

**For discussion on  
26 November 2018**

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

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

**PURPOSE**

This paper briefs Members on the outcome of the public consultation exercise conducted by the Government in July 2018 on the proposed arrangement on reciprocal recognition and enforcement of judgments (“**REJ**”) in civil and commercial matters between Hong Kong and the Mainland (“**Proposed Arrangement**”) and the key features of the latest Proposed Arrangement.

**BACKGROUND**

2. In November 2017, the Government briefed Members on matters relating to the Proposed Arrangement and sought their views and comments on issues relating to the Proposed Arrangement. The Government issued a consultation paper on the Proposed Arrangement in July 2018 (“**Consultation Paper**”).

3. Subsequently, the Government received 25 submissions from stakeholders including those from the legal, business, banking and insurance sectors, intellectual property practitioners as well as regulatory bodies in Hong Kong. The Government also met with some stakeholders to discuss the issues set out in the Consultation Paper.

4. Most respondents welcomed the proposed conclusion of an arrangement for REJ with the Mainland. Some respondents expressed that

such a proposed arrangement would reduce the need for re-litigation of the same disputes, lower litigation costs and offer better protection to the parties' rights. One respondent indicated in particular that a proposed arrangement for REJ with the Mainland would promote the reliable enforcement of judgments between Hong Kong and the Mainland, which is essential to attracting and fostering international business. Another respondent, however, expressed reservation for the the proposed conclusion of an arrangement for REJ with the Mainland and considered that there exists no imminent need to widen the current mechanism for REJ with the Mainland.

5. Having carefully considered the submissions made by the respondents, the Government takes the view that there is a need to establish a more comprehensive framework for REJ with the Mainland (i.e. the Proposed Arrangement) covering civil and commercial judgments beyond the scope of the **Choice of Court Arrangement**<sup>1</sup> and the **Matrimonial Arrangement**<sup>2</sup>. As noted by some respondents, the Proposed Arrangement would reduce the need for re-litigation of the same disputes in both places and offer better protection to the parties' rights in a wider range of civil and commercial matters. It would also foster Hong Kong's role as an important regional centre for legal and dispute resolution services.

6. Against this background, the Government has been further discussing with the Mainland side on the details of the Proposed Arrangement. We set out below our response to comments raised by the respondents on issues at consultation and the latest proposed content of the Proposed Arrangement.

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<sup>1</sup> The full title of the **Choice of Court Arrangement** signed in July 2006 in English is 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"; and in Chinese "《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》".

<sup>2</sup> The full title of the **Matrimonial Arrangement** signed in June 2017 in English is 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"; and in Chinese "《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》".

## THE PROPOSED ARRANGEMENT

### I. Reference to “civil and commercial matters”

7. The majority of the respondents agreed with the Government’s suggestion that the Proposed Arrangement would cover only matters which are considered to be “civil and commercial matters” under both Hong Kong and Mainland law<sup>3</sup>.

8. Taking into account the views of the respondents on this issue, the Government will seek to reflect in the Proposed Arrangement in clear terms that only matters considered to be “civil and commercial” under both Hong Kong and Mainland law would be covered. In other words, non-judicial proceedings and judicial proceedings relating to administrative or regulatory matters would be *excluded*. By way of *non-exhaustive examples*, the following matters would be excluded:

- (1) judicial review cases;
- (2) cases brought by the Securities and Futures Commission under section 214 of the *Securities and Futures Ordinance* (Cap. 571);
- (3) appeals before the Court of Appeal under sections 266 and 267 of Cap. 571;
- (4) appeals before the Court of First Instance under section 84 of the *Trade Marks Ordinance* (Cap. 559);
- (5) applications brought by the Competition Commission before the Competition Tribunal under section 92 of the *Competition Ordinance* (Cap. 619)<sup>4</sup>.

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<sup>3</sup> As mentioned in footnote 9 of the Consultation Paper, this proposed approach is 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 came into effect on 1 March 2017.

<sup>4</sup> However, follow-on actions before the Competition Tribunal brought by a person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule under section 110 of **Cap. 619** would be covered by the Proposed Arrangement.

## **II. Specific types of matters to be covered or excluded**

### **A. *Corporate insolvency and debt restructuring as well as personal bankruptcy***

9. We mentioned in the Consultation Paper<sup>5</sup> that the Government planned to conduct a *stand-alone* consultation exercise on a separate bilateral arrangement with the Mainland for mutual recognition and assistance in cross-border insolvency and debt restructuring. As such, the Government suggests that for the time being, matters on corporate insolvency and debt restructuring as well as personal bankruptcy would not be covered by the Proposed Arrangement.

10. While the respondents did not object to this approach, some respondents further highlighted the imminent need for a legal mechanism for mutual recognition of and assistance in matters on insolvency and debt restructuring between Hong Kong and the Mainland. The Government will conduct a separate public consultation exercise on this matter as soon as practicable.

### **B. *Succession of the estate of a deceased person and other related matters***

11. We noted in the Consultation Paper that there are fundamental differences between Hong Kong and the Mainland with regard to the legal principles and practice of estate administration<sup>6</sup>. The Government considers that at this stage, the Proposed Arrangement should *exclude* matters in relation to succession of the estate of deceased persons. This suggestion has received no objection from the majority of the respondents.

### **C. *Matrimonial or family matters not covered by the Matrimonial Arrangement***

12. Judgments on matrimonial or family matters already covered by the **Matrimonial Arrangement** would be *excluded* from the Proposed Arrangement.

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<sup>5</sup> Please see paragraph 20A(3) of the Consultation Paper.

<sup>6</sup> Please see paragraphs 20B(1) to (8) of the Consultation Paper.

13. The **Matrimonial Arrangement** *excludes* certain judgments on some disputes classified as matrimonial or family related disputes in the Mainland but not so classified in Hong Kong. In considering whether to cover judgments on such disputes in the Proposed Arrangement, it is suggested that the following disputes should be excluded:

- (1) disputes *after* divorce on liability for damages for personal injuries and mental suffering;
- (2) disputes on property arising from co-habitation relationship;
- (3) disputes on maintenance between siblings;
- (4) disputes on maintenance arising out of a legal obligation of a son/daughter to support his/her parent(s) or a grandchild to support his/her grandparent(s);
- (5) disputes on dissolution of an adoptive relationship;
- (6) disputes on rights over guardianship involving adults with mental incapacity.

14. In respect of the disputes described under sub-paragraphs (1) to (5) immediately above, Hong Kong law either does not recognise the type of relationship *per se* giving rise to the relevant claim, or does not recognise the underlying cause of action. In respect of the disputes set out in sub-paragraph (6) immediately above, the mechanism for appointment of guardians of mentally incapacitated adults in Hong Kong is substantively different from that in the Mainland<sup>7</sup> and such matters also involve complicated policy considerations and legal issues. With these reasons, we suggest that matters referred to in items (1) to (6) immediately above be excluded.

15. Separately, we are inclined to include the following two types of disputes in the Proposed Arrangement:

- (1) disputes between family members on division of property; and
- (2) disputes on property arising from engagement agreements.

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<sup>7</sup> Please see paragraphs 20C(4)(a) to (d) of the Consultation Paper.

16. These two types of disputes are categorised as matrimonial or family related disputes in the Mainland but not necessarily so in Hong Kong. That said, they could similarly arise under Hong Kong law.

17. The majority of the respondents did not object to the Government's suggestions set out in paragraphs 13 and 15 above.

#### ***D. Intellectual property rights***

18. Taking into account the principle of territoriality applicable to intellectual property rights, the Government made a number of suggestions in the Consultation Paper regarding judgments involving intellectual property rights, including the scope of intellectual property rights to be covered as well as the applicable jurisdictional grounds<sup>8</sup>.

19. The Government notes that in both Hong Kong and the Mainland, issues concerning the validity of intellectual property rights required to be registered are *not* primarily dealt with by the courts but, in the Mainland, by administrative authorities; and in Hong Kong, the relevant registrars, subject to the exception that appeals against decisions of for example, the Registrar of Trade Marks are brought before Court of First Instance.

20. The Government further notes that there has yet to be a clear consensus at the international level as to the types of intellectual property disputes to be covered in international agreements on reciprocal enforcement of judgments<sup>9</sup>. The Government believes that the proposed inclusion of

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<sup>8</sup> Please see paragraphs 20D(1) to (10) and 28(2)(b) to (c) of the Consultation Paper.

<sup>9</sup> For example, Articles 2(2)(n) and (o) of the **Hague Convention of 30 June 2005 on Choice of Court Agreements** exclude matters on the validity and infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties to such rights, or could have been brought for breach of that contract. Article 2(2)(p) also excludes the validity of entries in public registers.

The **Draft Hague Judgments Convention (May 2018 draft)** provides for the exclusion or inclusion of matters on intellectual property rights as alternatives for further deliberation (for exclusion, Article 2(1)(m) is relevant; for inclusion, see Articles 5(3), 6(a), 7(1)(g), 8 and 11).

The **Draft Hague Judgments Convention** is the latest draft convention on reciprocal recognition and enforcement of judgments produced in May 2018 under the "Hague Judgments Project". The "Hague 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 initial phase of the Hague Judgments Project resulted in the conclusion of the **Hague Choice of Court Convention 2005**. The second phase of the Hague

judgments on intellectual property rights under the Proposed Arrangement would facilitate Hong Kong's development as a regional hub for trading in intellectual property rights.

21. Having considered the submissions of the respondents, the majority of whom welcomed the inclusion of matters concerning intellectual property rights in the Proposed Arrangement, as well as the views of the Mainland side, we are inclined to adopt the following with respect to judgments involving intellectual property rights:

**Definition of intellectual property right**

- (1) It is suggested the Proposed Arrangement would include a definition of “intellectual property rights” in the Proposed Arrangement, with reference to the applicable international agreements as well as the situations in both places.
- (2) It is suggested that the definition would mirror the types of intellectual property rights provided for under Article 1(2) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* with an additional reference to the plant variety rights provided respectively under Hong Kong's *Plant Varieties Protection Ordinance* (Cap. 490) and Article 123(7) of the *General Provisions of the Civil Law of the People's Republic of China* (中華人民共和國民法總則).

**Scope**

- (3) Judgments ruling on contractual disputes involving intellectual property rights would be covered.

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Judgments Project led to the decision in August 2013 to develop a new Convention on the recognition and enforcement of foreign judgments in civil or commercial matters. Between June 2016 and May 2018, the Special Commission on the Hague Judgments Project had four meetings and the latest **Draft Hague Judgments Convention** was produced at the fourth and final meeting of the Special Commission held in May 2018. Hong Kong has been participating in the Hague Judgments Project, including the attendance of the Special Commission meetings as part of the Chinese delegation. Further details of the Hague Judgments Project are available on the following webpage of the Hague Conference on Private International Law: <https://www.hcch.net/en/projects/legislative-projects/judgments> (last access: 19 November 2018). The **Draft Hague Judgments Convention** (May 2018 draft) is available on the following webpage of the Hague Conference on Private International Law: <https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf> (last access: 19 November 2018).

- (4) Judgments ruling on tortious claims for infringement of intellectual property rights<sup>10</sup> would also be covered, except for infringement of invention patents and utility models in the Mainland and infringement of standard patents (including “original grant” patents) and short-term patents in Hong Kong.
- (5) Judgments ruling on the rate of licence fees of standard-essential patents in both the Mainland and Hong Kong would be excluded.
- (6) A ruling on the validity, ownership or subsistence of intellectual property rights would not be recognised or enforced under the Proposed Arrangement.
- (7) Notwithstanding sub-paragraph (6) immediately above, a judgment based on a ruling on the validity, ownership or subsistence of intellectual property rights as a *preliminary issue* would still be recognised and enforced under the Proposed Arrangement, provided the requirements under the Proposed Arrangement are satisfied<sup>11</sup>.

### ***E. Maritime matters***

22. Various international conventions and practices on maritime matters are respectively applicable to Hong Kong and the Mainland. As mentioned in the Consultation Paper, these matters would warrant special consideration<sup>12</sup>.

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<sup>10</sup> Including acts of unfair competition prohibited under Articles 6 and 9 of the *Anti-Unfair Competition Law of the PRC* (中華人民共和國反不正當競爭法) (Article 6 relates to acts of confusion to cause one’s products from being mistaken for the products of others or from being mistaken as having specific connection with others whereas Article 9 relates to infringement of trade secrets) as well as claims for passing off under Hong Kong law.

<sup>11</sup> The operation of the principle outlined in sub-paragraph 21(7) may be illustrated by the following example:

- (a) A contractual claim for licence fees in respect of a trade mark in Hong Kong was brought before a Hong Kong court.
- (b) The defendant raised as defence that the subject trade mark was invalid.
- (c) The Hong Kong court ruled, as a preliminary issue, that the trade mark was valid and the defendant was liable to pay a certain amount of licence fees.
- (d) The plaintiff could, pursuant to the Proposed Arrangement, seek recognition and enforcement in the Mainland of the Hong Kong judgment on the liability for licence fees.
- (e) However, the Hong Kong court’s ruling on the validity of the trade mark as a preliminary issue would not be recognised or enforced in the Mainland.

<sup>12</sup> Please see paragraphs 20E(1) to (3) of the Consultation Paper.



23. Having considered the views of the respondents and the views of the Mainland side, it is proposed that judgments involving marine pollution, limitation of liability for maritime claims, general average, emergency towage and salvage, maritime liens and carriage of passengers by sea be *excluded* from the Proposed Arrangement.

**F. Arbitration matters**

24. Having regard to the **Arbitration Arrangement**<sup>13</sup> between Hong Kong and the Mainland which took effect in both places since February 2000, we consider that judgments on the validity of an arbitration agreement and the setting aside of an arbitral award should be *excluded* from the Proposed Arrangement<sup>14</sup>. These matters would continue to be dealt with in accordance with the **Arbitration Arrangement**.

**G. Other matters**

25. We are also exploring the *exclusion* of the following matters from the Proposed Arrangement:

- (1) judgments ruling on a natural person's qualification as a voter;
- (2) judgments declaring the disappearance or death of a natural person;
- (3) judgments ruling on the legal capacity of a natural person for civil acts.

26. Whereas matters relating to a natural person's qualification as a voter would be considered a "civil matter" under Mainland law, they are not

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<sup>13</sup> The full title of the **Arbitration Arrangement** signed in June 1999 in English is the "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region"; and in Chinese "《關於內地與香港特別行政區相互執行仲裁裁決的安排》".

<sup>14</sup> Article 7 of the **Arbitration Arrangement** provides for the grounds of refusal for the mutual enforcement of arbitral awards between Hong Kong and the Mainland. Under Article 7(1)(1) of the **Arbitration Arrangement**, it is a ground of refusal if the arbitration agreement was not valid under the law to which the parties subjected it, or failing any indication, under the law of the place in which the arbitral award was made. It is a further ground of refusal under Article 7(1)(5) of the **Arbitration Arrangement** where the arbitral award has not yet become binding on the parties, or has been set aside or suspended by the court or in accordance with the law of the place where the arbitration took place.

considered to be civil or commercial matters in Hong Kong. We believe that an expressed exclusion of such would help avoid doubt.

27. As for the items under sub-paragraph 25(2) above, it appears that under Hong Kong law, whether a natural person is dead would be a question of fact subject to a rebuttable presumption of death after disappearance of seven years and as such, the Hong Kong court would not grant a declaratory relief on the disappearance or death of a natural person. In addition, as disputes relating to matters on succession are excluded from the Proposed Arrangement, it appears that the suggested exclusion under the said sub-paragraph (2) would not bring about any practical difficulties to the operation of the Proposed Arrangement.

28. The item under sub-paragraph 25(3) relates to matters on the legal capacity of a natural person. Given that disputes relating to rights over guardianship involving adults with mental incapacity are excluded from the Proposed Arrangement and that there appears to be substantive differences in the subject area of law (including rules on conflict of laws) in both places, we consider that this exclusion would be reasonable.

29. The suggested exclusion of the items under sub-paragraphs 25(2) and (3) are also in line with the approach adopted in the Hague Convention of 30 June 2005 on Choice of Court Agreements (“**Hague Choice of Court Convention 2005**”)<sup>15</sup> and the **Draft Hague Judgments Convention**<sup>16</sup>.

#### ***H. Findings on preliminary questions***

30. The Proposed Arrangement would include a provision to the effect that a requested court shall not refuse recognition and enforcement under the Proposed Arrangement *solely* for the reason that the judgment is based on a ruling on a preliminary question on a matter outside the scope of the Proposed Arrangement.

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<sup>15</sup> Article 2(2)(a) of the **Hague Choice of Court Convention 2005**.

<sup>16</sup> Article 2(1)(a) of the **Draft Hague Judgments Convention**. For background information on the **Draft Hague Judgments Convention**, please see footnote 9.

31. This means for instance that when the requesting court, after deciding that a natural person had the legal capacity to enter into a contract, proceeded to make a judgment on the contractual liability of that person, the requested court should not refuse to recognise and enforce the judgment on contractual liability simply because the ruling on the issue of legal capacity would fall outside the scope of the Proposed Arrangement.

32. This approach is also reflected in our suggestion outlined in sub-paragraph 21(6) above in respect of intellectual property rights and is broadly consistent with the **Draft Hague Judgments Convention**<sup>17</sup>.

### **III. Principle of enforceability and level of courts to be covered**

33. The Government proposed in the Consultation Paper that only judgments which are legally enforceable under the law of the requesting place should be eligible for recognition and enforcement under the Proposed Arrangement<sup>18</sup>. The respondents raised no objection to this suggestion.

34. In relation to the Mainland, legally enforceable Mainland judgments given by the Basic People's Courts or above in the following circumstances would be covered by the Proposed Arrangement:

- (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 an appeal has expired and no such appeal has been filed; and
- (3) any judgment of (1) or (2) above made in accordance with the procedure for trial supervision.

35. In respect of Hong Kong, legally enforceable Hong Kong judgments given by the following courts would be covered by the Proposed Arrangement:

- (1) the Court of Final Appeal;

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<sup>17</sup> Articles 2(2) and 8(1) of the **Draft Hague Judgments Convention**.

<sup>18</sup> Please see paragraph 22 of the Consultation Paper.

- (2) the Court of Appeal and the Court of First Instance of the High Court;
- (3) the District Court;
- (4) the Lands Tribunal;
- (5) the Labour Tribunal;
- (6) the Small Claims Tribunal; and
- (7) the Competition Tribunal.

36. With the suggested inclusion of the Lands Tribunal, Labour Tribunal, Small Claims Tribunal and Competition Tribunal, the scope of Hong Kong judgments covered by the Proposed Arrangement would go beyond those covered by the **Choice of Court Arrangement**. This reflects the comments of some respondents who indicated support for a wider coverage of judgments made by the Hong Kong courts<sup>19</sup>.

#### **IV. Jurisdictional basis**

37. Among the three approaches for the provision of *indirect jurisdictional rules* which are outlined in the Consultation Paper<sup>20</sup>, all the respondents who commented on this issue expressed support for the adoption of the second approach<sup>21</sup>, which entails the setting out of *detailed indirect jurisdictional rules* in the Proposed Arrangement.

38. Taking into account Hong Kong's common law regime, the statutory mechanism under the *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap. 319) and international instruments, including the **Draft Hague Judgments Convention**, we consider that *subject to* the relevant dispute *not* being under the exclusive jurisdiction of the courts of the requested place, the requesting court would be considered to have jurisdiction for the purpose of the Proposed Arrangement, if *one* of the following conditions is satisfied:

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<sup>19</sup> As the Proposed Arrangement only covers the recognition and enforcement of judgments made by the courts of both sides, decisions made by administrative bodies or tribunals would not be covered.

<sup>20</sup> Please refer to paragraphs 27 to 29 of the Consultation Paper.

<sup>21</sup> The "second approach" is discussed in paragraph 28(2) of the Consultation Paper.

- (1) at the time the requesting court accepted the case, where the defendant is a natural person, the defendant's habitual residence was in the requesting place; where the defendant is a legal person or other organisation, its place of incorporation, place of principal office (including place of central management) or principal place of business was at the requesting place;
- (2) at the time the requesting court accepted the case, the defendant maintained a representative office, branch (including office or place of business) or other establishment without separate legal personality at the requesting place, and the claim on which the judgment is based arose out of the activities of that establishment;
- (3) the proceeding was brought on a contractual dispute and the place of performance of the contract is in the requesting place;
- (4) the proceeding was brought on a tortious dispute and the tortious act took place in the requesting place;
- (5) the parties to a contractual dispute or other disputes related to interests in property had expressly agreed in writing that the courts of the requesting place shall have jurisdiction over the relevant proceedings, and the requesting place was in the location of the defendant's or the plaintiff's habitual residence, where the contract was performed or signed, the place where the subject matter was situated at etc., being a location which has an actual connection with the dispute;
- (6) the defendant did not raise any objection as to the jurisdiction of the requesting court and participated in the proceedings in defence or reply, unless the requesting place has no actual connection with the dispute.

39. Other than the provisions specified in paragraph 38 above, where the requested court considers that the requesting court had jurisdiction over the dispute according to the law of the requested place, the requested court may also determine that the requesting court has jurisdiction over the dispute.

### ***Judgments involving intellectual property rights***

40. For a judgment ruling on a tortious claim for infringement of intellectual property right<sup>22</sup>, the jurisdictional basis would **only** be satisfied if the act of infringement<sup>23</sup> takes place in the requesting place and the intellectual property right is claimed to be protected according to the law of the requesting place. In other words, the jurisdictional grounds set out in paragraph 38 would not be applicable to a judgment ruling on a tortious claim for an infringement of an intellectual property right.

41. On the other hand, the jurisdictional grounds set out in paragraph 38 will continue to apply judgments ruling on a contractual claim relating to an intellectual property right.

42. The suggestions set out in paragraphs 40 and 41 above seek to reflect the territoriality principle applicable to intellectual property rights. They are broadly in line with the approach adopted in the **Draft Hague Judgments Convention**<sup>24</sup>.

### **V. Grounds for refusal**

43. The majority of respondents took the view that the grounds for refusal set out in the Consultation Paper should be reflected in the Proposed Arrangement.

44. After considering the respondents' comments, we are inclined to include in the Proposed Arrangement, the following **mandatory** grounds for refusal, such that the requested court **shall** refuse to recognise and enforce the judgment if **any** of the following grounds is made out upon proof by the party against whom recognition and enforcement is sought:

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<sup>22</sup> Including acts of unfair competition prohibited under Articles 6 and 9 of the *Anti-Unfair Competition Law of the PRC* (中華人民共和國反不正當競爭法) (Article 6 relates to acts of confusion to cause one's products from being mistaken for the products of others or from being mistaken as having specific connection with others whereas Article 9 relates to infringement of trade secrets) as well as claims for passing off under Hong Kong law.

<sup>23</sup> *ibid.*

<sup>24</sup> Article 5(3) of the **Draft Hague Judgments Convention**.

- (1) the judgment does not meet the jurisdictional requirement(s) as set out under paragraphs 38, 39 or 40 above (as the case may be);
- (2) the respondent was not summoned in accordance with the law of the requesting place, or although the respondent was duly summoned, was not given a reasonable opportunity to make representations or defend his/her case;
- (3) the judgment was obtained by fraud;
- (4) the judgment was rendered in a cause of action which was accepted by the requesting court after the requested court has already accepted the cause of action on the same dispute;
- (5) a court of the requested place has rendered a judgment on the same cause of action, or the requested court has recognised a judgment on the same cause of action given by a court of another country or place;
- (6) an arbitral award was already given in the requested place on the same cause of action, or the requested court has recognised an arbitral award on the same cause of action given in another country or place.

45. Recognition and enforcement *must* also be refused if the requested Mainland court considers that the recognition and enforcement of the Hong Kong judgment is manifestly contrary to the basic legal principles of Mainland law or the social and public interests of the Mainland; or the requested Hong Kong court considers that the recognition and enforcement of the Mainland judgment is manifestly contrary to the basic legal principles of Hong Kong law or the public policy of Hong Kong.

46. In addition to the mandatory grounds of refusal set out in the two paragraphs immediately above, we are also inclined to include in the Proposed Arrangement the following *discretionary* grounds of refusal, such that the requested court *may* refuse to recognise and enforce the judgment if any of the following grounds is made out upon proof by the party against whom recognition and enforcement is sought:

- (1) the parties have entered into a valid arbitration agreement on the same cause of action and the parties have not given up the jurisdiction of the arbitration tribunal;

- (2) the parties have entered into a valid agreement designating a court (not being a court of the requesting place) as having jurisdiction for resolving the same cause of action, and the parties have not given up the jurisdiction of the chosen court.

47. The above suggested discretionary grounds seek to reflect the principles under section 3(1) to (3) of the **Foreign Judgments (Restriction of Recognition and Enforcement) Ordinance (Cap. 46)**, in that the requested court should refuse recognition and enforcement if the bringing of the proceedings in the courts of the requesting place was contrary to an arbitral agreement or choice of court agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the requesting place.

## **VI. Types of relief**

### ***Relief ordered after determination of the merits of the underlying claim***

48. The Consultation Paper suggested two options on the extent of relief to be enforced under the Proposed Arrangement. The majority of the respondents expressed support for covering ***all types of relief (whether monetary or otherwise)*** as long as they are available under the law of the requested place, whilst a minority of respondents expressed support for ***only*** covering monetary relief.

49. Having considered the respondents' submissions, we are inclined to cover ***both monetary (excluding exemplary or punitive damages) and non-monetary relief*** in the Proposed Arrangement (except for judgments concerning intellectual property rights which would be discussed immediately below). This approach is consistent with the **Hague Choice of Court Convention 2005** and the **Draft Hague Judgments Convention**.

50. In respect of judgments concerning intellectual property rights, whilst certain respondents expressed the view that the Proposed Arrangement should cover both monetary and non-monetary relief, we note that in view of the territoriality principle, judgments involving intellectual property rights tend to be subject to a more restrictive treatment under the relevant international regimes. Having considered the views of the respondents and the Mainland side, we suggest that for judgments ruling on tortious claims for



infringement of intellectual property rights, the Proposed Arrangement would *only* cover the *monetary relief* determined for the loss which was sustained in the requesting place. This approach is in line with the approach adopted in the **Draft Hague Judgments Convention**<sup>25</sup>.

### *Interim relief*

51. The respondents have expressed mixed views on whether interim relief should be covered by the Proposed Arrangement, with some pointing out that further study would be warranted before interim measures are included. At this stage, we take the view that interim relief should be *excluded* from the Proposed Arrangement. This is consistent with the approach adopted in the **Hague Choice of Court Convention 2005**<sup>26</sup> and the **Draft Hague Judgments Convention**<sup>27</sup>.

### *Costs orders*

52. The Proposed Arrangement would include costs orders made by the courts of both sides.

## **VII. Relationship with the Choice of Court Arrangement**

53. Two options on how to deal with the relationship between the **Choice of Court Arrangement** and the Proposed Arrangement have been identified in the Consultation Paper. All of the respondents who had commented specifically on this issue supporting the option that the Proposed Arrangement should supersede the **Choice of Court Arrangement**.

54. Having considered the views of the respondents, we suggest that the Proposed Arrangement would supersede the **Choice of Court Arrangement** upon the commencement of the Proposed Arrangement, but the **Choice of Court Arrangement** would remain applicable to a “choice of court agreement” within the meaning of the **Choice of Court Arrangement**<sup>28</sup>

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<sup>25</sup> Article 11 of the **Draft Hague Judgments Convention**.

<sup>26</sup> Article 4(1) of the **Hague Choice of Court Convention 2005**.

<sup>27</sup> Article 3(1)(b) of the **Draft Hague Judgments Convention**.

<sup>28</sup> A “choice of court agreement” is defined in the **Choice of Court Arrangement** to mean “any agreement in written form made, as from the day of commencement of this Arrangement, by the parties concerned in which a people’s court of the Mainland or a court of the HKSAR is expressly designated as the court having sole jurisdiction for resolving any dispute which has arisen or may arise in respect of a particular legal relationship”.

which was made between the parties *before* the commencement of the Proposed Arrangement.

55. This approach seeks to offer on the one hand, a single and more cost effective REJ mechanism and on the other hand, to uphold parties' autonomy where applicable.

### **VIII. Procedural matters**

56. The procedures for applications for recognition and enforcement of a judgment under the Proposed Arrangement are expected to be largely similar to that under the **Choice of Court Arrangement** and the **Matrimonial Arrangement**.

57. One of the documents which an applicant has to submit for recognition and enforcement of a judgment is a notarised copy of the applicant's identity card (if the person is a natural person) or registration record (if the person is a legal person or any other organisation). With a view to streamlining the procedure, it is suggested that the requirement for notarisation would be dispensed with where the applicant holds an identity document or registration record issued by the requested place.

### **WAY FORWARD**

58. Taking into account the considerations and suggestions outlined above, the Government intends to finalise the details of the Proposed Arrangement with the Mainland side with a view to signing the Proposed Arrangement as soon as practicable.

59. The Proposed Arrangement will need to be implemented by local legislation in Hong Kong. This will require amendments to existing legislation and/or the enactment of new legislation. The Proposed Arrangement will only take effect after both places have completed the necessary procedures to enable implementation.

**ADVICE SOUGHT**

60. The Government invites Members' views on and support for the Proposed Arrangement.

**Department of Justice**

**November 2018**