

**For discussion on
27 November 2017**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Proposed Arrangement with the Mainland on Reciprocal Recognition and
Enforcement of Judgments in Civil and Commercial Matters**

BACKGROUND

This paper seeks to consult Members on matters relating to a proposed arrangement with the Mainland on reciprocal recognition and enforcement of judgments in civil and commercial matters.

2. It is the Government's policy to promote Hong Kong as a leading centre for international legal and dispute resolution services in the Asia-Pacific region. In the Chief Executive's 2017 Policy Address¹, it is stated that "*the DoJ² is actively liaising with the Mainland authorities on proposals for facilitating the resolution of cross-boundary civil and commercial disputes through a clear and user-friendly legal regime with the aim to further safeguard the rights of the parties from the two places. In this regard, the DoJ will explore with the Supreme People's Court and relevant authorities appropriate ways to expand the scope of the arrangements on mutual legal assistance between the two places in civil and commercial matters*". Therefore, on the basis of the five arrangements that Hong Kong has so far concluded with the Mainland in various aspects of mutual legal assistance in civil and commercial matters³, we have commenced discussion with the Supreme People's Court ("SPC") with a view to expanding the scope of the existing arrangement for reciprocal enforcement of judgments ("REJ") in civil and commercial matters.

(a) Existing arrangements with the Mainland on reciprocal recognition and enforcement of judgments

3. There are two existing arrangements to provide for REJ in civil and commercial matters. The first one is the *Arrangement on Reciprocal*

¹ Chief Executive's 2017 Policy Address, at paragraph 54.

² i.e. the Department of Justice.

³ The five arrangements respectively deal with mutual service of judicial documents, reciprocal enforcement of arbitral awards, taking of evidence and matters on REJ as referred to in paragraphs 3 to 6 of this paper.

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 the Choice of Court Agreements between Parties Concerned (《關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排》) (“**Choice of Court Arrangement**”) signed in July 2006. The Choice of Court Arrangement, modelled on the Hague Convention of 30 June 2005 on Choice of Court Agreements, is however limited in scope. It only applies to money judgments made by the courts of both sides where the parties to a commercial contract have agreed in writing that the court of either side will have exclusive jurisdiction to determine a dispute arising from that contract. The Choice of Court Arrangement took effect since 1 August 2008 and as far as Hong Kong is concerned, it is implemented through the enactment of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597).

4. Given the restrictive application of the Choice of Court Arrangement, there have been calls from time to time in the community to widen the scope of the current REJ regime between Hong Kong and the Mainland. In view of the increasing number of cross-boundary marriages and hence the pressing need in the community for a legal mechanism between Hong Kong and the Mainland for REJ in matrimonial and related matters, the Government, having consulted this Panel and other stakeholders, proceeded to conclude a standalone REJ arrangement with the Mainland specifically on matrimonial and related matters, which is the second REJ arrangement with the Mainland since China resumed exercise of sovereignty over Hong Kong.

5. In June 2017, the *Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (《關於內地與香港特別行政區法院相互認可和執行婚姻家庭民事案件判決的安排》) (“**Matrimonial Arrangement**”) was signed with the Mainland. The Matrimonial Arrangement only applies to civil judgments in matrimonial and family matters, which include decrees absolute of divorce, decrees absolute of nullity, maintenance orders, custody orders etc. made by Hong Kong courts; and judgments on dissolution of marriage, validity of marriage, duty to maintain the other party to a marriage, custody of a child etc. made by the Mainland courts.

6. The Matrimonial Arrangement will be implemented in the Mainland by way of a judicial interpretation to be issued by the SPC and in Hong Kong by way of legislation. The Government is currently preparing the relevant bill for consultation with the stakeholders in the first quarter of next year.

(b) **Need for a more comprehensive REJ arrangement with the Mainland**

7. Under Hong Kong's existing legal framework, the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) provides for a registration system for the enforcement in Hong Kong of final and conclusive money judgments given by a relevant court of certain foreign jurisdictions. Cap. 319, however, does not apply to judgments made by the courts of the Mainland. Accordingly, Mainland judgments not covered by the Choice of Court Arrangement and the Matrimonial Arrangement cannot be recognised and enforced under the statutory mechanism in Cap. 319.

8. Although a Mainland judgment not covered by the Choice of Court Arrangement and the Matrimonial Arrangement may still be considered for enforcement in Hong Kong at common law, this is fraught with difficulties. In gist, common law allows the recognition and enforcement of a foreign judgment (including a Mainland judgment) if certain conditions are satisfied, including, for instance, it is given by a competent court for a fixed sum of money and it is a final judgment that is conclusive upon the merits of the claims. When not being able to take advantage of the registration mechanism under Cap. 319, a party seeking to enforce a foreign judgment at common law must initiate a fresh action in Hong Kong by writ and bear the burden of proving to the court all the essential requirements for the recognition and enforcement of the foreign judgment⁴. In other words, seeking to enforce a foreign judgment at common law may arguably be less straightforward and more time-consuming when compared with the registration mechanism under Cap. 319. There is also one fundamental issue, the Hong Kong courts have doubted whether Mainland judgments can be regarded as final and conclusive (which is a requirement under common law) due to the review power exercisable under the trial supervision system in the Mainland⁵. Therefore, there are uncertainties as regards enforcement at common law.

THE PROPOSED ARRANGEMENT

9. As the Choice of Court Arrangement and the Matrimonial Arrangement each provides for a specific scope of application, they are not able to fully address the needs for a clear and comprehensive REJ mechanism arising from the increasingly close interaction and cooperation between the two places

⁴ Save for under the summary judgment process (under Order 14 of the Rules of High Court (Cap. 4A)) which is equally applicable to an action to enforce a Mainland judgment at common law.

⁵ See Articles 198, 199 and 208 of the *Civil Procedure Law of the PRC* (中華人民共和國民事訴訟法).

in the people-to-people context as well as in terms of trade and economic activities.

10. In view of this, the DoJ has commenced discussion with the SPC with a view to establishing a more comprehensive framework for an REJ arrangement with the Mainland to cover civil and commercial judgments which are *outside* the scope of application under the Choice of Court Arrangement and the Matrimonial Arrangement (“**Proposed Arrangement**”). It is contemplated that the Proposed Arrangement would set up a legal mechanism with a wider scope of coverage for REJ, thereby reducing the need for re-litigation of the same disputes in both places and offering better protection to the parties’ rights in a wider range of civil and commercial matters.

11. The following parts highlight the key features of the current Proposed Arrangement on which the Government intends to invite views and comments from Members and the stakeholders and to discuss with the Mainland side.

(a) **Reference to “civil and commercial matters”**

12. The meaning of the reference to “civil and commercial matters” under Mainland law would be different from that under Hong Kong law. Although the term “civil and commercial matters” is rather commonly used in the Mainland, it appears to be undefined under Mainland law.

13. Reference may be made to the following provisions of Mainland law to understand what a reference to “civil and commercial matters” would entail:

- (1) Article 2 of the *General Rules on the Civil Law of the People’s Republic of China* (中華人民共和國民法總則), which provides that the civil law regulates personal relations and property relations between natural persons, legal persons, and non-legal-person organisations which are civil subjects of equal status⁶; and
- (2) Article 3 of the *Civil Procedure Law of the People’s Republic of China* (中華人民共和國民事訴訟法) which provides that in dealing with civil litigation arising from disputes on property and personal relations between citizens, legal persons or other

⁶ The Chinese version of Article 2 of the General Rules on Civil Law of the PRC reads as follows: “民法調整平等主體的自然人、法人和非法法人組織之間的人身關係和財產關係”.

organisations, the courts of the Mainland shall apply the provisions of the *Civil Procedure Law of the PRC*⁷.

14. In addition, we understand that a suit before the Mainland court against a specific administrative act of an administrative organ which is alleged to have violated the lawful rights or interests of the person or organisation concerned would be governed by the *Administrative Procedure Law of the People's Republic of China* (中華人民共和國行政訴訟法)⁸ but not the civil law and hence such would not fall within the ambit of “civil and commercial matters” as far as Mainland law is concerned.

15. Contrasted with the position under Mainland law, judicial review proceedings, certain proceedings like market misconduct proceedings before the Market Misconduct Tribunal and certain proceedings on competition law before the Competition Tribunal are civil in nature. In the absence of any qualification, these proceedings would fall under a general reference to “civil and commercial matters” under Hong Kong Law.

16. The Government preliminarily suggests that the Proposed Arrangement would cover only matters which are considered to be “civil and commercial matters” under both Hong Kong and Mainland law. In this way, cases on administrative litigation in the Mainland as well as judicial review proceedings and the relevant proceedings before the Market Misconduct Tribunal and the Competition Tribunal of Hong Kong would be excluded from the Proposed Arrangement.

17. This proposed formulation would be consistent with the principle reflected in the *Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region* (《關於內地與香港特別行政區法院就民商事案件相互委託提取證據的安排》) which was signed between Hong Kong and the Mainland in December 2016 and has taken effect since 1 March 2017⁹.

⁷ The Chinese version of Article 3 of the *Civil Procedure Law of the PRC* reads as follows: “人民法院受理公民之間、法人之間、其他組織之間以及他們相互之間因財產關係和人身關係提起的民事訴訟，適用本法的規定”。

⁸ The Chinese version of Article 2 of the *Administrative Procedure Law of the PRC* reads as follows: “公民、法人或者其他組織認為行政機關和行政機關工作人員的行政行為侵犯其合法權益，有權依照本法向人民法院提起訴訟。前款所稱行政行為，包括法律、法規、規章授權的組織作出的行政行為”。

⁹ See Articles 3(3) and 7 of the said *Arrangement*.

(b) **Specific scope**

18. It follows from the preceding paragraph that the Proposed Arrangement would cover judgments on disputes in matters which are considered as “civil and commercial” under both the law of Hong Kong and the Mainland and such would include contractual claims, tortious claims, employment disputes as well as disputes on intellectual property matters, but exclude the registration or validity of intellectual property rights.

19. Specifically, the Government is considering whether the Proposed Arrangement should cover matters on succession of estate (hereinafter referred to as “**succession**”) and if so, whether any specific provisions should be included in the Proposed Arrangement in order to cater for the specific nature of those matters. In this connection, a non-exhaustive list of specific issues on succession, as well as other matters, is set out in **Annex A**.

(c) **Jurisdictional basis**

20. Taking into account Hong Kong’s common law regime and international practices, the Proposed Arrangement should include some form of indirect jurisdictional rules to the effect that only judgments made in compliance with those rules would be eligible for reciprocal recognition and enforcement. The following possible options have been identified:

- (1) The first option is to exclude only judgments made in violation of the exclusive jurisdiction of the place of the requested court. This approach is adopted in the Choice of Court Arrangement¹⁰.

By way of example, an action brought under Mainland law on disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, or Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources in the Mainland would be considered as falling under the exclusive jurisdiction of the Mainland courts¹¹.

For the purpose of recognition and enforcement of a foreign judgment, it seems that the Hong Kong court would consider itself as the only competent court to decide on an action *in rem* in immovable property situated in Hong Kong.

¹⁰ See Article 9(1)(3) of the *Choice of Court Arrangement*.

¹¹ Article 266 of the *Civil Procedure Law of the PRC*.

- (2) The second option is to devise detailed indirect jurisdictional rules. This option may seek to provide a higher degree of certainty and hence offer clearer guidance to the parties in their choice of forum and litigation strategies. Having made reference to Hong Kong's existing law (including the common law regime for REJ and the mechanism under Cap. 319) as well as various international agreements, particularly, the February 2017 draft convention of the Hague Judgments Project¹² ("**Hague Draft Convention**"), the Government preliminarily suggests that such rules would cover the following circumstances:
- (a) if the person against whom recognition or enforcement is sought had his habitual residence or had a principal place of business in the place of the original court at the time that person became a party to the proceedings in the original court;
 - (b) if the defendant in the original court had a branch, agency or other establishment in the place of the original court and the proceedings in that court were in respect of activities of that branch, agency or establishment;
 - (c) if the person against whom recognition or enforcement is sought is the plaintiff or has counterclaimed in the original court;
 - (d) if the defendant expressly consented to the jurisdiction of the original court; or
 - (e) if the defendant submitted to the jurisdiction of the original court by arguing on the merits of the case without contesting the jurisdiction of the original court.

We have set out in detail in **Annex B** the above rules and other suggested rules on different nature of disputes.

- (3) The third option is to allow the requested court to refuse recognition and enforcement if the requested court considers that

¹² The "Judgments Project" refers to the work undertaken by the Hague Conference on Private International Law since 1992 on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of their judgments abroad.

the original court did not have jurisdiction over the dispute according to the law of the place of the requested court.

21. Given its specific nature, it appears that matters on succession would require specific rules on jurisdictional issues and discussion on this is set out in Annex A.

(d) Safeguards

22. Having made reference to the Choice of Court Arrangement and the Matrimonial Arrangement, as well as the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap. 46), Cap. 319 and the relevant international agreements, it is suggested that the following grounds for refusal of recognition and enforcement of a relevant judgment may be considered:

- (1) the respondent was not legally summoned according to the law of the original court, or although the respondent was legally summoned, the respondent was not given a reasonable opportunity to make representations or defend the respondent's case;
- (2) the judgment was obtained by fraud;
- (3) the judgment was rendered in a cause of action which was accepted by the original court after the requested court has already accepted the cause of action on the same dispute;
- (4) an arbitral award was already given in the place of the requested court on the same dispute, or the requested court has rendered a judgment on the same dispute; or has recognised or enforced a judgment on the same dispute given by a court of another country or place, or has recognised or enforced an arbitral award given in another country or place;
- (5) the bringing of the relevant proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the original court;
- (6) according to the law of the place of the requested court, the judgment rendered concerned a matter which is within the exclusive jurisdiction of the requested court;

- (7) the Mainland court considers that the recognition and enforcement of the judgment is manifestly contrary to the basic legal principles of Mainland law or the social and public interests of the Mainland; or the Hong Kong court considers that the recognition and enforcement of the judgment is contrary to the basic legal principles of Hong Kong law or the public policy of Hong Kong.

(e) **Types of relief**

23. As for what types of relief would be recognised and enforced under the Proposed Arrangement, the following two options may be considered.

- (1) The first is to cover only money judgments (i.e. judgment for a definite sum of money) and exclude any sum payable under the judgment in respect of taxes or other charges of a like nature or in respect of a fine or other penalty (including punitive damages).

This option would be in line with Cap. 319, Cap. 597 as well as the Protection of Trading Interests Ordinance (Cap. 471).

- (2) The second option is to cover only relief that is available under the law of the place of the requested court, i.e. relief which are common in both Hong Kong and the Mainland.

This option would not only cover money judgments, but also other relief including injunction orders, orders for specific performance and restitution.

(f) **Level of courts to be covered**

24. It is suggested that the Proposed Arrangement should cover judgments of the District Court or above in Hong Kong.

25. In relation to the Mainland, it is provided under the *Civil Procedure Law of the PRC* that all civil cases in the Mainland would generally be tried before the primary people's courts. This general rule is subject to the specific rules promulgated by the SPC on the delineation of jurisdiction on civil cases in the first instance among the different levels of courts in the Mainland, primarily by a reference to the amount of claim in dispute¹³. Accordingly, it is for

¹³ For example, under Article 1 of the notice titled in Chinese “最高人民法院關於調整高級人民法院和中級人民法院管轄第一審民商事案件標準的通知（法發[2015]7號）”, where the

consideration whether judgments made by the primary people's courts of the Mainland and above be covered under the Proposed Arrangement.

(g) Legally enforceable judgments under the law of the original court

26. It is considered that to be eligible for recognition and enforcement under the Proposed Arrangement, the relevant judgment should be legally enforceable under the law of the original court. This suggested approach would be generally in line with the Matrimonial Arrangement.

27. In respect of Mainland judgments, the following are considered to be legally enforceable under Mainland law:

- (1) any judgment of the second instance;
- (2) any judgment of the first instance from which no appeal is allowed or one in respect of which the time limit provided for an appeal therefrom under Mainland law has expired and no such appeal has been filed; and
- (3) any judgment made in accordance with the procedure for trial supervision.

28. In the case of Hong Kong judgments, those made by the Court of Final Appeal, by the Court of Appeal and Court of First Instance (comprising the High Court) and by the District Court which are legally enforceable are suggested to be covered.

place of residence of both parties are within the provincial administrative divisions in which the Mainland court accepting the civil case is located, an Intermediate People's Court of Beijing, Shanghai, Jiangsu, Zhejiang and Guangdong may accept the case in the first instance if the amount of claim in that case is over RMB100 million; whilst a Higher People's Court of the above-mentioned cities or provinces may accept the case in the first instance if the amount of claim in that case is over RMB500 million. In respect of disputes on intellectual property rights, under Article 1 of the notice titled in Chinese "最高人民法院關於調整地方各級人民法院管轄第一審知識產權民事案件標準的通知(法發[2010]5號)", a Higher People's Court may accept a civil case involving intellectual property rights in the first instance if the amount of claim in that case is over RMB200 million, or where the case is foreignrelated, or Hong Kong, Macao or Taiwanrelated, if the amount of claim in that case is over RMB100 million. Separately, another notice titled in Chinese "最高人民法院關於印發基層人民法院管轄第一審知識產權民事案件標準的通知(法發[2010]6號)" sets out the standards of the jurisdiction of different primary people's courts in the hearing of civil cases on intellectual property matters at the first instance, by reference mainly to the amount of claims in disputes over intellectual property rights. For example, the Primary People's Court of the Dongcheng District in Beijing may hear an intellectual property dispute in which the claim in dispute is below RMB 5 million; or in the case of both parties are resident in the jurisdiction of the Higher People's Court of Beijing, the claim in dispute is above RMB 5 million but below RMB 10 million.

29. Another relevant issue is to consider whether the Proposed Arrangement should cover interim relief granted by the courts of both sides. In the Mainland, examples of interim relief that may be granted by the Mainland courts include orders for preservation of assets of a party, requiring a party to perform certain acts or prohibiting a party from committing certain acts¹⁴. In Hong Kong, the court is empowered to grant interim relief in appropriate circumstances¹⁵, such as interlocutory injunction, interim payment, provisional damages for personal injuries, and detention, preservation and inspection of property.

WAY FORWARD

30. The Government would further consult the legal professional bodies and other stakeholders at a suitable stage on the Proposed Arrangement. Having considered the views and comments of the stakeholders, the Government would further discuss the details of the Proposed Arrangement with the Mainland side with the aim of reaching an arrangement as soon as practicable.

ADVICE SOUGHT

31. The Government invites Members' views and comments on the issues outlined above.

Department of Justice
November 2017

¹⁴ Article 100 of the *Civil Procedure Law of the PRC*.

¹⁵ Such powers of the Hong Kong court include that under section 21M of the High Court Ordinance (Cap. 4), the Court of First Instance may grant interim relief in relation to proceedings which have been or are to be commenced in a place outside Hong Kong and are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at common law.

List of Specific Issues on Succession and Other Matters¹

Succession

1. Whether the Proposed Arrangement² should include specific provisions seeking to establish a mechanism for mutual recognition and enforcement of judgments on succession matters between Hong Kong and the Mainland?

The following points may be relevant to the consideration of the above question.

- (1) The mechanism for recognition and enforcement of foreign judgments provided under Cap. 319 does not apply to any judgment on the administration of the estate of a deceased person.
- (2) At common law, the Hong Kong court would recognise the proprietary effects of a foreign judgment determining a succession issue in so far as it relates to any property (movable or immovable) which was situated in that foreign jurisdiction at the time of judgment³. In addition, it seems that a foreign judgement would be recognised in so far as relating to movables in a case where the deceased died domiciled in the foreign jurisdiction in which the judgment is given⁴.
- (3) The Hong Kong court shall have jurisdiction to reseal grants of probate and letters of administration made by a court of probate in any designated country or place in accordance with Part IV of the Probate and Administration Ordinance

¹ This Annex seeks to highlight some of the issues for consideration which are by no means exhaustive.

² As defined in paragraph 10 of the main paper.

³ See the following remarks of Godfrey JA in *Ip Cheung Kwok v Yip Chi Keung*, *Allen* [1994] 1 HKC 676: “I have no doubt that the Heungchow District People’s Court [in Zhuhai, Guangdong Province] was competent to decide any question relating to the deceased’s immovable property in China; and any such question relating to any movable property of the deceased, whether situated in China or elsewhere” (at 679 I and 680 A). See also Graeme Johnston, *The Conflict of Laws in Hong Kong*, 3rd edition, Sweet & Maxwell 2017 at 8.036.

⁴ Graeme Johnston, at 8.036.

(Cap. 10). The Mainland is not a designated place for the purpose of Part IV of Cap. 10.

- (4) Unlike Hong Kong, whilst a testator under Mainland law *may* appoint an executor in his/her will, Mainland law does not provide for a default mechanism of personal representation in probate and administration of a deceased's estates. In practice, successors to any Mainland property would apply to the relevant notary office in the Mainland for a notarial certificate on succession and such certificate would be presented to the relevant authorities or institutions to effect the transfer of ownership of the relevant property to the successors. In case of disputes on matters on succession, the parties would file a suit before the relevant Mainland court for determination of those disputes.
 - (5) Mainland law does not, at present provide for a clear basis for the recognition and enforcement of orders made by the Hong Kong court on succession.
 - (6) It should be noted that judgments on succession are not covered under the Choice of Court Arrangement⁵ or the Matrimonial Arrangement⁶.
2. On the assumption that a mechanism for mutual recognition and assistance on succession between Hong Kong and the Mainland should be provided for in the Proposed Arrangement, various main issues are highlighted below for consideration:
- (1) What should be the pre-conditions for recognition and enforcement of Mainland judgments on succession? Specifically on jurisdiction, should such judgments be restricted to those determining succession relating to any property (movable or immovable) situated in the Mainland, and those determining such issues relating to movables (wherever they are situated) if the deceased was a habitual resident in the Mainland at the time of death?
 - (2) Under what circumstances should a grant of probate and a grant of letters of administration made by the Hong Kong

⁵ As defined in paragraph 3 of the main paper.

⁶ As defined in paragraph 5 of the main paper.

court be recognised by the Mainland court and be enforced? Specifically on jurisdiction, should such be restricted to a grant made in respect of a deceased being a habitual resident in Hong Kong at the time of death?

- (3) Should there be provisions on the applicable law governing intestate succession⁷?
- (4) What should be the pre-conditions for recognition and enforcement of judgments on the validity of a will? Should specific indirect jurisdictional rules be devised in this regard? For example, it may be provided that a judgment by the Hong Kong court on the validity of a will would be recognised and enforced if the deceased was habitually resident in Hong Kong at the time of death or if the will was executed in Hong Kong; and vice versa.
- (5) Should there be provisions on the applicable law governing the validity of a will⁸?

⁷ Under common law rules on conflict of laws, intestate succession is governed, in the case of movables, by the law of the deceased's domicile at death and in the case of immovable property, by the law of the place where the immovable property is situated (Graeme Johnston, at 8.007). It appears that the conflict of law rules under Mainland law is substantially the same: "statutory succession" (法定繼承) (when the deceased did not leave a valid will) shall be governed by law of the deceased's habitual residence at the time of death, provided that statutory succession to immovable property shall be governed by the law of the place where the immovable property is situated (Article 31 of the *Law of the PRC on Application of Law to Civil Relations Involving Foreign Interests* (中華人民共和國涉外民事關係法律適用法) and Article 36 of the *Law of Succession the PRC* (中華人民共和國繼承法)).

⁸ On formal validity, Hong Kong law as a general rule provides that a will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, he/she was domiciled or had his/her habitual residence, or in a state of which, at either of those times, he/she was a national (Section 24 of the Will Ordinance (Cap. 30)). Mainland law provides that a will shall be valid if it was, at the time of death or the time when the will was made, in compliance with the law of the place of the testator's habitual residence or the law of the state in which the testator was a national; or the law of the place where the act of making the will was performed (Article 32 of the *Law of the PRC on Application of Law to Civil Relations Involving Foreign Interests*).

On essential validity and personal capacity, it is a common law rule that in the case of a will which disposes of movables, the essential validity of the will and personal capacity of the testator (such as age and mental capacity) are matters for the law of the testator's domicile; and in the case of a will which disposes of immovable property, essential validity and personal capacity are matters for the law of the place where the immovable property is situated (Graeme Johnston, at 8.012). Mainland law provides that the essential validity of a will (including matters on personal capacity) shall be governed

- (6) Should orders made by the Hong Kong court under the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481) be covered under the Proposed Arrangement?

Other matters

1. Should the Proposed Arrangement exclude torts relating to environmental pollution, matters on emergency towage and salvage and any other “civil and commercial matters”⁹?
2. In relation to labour disputes, should the Proposed Arrangement include only judgments made by the Mainland court but exclude arbitral awards made by the labour arbitration commissions in the Mainland?
3. Should the Proposed Arrangement exclude judgments on the registration or validity of the relevant intellectual property rights?
4. In relation to judgments on infringement of intellectual property rights, should the Proposed Arrangement apply only to judgments granting monetary damages?
5. Should the Choice of Court Arrangement continue to operate upon the taking effect of the Proposed Arrangement in such a way that the recognition and enforcement of judgments so eligible should only be governed by the Choice of Court Arrangement but not otherwise?

by the law of the place of the testator’s habitual residence at the time of death or the time when the will was made; or the law of the state in which the testator was a national at the time of death or the time when the will was made (Article 33 of the *Law of the PRC on Application of Law to Foreign-Related Civil Relations Involving Foreign Interests*. See also Wan E-xiang (萬鄂湘), 《中華人民共和國涉外民事關係法律適用法條文理解與適用》, 中國法制出版社 (2011), at page 249).

⁹ Please refer to the discussions on the reference to “civil and commercial matters” in paragraphs 12 to 17 of the main paper.

Suggested Indirect Jurisdictional Rules

A judgment is eligible for recognition and enforcement under the Proposed Arrangement¹ if one of the following requirements is met –

- (1) the person against whom recognition or enforcement is sought was habitually resident in the place of the original court or had his or her principal place of business in the place of the original court at the time that person became a party to the proceedings in the original court;
- (2) the person against whom recognition or enforcement is sought was the plaintiff in, or counterclaimed in, the proceedings in the original court;
- (3) the person against whom recognition or enforcement is sought maintained a branch, agency, or other establishment without separate legal personality in the place of the original court, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
- (4) the parties expressly consented to the jurisdiction of the original court over the relevant proceedings, or the person against whom recognition or enforcement is sought, being the defendant in the original court, expressly consented to the jurisdiction of the original court in the course of the proceedings in which the judgment was given; or argued on the merits of the case before the original court without contesting the jurisdiction of the original court within the time limit under the law of the original court;
- (5) the judgment ruled on a contractual obligation and in accordance with the parties' agreement, the performance of that obligation should take place in the place of the original court, or in the absence of an agreed place of performance, the performance of that obligation should be the place of the original court according to the law applicable to the contract;
- (6) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and

¹ As defined in paragraph 10 of the main paper.

the act or omission directly causing such harm occurred in the place of the original court;

- (7) the judgment ruled on an infringement of an intellectual property right required to be granted or registered and it was given by a court of the place in which the grant or registration of the right concerned has taken place;
- (8) the judgment ruled on the infringement of copyright or related rights or an unregistered intellectual property right and it was given by a court of the place for which protection was claimed.