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Access to Justice and Sustainable Development:
The Impact of the HCCH in an Inter-Connected World

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**Session 6 – The HCCH: Entry into Force of
the 2019 Judgments Convention (Part Two)**

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Dr. Bernasconi, Professor Huo, The Honourable Judge Cho, Professor Takeshita,
Distinguished Guests, Ladies and Gentlemen,

1. Good afternoon. I am most grateful to have this opportunity to join this distinguished panel and share with you some observations on the 2019 Judgments Convention from the Hong Kong SAR's perspectives.
2. Hong Kong has all along been a strong supporter of the Hague Conference. We have fond memories of our years of friendship, and close co-operation with the Hague Conference for decades.
3. Speaking of the Judgments Convention in particular, just two months after its conclusion in July 2019, Hong Kong hosted the first global conference on the Convention in September 2019. More than 200 participants from 18 jurisdictions were addressed by 15 speakers who were practising and academic lawyers, judges and officials from Asia, Europe and Latin America and had participated in the negotiation of the ground-breaking new convention.
4. Four years later, the HCCH has chosen to hold its Asia Pacific Week in Hong Kong, celebrating its 130th Anniversary, and also, more importantly, marking the entry into force of the Judgments Convention on 1 September.

5. Hong Kong is most privileged to have taken an active part in and have contributed to the deliberations of the Judgments Project, and subsequently the Convention. With the support of the Central Government, the Informal Working Groups II and IV under the Judgments Project took place in Hong Kong in February 2019. We are most pleased that these meetings have contributed to the final conclusion of the Judgments Convention.
6. On a more personal note, I was very privileged to have participated in the Special Commission meetings of the Judgments Project myself, as well as the Diplomatic Session leading to the conclusion of the Convention.
7. The reason for my participation in these sessions of the Hague Judgments Project is indeed the crux of my sharing today.
8. A couple of years back, I was part of a team in the Department of Justice working on a new arrangement between Hong Kong and our motherland, the Mainland China on reciprocal recognition and enforcement of judgments in civil and commercial matters.

Why do we need an REJ arrangement between HK and the Mainland China?

9. At this point, one may ask why is there such a need for an arrangement on REJ, the short form of reciprocal enforcement of judgments, between Hong Kong and the Mainland China?
10. My short answer is – “One Country, Two Systems”. Hong Kong, as a special administrative region, is part of the People’s Republic of China. At the same time, thanks to the innovative principle of “One Country, Two Systems”, the legal system of Hong Kong is distinct from that of the Mainland China.
11. Hong Kong maintains its common law system and this is constitutionally guaranteed under the Basic Law of the Hong Kong SAR, a piece of national laws of the PRC. Under Article 2 of the Basic Law, the Hong Kong SAR exercises high degree of autonomy and enjoys independent judicial power, including the power of final adjudication. Hong Kong courts adjudicate cases independently and are separate from the Mainland courts.

12. Given that Hong Kong's legal system is different from that of the Mainland China, judgments in civil and commercial matters made by the Hong Kong courts would not automatically be enforceable in other parts of China and vice versa – judgments made by the Mainland courts would not automatically be enforceable in Hong Kong.
13. We therefore need to build a bridge between the legal systems of the Mainland and Hong Kong so that judgments made in relation to civil and commercial matters could travel between the two jurisdictions and become mutually enforceable.

The Hague Instruments as Useful References

14. In seeking to construct this bridge, we are mindful of learning from experience around the world. Where else could we find a more reliable and useful reference than the Judgments Project? The Hague Conference itself has abundant experience in bridging different legal systems.
15. In fact, Hong Kong has drawn inspiration not only from the Hague Judgments Project, but also the Choice of Court Convention concluded years before. Having made reference to the Choice of Court Convention, Hong Kong and the Mainland China in 2006 entered into an arrangement providing for REJ in cases where parties have entered into “exclusive choice of court agreements”. Substantially similar to the Choice of Court Convention, the Choice of Court Arrangement has a very specific, if not limited, scope of application. It only applies to money judgments made by the Hong Kong court or the Mainland court arising from a dispute of a commercial contract, where the parties have agreed in writing designating either the Hong Kong court or the Mainland court have an exclusive jurisdiction to determine any dispute arising from that contract.
16. With increasingly closes interactions and co-operation between Hong Kong and the Mainland China in trade as well as socio-economic activities, the Choice of Court Arrangement alone is not able to fully address the needs. As a result, there have been calls from time to time in the community to widen the scope of the REJ regime between the two jurisdictions.

17. In formulating a more comprehensive REJ mechanism, reference had been drawn to the then draft versions of the Judgments Convention. Indeed, the REJ Arrangement was concluded around half a year before the conclusion of the Judgments Convention.

What does the REJ Arrangement do?

18. While the Judgments Convention applies to all contracting parties, the REJ Arrangement is only applicable between Hong Kong and the Mainland. Having said that, the REJ Arrangement shares substantially similar objectives with that of the Judgments Convention.

19. In particular, the Arrangement seeks to facilitate effective REJ between Hong Kong and the Mainland, noting that such enhanced legal co-operation between the two jurisdictions would provide greater predictability and certainty to the parties and hence better protection of parties' rights.

20. In specific terms, the REJ Arrangement reduces the need for re-litigation of the same disputes in both places, offering enhanced protection to the parties' interests and enhancing Hong Kong's competitiveness as a regional centre for international legal and dispute resolution services.

Key Features – similar with the Judgments Convention

21. Allow me to outline the key features of the REJ Arrangement which are substantially similar with the Judgments Convention. I will touch upon four dimensions.

On general scope

22. Firstly, on scope. The Arrangement applies to matters which are considered to be of "civil and commercial" nature under both the Hong Kong law and Mainland law. Non-judicial proceedings and judicial proceedings relating to administrative or regulatory matters would be excluded.

23. By way of non-exhaustive examples, the following matters are excluded from the Arrangement: (a) judicial review cases; (b) cases brought by the regulatory authorities, for example proceedings seeking disqualification orders against directors of listed companies brought by the Securities and Futures Commission would be excluded.
24. This is consistent with the approach adopted in the Judgments Convention that among other matters, revenue, customs or administrative matters are excluded.

On definition of “judgments”

25. Secondly, on the definition of the term “judgment”. As far as the Arrangement is concerned:
- (1) in the case of the Mainland, any judgment, ruling, conciliatory statement – however it is labelled would be covered; but rulings on preservation measures would be excluded; and
 - (2) in the case of Hong Kong, any judgment, order – again, however it is labelled would be covered; but anti-suit injunction and interim relief would be excluded.
26. This is also consistent with the approach adopted in the Judgments Convention that –
- (1) an interim measure of protection is not a judgment for the purposes of the Convention; and
 - (2) judicial settlements approved by a court of a contracting state, and judicial settlements which are enforceable in the same manner as a judgment of the state of origin, shall be enforced under the Convention in the same manner as a judgment.

On principle of enforceability

27. The third dimension is on enforceability. The REJ Arrangement employs substantially the same concept of enforceability embodied in the Convention, Article 4 of which provides that a judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
28. Under the REJ Arrangement, only legally enforceable judgments made in one place could be enforced in the other place. In terms of drafting, the Arrangement adopts the notion of “effective judgments” which is in substance no different from “enforceable judgments”. The definition of “effective judgments” and the relevant mechanisms for determining the same as provided for in the Arrangement has taken into account the following features:
- (1) Under the Hong Kong law, a judgment on appeal remains legally enforceable unless it is subject to a court’s order for stay of execution;
 - (2) In the Mainland, in very general terms, legally effective judgments could be subject to re-trial under the operation of the “trial supervision” procedures as provided for under the Civil Procedure Law of the PRC.
29. Translating into specific terms, as far as Mainland judgments are concerned, the REJ Arrangement provides that the following judgments are legally enforceable:
- (1) any judgment of the second instance;
 - (2) any judgment of the first instance from which no appeal is allowed, or the time limit for appeal has expired and no such appeal has been filed; and
 - (3) any judgment of these two categories made in accordance with the procedure for trial supervision.

30. In respect of Hong Kong judgments, the Arrangement covers legally enforceable judgments given by all the relevant civil and commercial courts, including some specific tribunals, like the Labour Tribunal and the Small Claims Tribunal. This is a scope which is wider than that covered under Choice of Court Arrangement 2006.

On grounds of refusal for enforcement

31. The fourth dimension, grounds of refusal. The REJ Arrangement sets out in clear terms the grounds under which enforcement of a relevant judgment would be refused. These grounds are substantially similar to those provided under the Judgments Convention.

32. Such refusal grounds are provided to, among others, observe natural justice, give effect to the principle of res judicata, and safeguard against judgments obtained by fraud or judgments that are contrary to public policy.

Key Features – different from the Judgments Convention

33. I would now turn to discuss the key features of the REJ Arrangement which are different from the Convention.

Jurisdictional Grounds as Grounds for Refusal

34. Firstly, the Convention in its Chapter II, establishes the bases for recognition and enforcement of a judgment in the form of jurisdictional filters against which the judgment from the state of origin is to be assessed by the state where recognition or enforcement is sought. In order for a judgment to be eligible for recognition and enforcement, it must satisfy the connections with the state of origin as identified in Article 5. In other words, only judgments satisfying the jurisdictional filters provided in Chapter II of the Convention would be eligible for circulation.

35. Unlike the Convention, the REJ Arrangement provides various jurisdictional grounds which are in substance similar to those under the Convention and yet, such grounds do not operate as determining whether the Arrangement is applicable in the first place. Rather, the grounds serve as grounds for refusal. In other words, if the relevant judgment does not satisfy the jurisdictional

grounds set out in the Arrangement, the requested court must refuse to recognise or enforce the judgment in the requested place.

36. One may ask why the REJ Arrangement has taken a different approach. My short answer would again be “One Country, Two Systems”. Given Hong Kong is part of China, the reciprocal enforcement we are looking at would be the enforcement within one country. The overarching principles in devising a REJ mechanism between Hong Kong and the Mainland China are to respect the differences between the respective legal systems and to maximise the facilitation for REJ and legal cooperation as far as possible.
37. Anchoring at such principles, jurisdictional grounds are adopted as refusal grounds rather than as filters to determine eligibility of a judgment in the first place. In terms of legal implications, under the REJ Arrangement, the party against whom enforcement is sought would bear the burden to prove to the satisfaction of the requested court that the relevant judgment does not satisfy the jurisdictional grounds and hence enforcement of the judgment should be refused. Whilst under the Convention, it would presumably be the party seeking to enforce a judgment to prove that the subject judgment is eligible for circulation in the first place, in other words, the judgment is not jurisdictionally filtered out.

The Coverage of IP matters

38. The second notable difference is the coverage of certain IP matters in the REJ Arrangement, as contrasted to the outright exclusion of IP matters from the Judgments Convention.
39. Specifically, the Arrangement provides a definition of “IP rights” mirroring the types of such rights stipulated under Article 1(2) of the TRIPS (i.e. the Agreement on Trade-Related Aspects of Intellectual Property Rights), with an additional reference to the plant variety rights as provided for under the respective laws of Hong Kong and the Mainland China.
40. The specific applicable scope of the Arrangement on judgments involving IP rights is summarised as follows:
 - (1) judgments ruling on contractual disputes involving IP rights are

covered;

- (2) judgments ruling on tortious claims for infringement of IP rights are covered, except for infringement of invention patents and utility models in the Mainland and standard patents (including “original grant” patents) and short-term patents in Hong Kong;
- (3) judgments ruling on the licence fee rate of standard essential patents in both the Mainland and Hong Kong are excluded;
- (4) a ruling on the validity, establishment or subsistence of intellectual property rights is not recognised or enforced under the Arrangement.

41. The approach in relation to the coverage of judgments on IP related disputes adopted in the REJ Arrangement reflects the commonly recognized territoriality principle applicable to IP rights on the one hand, and the practical needs and circumstances of Hong Kong and the Mainland China on the other. This major breakthrough makes Hong Kong the first jurisdiction to have an arrangement with the Mainland on REJ with such a wide coverage, reflecting the unique advantages of “One Country, Two Systems”.

Concluding Remarks

42. Looking ahead, the REJ Arrangement would be implemented by way of local legislation in Hong Kong and in the Mainland by way of judicial interpretation to be promulgated by the Supreme People’s Court. The Department of Justice is actively working to bring about its early implementation so that a comprehensive REJ mechanism could come into place between Hong Kong and the Mainland China.

43. Ladies and gentlemen, despite the differences between the legal systems of Hong Kong and the Mainland under “One Country, Two Systems” principle, the REJ Arrangement, modelling on The Hague Judgments Convention, is nothing but an excellent model for effectively bridging the two legal systems within one country and more importantly, transforming the differences into distinctive and practical advantages. The Arrangement is a vivid testimony of the vitality of “One Country, Two Systems”.

44. Looking ahead, Hong Kong would continue to support the Hague Conference by actively participating in and contributing to its projects as members of the Chinese delegation. We are also looking forward to working closely with the Hague Conference in organising capacity building and experience sharing activities for the stakeholders, be they government officials, judges, experts, academics, in the Asia-Pacific Region and beyond.

45. On this note, may I once again thank the Hague Conference for giving this opportunity to present in the panel. I wish you all a fruitful Week. Thank you very much.