts that required cross-border enforcement tended to specify arbitration as the means for resolving disputes. Once the Arrangement is in force, litigation will be a viable alternative to arbitration.

Contract draftsmen will have to pay careful attention to dispute resolution clauses from now on. Businesses will also be required to reexamine their standard form contracts to see if arbitration or choice of court clauses are to be included when contracting with Mainland and Hong Kong parties.

## BENEFITS

The Arrangement, seen by many as a natural step towards integrating Hong Kong with the Mainland, is likely to benefit not only cross-border businesses but the international community as a whole.

Contracting parties in China-related transactions will now have complete freedom to choose between arbitration or litigation, in either Mainland China or Hong Kong, certain in the knowledge that any eventual arbitral award or money judgment will be enforceable in both jurisdictions.

This choice will no doubt bring into focus the sharp contrast between the civil law–inquisitorial system of litigation on the Mainland and the common law–adversarial system of Hong Kong. Parties from other common law jurisdictions, like the United States, the United Kingdom, Australia, and Canada, are likely to be more familiar with the trial process in Hong Kong, where pleadings, discovery, and cross-examination of witnesses are regular features of the litigation process. On the other hand, Mainland parties, especially large state-related enterprises, are likely to prefer the “home court” advantage, where the power to collect evidence and question witnesses lies mostly with the presiding judge.

The Hong Kong government believes the implementation of the Arrangement will bolster Hong Kong’s role as the pre-eminent dispute resolution center of the region. Parties not wishing to litigate on the Mainland now have an alternative to arbitration: having their disputes resolved in the Hong Kong courts. Hong Kong’s attraction also lies with its well-developed legal system and body of law, the independence of its judiciary, the strength of the rule of law, and the availability of world-class legal talent.

One industry that will benefit from the Arrangement is the financial sector; financial institutions, many of which are located in Hong Kong, can now lend to Mainland borrowers safe in the knowledge that they have recourse against the borrowers’ Mainland assets in the event of default.

The Arrangement will provide a framework in which judgment creditors will be able to enforce money judgments with ease, convenience, and certainty. On the whole, this will engender business confidence for both the Mainland and Hong Kong.

## LAWYER CONTACTS

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