PROPOSED ARRANGEMENT BETWEEN HONG KONG AND THE MAINLAND ON RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

CONSULTATION PAPER

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INDEX

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

PURPOSE

The Department of Justice ("**DoJ**") would like to invite views from the community, including the legal profession, business organisations and other interested parties, on a proposal to enter into an arrangement with the Mainland on reciprocal recognition and enforcement of judgments ("**REJ**") in civil and commercial matters ("**Proposed Arrangement**").

BACKGROUND

Existing arrangements for REJ between Hong Kong and the Mainland

2. Hong Kong has so far concluded five arrangements with the Mainland concerning various aspects of mutual legal assistance in civil and commercial matters[1]. Among these arrangements, two existing arrangements provide for REJ in civil and commercial matters.

3. The first one 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* (《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 ("**Hague Choice of Court Convention 2005**"), is however limited in scope. It only applies to money judgments made by courts of either side where the parties to a commercial contract have agreed in writing that a

[1] The five arrangements respectively deal with the mutual service of judicial documents, reciprocal enforcement of arbitral awards, taking of evidence and matters on REJ as referred to in paragraphs 3 to 5 of this paper.

court of one 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 it is implemented in Hong Kong through the enactment of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) and in the Mainland by way of judicial interpretation issued by the Supreme People's Court ("**SPC**").

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.

5. In view of the increasing number of cross-boundary marriages which gave rise to the pressing need in the community for a legal mechanism between Hong Kong and the Mainland for REJ in matrimonial and related matters, the second REJ Arrangement with the Mainland was signed 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**") only applies to civil judgments in matrimonial or 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 Mainland courts. The Matrimonial Arrangement will be implemented in Hong Kong by way of legislation and in the Mainland by way of judicial interpretation to be issued by the SPC.

Need for a more comprehensive arrangement for REJ with the Mainland

6. 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.

7. 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. Notably on the requirement of finality under common law[2], Hong Kong courts have in different circumstances doubted whether Mainland judgments can be regarded as final and conclusive[3] due to the review power exercisable under the trial supervision system in the Mainland[4]. Procedurally, a party seeking to enforce a non-Hong Kong 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 non-Hong Kong judgment[5].

8. In other words, seeking to enforce a Mainland judgment at common law may arguably be less straightforward and more time-consuming when

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2 Common law allows the recognition and enforcement of a non-Hong Kong judgment (including a Mainland judgment) if certain conditions are satisfied, including that the judgment is given by a competent court for a fixed sum of money and that it is a final judgment conclusive upon the merits of the claim.

3 In *Lee Yau Wing v Lee Shui Kwa*n [2007] 2 HKLRD 749, the Court of Appeal, by a majority, held that the issue whether the Mainland judgment was final and conclusive could not be determined in interlocutory proceedings and ordered the case to proceed to trial. In *Bank of China Limited v Yang Fan* [2016] 3 HKLRD 7, the Court of First Instance (To J) considered that the Court of Appeal has left open the issue whether Mainland judgments are not final and conclusive by reason only of the review regime (at paragraph 54 of the judgment). The court considered that the relevant law then applicable in the Mainland was not the same as that applicable at the time of *Chiyu Banking Corporation Limited v Chan Tin Kwun* [1996] 2 HKLR 395, being the first decision of a Hong Kong court on the issue of finality of a Mainland judgment. The court considered itself bound by the Court of Appeal decisions that in view of its complicated nature and public importance, the question on the finality of Mainland judgments could not be determined in interlocutory proceedings without hearing evidence from expert witnesses. The court was however satisfied that for the purpose of the interlocutory application by the plaintiff in the case of *Bank of China Limited* to continue an *ex parte Mareva* injunction, the plaintiff has discharged its burden of showing an arguable case that the relevant Mainland judgment, if obtained, is final and conclusive for the purpose of Cap. 597 (also at paragraph 54 of the judgment).

4 For details of the trial supervision mechanism of the Mainland, see Chapter 16 of the *Civil Procedure Law of the PRC* (中華人民共和國民事訴訟法).

5 Save under the summary judgment process (pursuant to 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.

compared with the registration mechanism for applicable foreign judgments under Cap. 319.

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 in terms of trade and economic activities as well as social interactions.

10. In view of this, DoJ considers that by entering into a more comprehensive framework for REJ with the Mainland (i.e. the Proposed Arrangement) covering civil and commercial judgments beyond the scope of application of the Choice of Court Arrangement and the Matrimonial Arrangement, this 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.

11. On this basis, 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 of the Choice of Court Arrangement and the Matrimonial Arrangement. DoJ now invites views and comments on the Proposed Arrangement which seeks to broaden the scope of REJ in civil and commercial matters between Hong Kong and the Mainland.

ISSUES FOR CONSULTATION

12. DoJ proposes that similar to the Choice of Court Arrangement and the Matrimonial Arrangement, the Proposed Arrangement will set out the scope of application, requirements for REJ, grounds for refusal as well as the relevant procedural matters. In this regard, we set out in the following paragraphs the issues on which we would like to seek your views and comments.

I. Reference to "civil and commercial matters"

13. Generally speaking, the meaning of "civil and commercial matters" is different under the Mainland legal system and the Hong Kong legal system. The Mainland legal system, being more in line with a civil or continental law system, draws a distinction between "criminal", "civil" and "administrative" law and procedures. On the other hand, the Hong Kong legal system, being a common law system, classifies proceedings into civil and criminal proceedings.

14. Although the expression "civil and commercial matters" is commonly used in the Mainland, it is not clearly defined under Mainland law. It is understood that reference may be made to the following provisions of Mainland law as to what the expression "civil and commercial matters" may entail:

(1) Article 2 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), which provides that the civil law regulates personal relations and property relations between natural persons, legal persons, and non-legal-person organisations which are *subjects of equal status*[6]; 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 organisations, the courts of the Mainland shall apply the provisions of the *Civil Procedure Law of the PRC*[7].

15. It is understood that a dispute between an administrative organ in the Mainland and a natural or legal person or other organisation would be regarded as one between *subjects of unequal status* and hence would fall into the category of administrative law rather than civil law. We further understand

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

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".

that a suit before a Mainland court against an 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" for Mainland law purposes.

16. By contrast, "administrative" and other *sui generis* proceedings before a court or tribunal in Hong Kong are, generally speaking, considered "civil" (in contrast to "criminal") in nature. These include, for example, judicial review proceedings, market misconduct proceedings before the Market Misconduct Tribunal and proceedings on matters on competition law before the Competition Tribunal in Hong Kong. In the absence of any qualification, these proceedings may arguably fall under a general reference to "civil and commercial matters" under Hong Kong law.

17. In view of this, DoJ 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*[9]. This means that 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[10].

18. **DoJ welcomes views in this regard.**

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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 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.

10 It is suggested that the Proposed Arrangement would cover judgments on the part of Hong Kong made by the Court of Final Appeal, the Court of Appeal, the Court of First Instance and the District Court whilst decisions made by tribunals and administrative appeal boards are excluded. See paragraph 23 of this paper.

II. Specific types of matters to be covered or excluded

19. If the Proposed Arrangement covers judgments on disputes in matters which are considered as "civil and commercial" under both Hong Kong and Mainland law, it would include claims such as contractual claims and tortious claims.

20. Having considered the law and practice in both Hong Kong and the Mainland as well as the latest development of the Hague Judgments Project[11] under which the latest draft convention on reciprocal recognition and enforcement of judgments[12] was produced in May 2018 ("**Draft Hague Judgments Convention**"), DoJ has initially identified the following five types of civil and commercial matters which may warrant special consideration.

A. Corporate insolvency and restructuring as well as personal bankruptcy

(1) At present, Hong Kong does not have a statutory regime empowering Hong Kong courts to recognise and provide assistance to the Mainland liquidators and Mainland insolvency proceedings. Neither does the existing Mainland law provide for the recognition of Hong Kong liquidators and assistance to Hong Kong insolvency proceedings.

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[11] 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 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 dhad 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: 30 July 2018).

[12] 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: 30 July 2018).

(2) This is far from satisfactory and is not conducive to a fair and efficient administration of corporate insolvencies when cross-boundary elements are increasingly common between Hong Kong and the Mainland.

(3) DoJ, jointly with other relevant Government bureuax/departments, are actively considering the proposal of entering into a *separate* bilateral arrangement with the Mainland for mutual recognition of and assistance in cross-boundary corporate insolvency matters. Since the subject is complicated and will entail both policy and technical considerations, we plan to conduct a *stand-alone consultation exercise* on cross-boundary insolvency with the Mainland. For the time being therefore, corporate and personal insolvency matters would not be covered by the Proposed Arrangement.

(4) For reference, the Draft Hague Judgments Convention currently excludes matters of insolvency, composition, resolution of financial institutions, and analogous matters from its application[13].

(5) **DoJ invites views on the suggestions and observations set out in sub-paragraph (3) above.**

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

(1) At common law, Hong Kong courts would recognise a non-Hong Kong judgment determining a succession issue insofar as it relates to any property (movable or immovable) which was situated in that jurisdiction at the time of judgment[14]. In addition, it seems

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[13] Article 2(1)(e) of the Draft Hague Judgments Convention.

[14] See the following remarks of Godfrey JA in *Ip Cheung Kwok v Yip Chin 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) and in the *Ip* case, the

that a non-Hong Kong judgment would be recognised insofar as it relates to movable property (wherever situated) of a deceased who at the time of death was domiciled in the foreign jurisdiction in which the judgment is given[15].

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

(3) For succession to any Hong Kong property (movable or immovable), the relevant party would have to apply for a grant of representation (a grant of probate in respect of an estate with a will or a grant of letters of administration in respect of an estate without a will) from the Probate Registry of the High Court of Hong Kong.

(4) Under Hong Kong law, where an executor has been appointed by the will, the assets will vest in the executor at the date of the death. The grant of probate by the High Court serves as a confirmation of the validity of the will and provides a document of title to act in the administration of the estate. Before obtaining the grant from the High Court, the executor has power to deal with the assets but in practice, he/she can do little without production of the grant.

(5) When a person dies intestate leaving estate in Hong Kong, such estate shall vest in the Official Administrator who may receive and take possession of the estate until letters of administration is granted[16]. Unlike a grant of probate which confirms the executor's authority, letters of administration confer authority on the administrator and vest the deceased's property in the administrator.

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deceased died domicile in the Mainland. See also Graeme Johnston, *The Conflict of Laws in Hong Kong*, 3rd edition, Sweet & Maxwell 2017 at 8.036.

15 Graeme Johnston, at 8.036.

16 Section 10 of Probate and Administration Ordinance (Cap. 10).

(6) This could be contrasted with the position under Mainland law. Whilst a testator of a will may appoint an executor in his/her will, it is understood that Mainland law does not provide for a default mechanism of personal representation in probate and administration of a deceased's estate.

(7) It is further understood that under Mainland law, a deceased person's estate would be vested in the successor(s) upon the death of the deceased. A successor seeking to succeed the deceased's property in the Mainland (movable or immovable) would need to take steps on his/her own to take possession or otherwise deal with the assets.

(8) In practice, a successor to any Mainland property (movable or immovable) 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 may file a suit before the relevant Mainland court for determination of those disputes.

(9) Against this background and in particular, taking into account the fundamental differences between Hong Kong and the Mainland with regard to the legal principles and practice of estate administration, it is proposed that matters in relation to succession of the estate of deceased persons would not be covered by the Proposed Arrangement.

(10) For reference, the Draft Hague Judgments Convention currently excludes matters of wills and succession[17].

(11) **DoJ invites views on the suggestion set out in sub-paragraph (9) above.**

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[17] Article 2(1)(d) of the Draft Hague Judgments Convention.

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

(1) As the Matrimonial Arrangement specifically provides for the recognition and enforcement of the judgments on matrimonial or family matters covered thereunder, those judgments would be excluded from the Proposed Arrangement.

(2) Other than the judgments on matrimonial or family matters covered by the Matrimonial Arrangement, we would also need to consider whether the Proposed Arrangement should cover the following types of disputes classified as matrimonial or family related disputes in the Mainland which are *excluded* from the Matrimonial Arrangement, namely:

(a) disputes after divorce on liability for damages for personal injuries and mental suffering;
(b) disputes on property arising from co-habitation relationship;
(c) disputes on maintenance between siblings;
(d) disputes on maintenance arising out of the obligation of a child to support his/her parent(s) and grandparent(s);
(e) disputes on dissolution of an adoptive relationship;
(f) disputes on rights over guardianship involving adults with mental incapacity;
(g) disputes between family members on division of property; and
(h) disputes on property arising from engagement agreements.

(3) Except for items under sub-paragraphs (2)(f), (g) and (h) immediately preceding, it seems that for the remaining types of disputes, Hong Kong law either does not recognise the type of relationship as *per se* giving rise to the relevant claim, or does not recognise the underlying cause of action. For instance, unlike Mainland law, there exists no statutory obligation under Hong Kong law for the maintenance of one's sibling(s) and grandparent(s). We take the preliminary view that disputes

referred to in sub-paragraphs (2)(a), (b), (c), (d) and (e) immediately preceding should be excluded from the Proposed Arrangement.

(4) In respect of item under sub-paragraph (2)(f) above:

(a) It is understood that Mainland courts would determine disputes on the appointment of guardians in respect of mentally incapacitated adults, variation of such appointment and disputes on the handling of financial and other arrangements in respect of a mentally incapacitated adult.

(b) There seems to be no equivalent in the Mainland of the Guardianship Board, a quasi-judicial tribunal in Hong Kong, which has power under the Mental Health Ordinance (Cap. 136) to make a guardianship order in respect of a mentally incapacitated adult for appointment of a private guardian (say, a family member) or the public guardian (i.e. the Director of Social Welfare). The guardianship order made by the Guardianship Board would be subject to certain terms and conditions as to the exercise, extent and duration of the powers and duties of the guardian[18].

(c) In addition, Cap. 136 also empowers the Court of First Instance to make any order for the maintenance of a mentally incapacitated person or the administration of that person's property and affairs.

(d) If guardianship orders are covered by the Proposed Arrangement, it might mean that the guardian appointed in

[18] Under section 59R of Cap. 136, a guardianship order may confer on the guardian certain powers, including, for example, the power to require the mentally incapacitated person (i.e. the subject of the guardianship order) to reside at such place as may be specified by the guardian and the power to require the mentally incapacitated person to attend at places and times so specified by the guardian for the purpose of treatment. Section 59S(3) of Cap. 136 provides, among other things, that in the performance of any functions or the exercise of any powers, the guardian shall ensure that the interests of the mentally incapacitated person are promoted and shall comply with any directions given by the Guardianship Board.

the requesting place may have the power to administer the property of the subject person in the requested place. Since matters on guardianship involving adults with mental incapacity would involve complicated policy considerations and legal issues, we propose to exclude these matters from the Proposed Arrangement.

(5) In relation to disputes under sub-paragraphs (2)(g) and (h) above, it appears that they could similarly arise under Hong Kong law even though they would not necessarily be categorised as "matrimonial or family" related disputes. DoJ does not see any in-principle objection to including the same in the Proposed Arrangement.

(6) For reference, the Draft Hague Judgments Convention currently excludes from its application matters concerning the status and legal capacity of natural persons, maintenance obligations and other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships[19].

(7) **DoJ invites views on the suggestions set out in sub-paragraphs (3), (4) and (5) above.**

D. Intellectual property rights

(1) Intellectual property rights are territorial in nature in that the existence of intellectual property rights and the rights afforded to the rightholder are limited to the territory of the place granting or protecting such a right.

(2) Specifically, whether the intellectual property right subsists (and, in the case of a registered right, the validity of registration), its scope and ownership would be subject to the law of the place where protection is claimed.

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[19] Articles 2(1)(a), (b) and (c) of the Draft Hague Judgments Convention.

(3) Taking into account the principle of territoriality applicable to intellectual property rights, DoJ proposes that judgments ruling on the validity or infringement of an intellectual property right would *only* be included if the intellectual property right is one which is registered or subsists (or purports to subsist) in the requesting place. This means for example that the Proposed Arrangement would cover judgments awarding damages for infringement of an intellectual property right which is registered or subsists in the requesting place.

(4) In principle, judgments on *contractual claims* relating to an intellectual property right (e.g. an alleged failure to pay licence fee or other breaches of a licence agreement in respect of an intellectual property right) should not be affected by the suggestion set out in sub-paragraph (3) immediately preceding. However, we note that in some circumstances, the court ruling on a contractual claim relating to an intellectual property right may first need to rule on the validity of that intellectual property right. It is for consideration whether special treatment is warranted.

(5) Furthermore, in view of the special nature of intellectual property rights, it is proposed that only *monetary relief* in a judgment relating to an intellectual property right could be enforced under the Proposed Arrangement[20].

(6) To reflect the suggestions in sub-paragraphs (3), (4) and (5) immediately preceding, we propose specific jurisdictional filters in respect of judgments concerning intellectual property rights as set out in sub-paragraphs 28(2)(b) and (c) below and specific provisions on the remedies to be covered under the Proposed Arrangement in respect of such judgments as set out in paragraph 34 below.

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[20] See further discussions in paragraph 34 of this paper.

(7) We believe that the proposals set out in sub-paragraphs (3) to (6) above have sufficiently reflected the territoriality principle applicable to intellectual property rights. As far as international instruments on REJ are concerned, there seems to be yet a clear consensus on the types of intellectual property right disputes to be covered in the relevant instruments.

(8) For example, the Hague Choice of Court Convention 2005 excludes 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 relating to such rights, or could have been brought for breach of that contract[21].

(9) The Draft Hague Judgments Convention currently provides for the exclusion or inclusion of matters on intellectual property rights as alternatives for further deliberation[22].

(10) While we see merits of including matters on intellectual property rights in the Proposed Arrangement as such inclusion may complement the development of Hong Kong as a regional hub for trading in intellectual property rights and resolution of disputes involving intellectual property rights, there is room for consideration whether only certain types of intellectual property rights or certain types of intellectual property disputes may be included.

(11) **We welcome views in this regard and on the suggestions and observations set out in sub-paragraphs (3) to (10) above**.

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[21] Articles 2(2)(n) and (o) of the Hague Choice of Court Convention 2005. Article 2(2)(p) also excludes the validity of entries in public registers from the said Convention.

[22] For a possible exclusion, see Article 2(1)(m) of the Draft Hague Judgments Convention; and for inclusion, see Articles 5(3), 6(a), 7(1)(g), 8 and 11.

E. Maritime matters

(1) Various international conventions and practices on marine pollution, limitation of liability for maritime claims and general average and emergency towage and salvage are applicable to Hong Kong. These international conventions and the relevant legislation in Hong Kong may contain certain provisions on jurisdictional rules and reciprocal enforcement of the relevant judgments. Hong Kong and the Mainland may have different obligations under the relevant international conventions.

(2) If maritime matters are to be included in the Proposed Arrangement, it is necessary to consider how the judgment enforcement provisions under the existing legal regimes would interface with Proposed Arrangement and how matters concurrently covered by both should be treated.

(3) For reference, the Draft Hague Judgments Convention currently excludes maritime pollution, limitation of liability for maritime claims, general average and emergency towage and salvage from its application[23].

(4) **DoJ invites views if any maritime matters should be covered by the Proposed Arrangement, and if so, views on how to deal with the issues identified in sub-paragraphs (1) and (2) above.**

21. **DoJ invites views on the above suggested scope of the Proposed Arrangement as outlined in paragraph 20 as well as whether judgments concerning other types of matters should be excluded from the Proposed Arrangement or merit the provision of specific rules, and the reasons therefor.**

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[23] Article 2(1)(g) of the Draft Hague Judgments Convention. The last meeting of the Special Commission on the Hague Judgments Project held in May 2018 discussed a proposal to remove the reference to marine pollution and emergency towage and salvage from the exclusion concerning maritime matters in Article 2(1)(g) of the Draft Hague Judgments Convention. The meeting decided to proceed on the basis that the text should remain as it is in the Draft Hague Judgments Convention, but noted the need to consider these matters further in preparation for the Diplomatic Session.

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

22. DoJ takes the view 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. This reflects the general principle that a judgment shall be recognised only if it has effect in the place where it is made, and shall be enforced only if it is enforceable in the place where it is made. This approach would be generally in line with the Choice of Court Arrangement, the Matrimonial Arrangement as well as the Draft Hague Judgments Convention[24].

23. Specifically on the level of Hong Kong courts, the Proposed Arrangement should cover legally enforceable judgments made by the Court of Final Appeal, the Court of Appeal, the Court of First Instance and the District Court.

24. In relation to the Mainland, legally enforceable Mainland judgments given 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 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 of (1) or (2) above made in accordance with the procedure for trial supervision.

25. As to the level of Mainland courts, pursuant to the *Civil Procedure Law of the PRC*, civil cases in the Mainland are generally tried before the Basic People's Courts in the first instance. This general rule is subject to the specific rules promulgated by the SPC on the delineation of jurisdiction in civil cases in

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[24] Reference may be made to Articles 1 and 2 of the Choice of Court Arrangement, Articles 1 and 2 of the Matrimonial Arrangement and Article 4(3) of the Draft Hague Judgments Convention.

the first instance among the different levels of courts in the Mainland, primarily by a reference to the amount of claim in dispute[25]. DoJ therefore considers that there are merits in applying the Proposed Arrangement to judgments made by the Basic People's Courts of the Mainland and above. This issue would need to be considered in light of the discussion on the relationship between the Proposed Arrangement and the Choice of Court Arrangement as outlined in paragraphs 38 to 40.

26. **DoJ welcomes views in this regard.**

IV. <u>Jurisdictional basis</u>

27. For a non-Hong Kong money judgment to be enforced by Hong Kong courts under common law, the judgment debtor must have submitted to the jurisdiction of that foreign court[26]. The statutory regime for REJ provided under Cap. 319 also reflects the principle of submission as the basis for proving

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[25] 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 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 foreign-related, or Hong Kong, Macao or Taiwan-related, 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 basic people's courts in the hearing of civil cases on intellectual property matters in the first instance, by reference mainly to the amount of claims in disputes over intellectual property rights. For example, the Basic People's Court of the Dongcheng District in Beijing may hear a dispute on intellectual property right in which the claim in dispute is below RMB 5 million; or in the case where 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.

[26] Halsbury's Laws of Hong Kong, 2nd Edition, Volume 16 at paragraph 100.013. Submission to the jurisdiction of the foreign court may take place if, for instance, the judgment debtor was a resident in that foreign country when the action began; or where he/she had counter-claimed; or where he/she had contracted to submit to the forum in which the judgment was obtained (also at para. 100.013).

the jurisdiction of a foreign court for the purpose of enforcement in Hong Kong pursuant to Cap. 319[27].

28. Taking into account Hong Kong's common law regime, the statutory mechanism under Cap. 319 and international instruments, DoJ proposes that the Proposed Arrangement should include some form of *indirect jurisdictional rules* to the effect that an applicant would be required to prove that the judgment was made in compliance with those rules. The following possible approaches have been identified:

(1) The first is to *exclude only judgments made in violation of the exclusive jurisdiction of the courts of the requested place*.

(a) By way of example, an action brought under Mainland law in connection with a dispute arising from the performance of contracts for Chinese-foreign equity or 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 Mainland courts[28].

(b) For the purpose of recognition and enforcement of a non-Hong Kong judgment, it seems that a 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.

(c) Whilst the Choice of Court Arrangement provides that recognition and enforcement of a judgment should be refused if the judgment is made in respect of a matter which, according to the law of the requested place, is subject to the exclusive jurisdiction of the courts of the requested place[29], we need to consider whether adopting this approach *alone* is sufficient for the purpose of the Proposed Arrangement,

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27 Sections 6(2) and (3) of Cap. 319.

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

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

particularly in light of the need for greater certainty and clarity where parties have not entered into any form of choice of court agreement. The fact that the law of the requested place may be subject to change over time is also a relevant consideration.

(d) It is also relevant to consider whether this approach should be reflected as a jurisdictional rule[30] or as a ground for refusal of enforcement[31].

(2) The second approach is that in addition to the approach set out in sub-paragraph (1) above, *detailed indirect jurisdictional rules* are devised in the Proposed Arrangement so that a judgment would only be eligible for recognition and enforcement thereunder if it meets *one* of the requirements of such rules. This approach would have the advantage of offering a high degree of certainty and a clear guidance to the parties in their choice of forum and litigation strategies.

(a) Having made reference to Hong Kong's existing law (including the common law regime for REJ and the

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30 Reference may be made to Article 6 of the Draft Hague Judgments Convention which contains three exclusive bases for recognition and enforcement. Article 6 has both positive and negative effects: judgments meeting those bases of jurisdiction are eligible for recognition and enforcement and those do not shall not be recognised or enforced even under the national law of the requested State (since Article 16 of the Draft Hague Judgments Convention provides that subject to Article 6, the Convention does not prevent the recognition or enforcement of judgments under national law). Specifically, Article 6(a) reflects the principle that the State of registration of an intellectual property right should have exclusive jurisdiction to deal with issues of validity and registration of such right. Article 6(b) seeks to establish an indirect basis of exclusive jurisdiction for judgments that rule on rights *in rem* in immovable property. Article 6(c) seeks to give effect to the policy of certain States in favour of exclusive jurisdiction for tenancies. Article 6(c) does not, however, lay down a harmonised basis of exclusive jurisdiction in matters on tenancies over immovable property. It includes a reference to the national law of the State where the immovable property is situated. It only applies if, under the law of the State where the immovable property is situated, the courts of that State have exclusive jurisdiction in the matter. Further discussions on Article 6 are set out in the Judgments Convention: Revised Preliminary Explanatory Report (Preliminary Document No.10 of May 2018), available in the following webpage of the Hague Conference on Private International Law: https://assets.hcch.net/docs/7cd8bc44-e2e5-46c2-8865-a151ce55e1b2.pdf (last access: 30 July 2018).

31 See sub-paragraph 30(6) of this paper. Insofar as the applicability of a ground for refusal, the party against whom recognition and enforcement is sought would bear the burden of proof.

mechanism under Cap. 319) as well as various international instruments, particularly, the Draft Hague Judgments Convention, DoJ preliminarily suggests that rules (satisfaction of one of which would suffice) along the following lines be adopted for cases other than those relating to intellectual property rights:

(i) the person against whom recognition or enforcement is sought was habitually resident in the requesting place at the time that person became a party to the proceedings in the requesting court[32];

(ii) the person against whom recognition or enforcement is sought had his or her principal place of business in the requesting place at the time that person became a party to the proceedings in the requesting court[33];

(iii) the person against whom recognition or enforcement is sought maintained a branch, agency, or other establishment without separate legal personality in the requesting place at the time that person became a party to the proceedings in the requesting court, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment[34];

(iv) the person against whom recognition or enforcement is sought was the plaintiff in, or counterclaimed in, the proceedings in the requesting court[35];

(v) the parties expressly consented to the jurisdiction of the courts of the requesting place over the relevant proceedings, or the person against whom recognition or enforcement is sought, being the defendant in the

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32 Reference may be made to Article 5(1)(a) of the Draft Hague Judgments Convention.
33 Reference may be made to Article 5(1)(b) of the Draft Hague Judgments Convention.
34 Reference may be made to Article 5(1)(d) of the Draft Hague Judgments Convention.
35 Reference may be made to Article 5(1)(c) of the Draft Hague Judgments Convention.

requesting court, expressly consented to the jurisdiction of the requesting court in the course of the proceedings in which the judgment was given; or argued on the merits of the case before the requesting court without contesting the jurisdiction of the requesting court within the time limit under the law of the requesting place[36];

(vi) where the judgment ruled on a contractual right or obligation, in accordance with the parties' agreement, the performance of that right or obligation should take place in the requesting place, or in the absence of an agreed place of performance, the performance of that right or obligation should take place in the requesting place according to the law applicable to the contract[37];

(vii) where the judgment ruled on a non-contractual liability arising from death, personal injury, damage to or loss of tangible property, the act or omission directly causing such harm occurred in the requesting place[38];

(viii) where the judgment ruled on an immovable property , the immovable property is situated at the requesting place[39];

(ix) where the judgment ruled on a tenancy of immovable property, the immovable property is situated at the requesting place[40].

Judgments relating to intellectual property rights

(b) In relation to judgments ruling on intellectual property rights, to reflect the territoriality principle, we propose the following

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36 Reference may be made to Articles 5(1)(e) , 5(1)(f) and 5(1)(m) of the Draft Hague Judgments Convention.

37 Reference may be made to Article 5(1)(g) of the Draft Hague Judgments Convention.

38 Reference may be made to Article 5(1)(j) of the Draft Hague Judgments Convention.

39 Reference may be made to Article 6(b) of the Draft Hague Judgments Convention.

40 Reference may be made to Article 5(1)(h) of the Draft Hague Judgments Convention.

exclusive jurisdictional rules under which judgments ruling on the validity or infringement of intellectual property rights could *only* be eligible for recognition and enforcement under the Proposed Arrangement if they fulfil *one* of the grounds in sub-paragraphs (i) or (ii) below but not otherwise:

(i) where the judgment ruled on the validity or infringement of an intellectual property right required to be granted or registered, the judgment was given by a court of the place in which the grant or registration of the right concerned has taken place[41];

(ii) where the judgment ruled on the validity or infringement of an unregistered intellectual property right (including copyright or related right), the judgment was given by a court of the place for which protection was claimed[42].

(c) It would seem that the jurisdictional rules set out in sub-paragraphs (i) and (ii) above should *not* apply to judgments ruling on a contractual claim relating to an intellectual property right (e.g. an alleged failure to pay licence fee or other breaches of a licence agreement in respect of an intellectual property right). However, we note that in some circumstances, the court ruling on a contractual claim relating to an intellectual property right may first need to rule on the validity of that intellectual property right. It is for consideration whether special treatment is warranted in these cases[43]. **We welcome views in this regard.**

(3) The third approach is that the Proposed Arrangement would *not* contain any detailed jurisdictional rules but the requested court would be allowed to refuse recognition and enforcement *if the*

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41 Reference may be made to Articles 5(3), 6(a) and 8 of the Draft Hague Judgments Convention.

42 *ibid*.

43 Reference may be made to Articles 6(a), 8(1) and 8(3) of the Draft Hague Judgments Convention.

requested court considers that the requesting court did not have jurisdiction over the dispute according to the law of the requested place (including that place's conflict of laws rules).

(a) If this approach is adopted, then as far as Hong Kong law is concerned, in the absence of any express provisions in the Proposed Arrangement, reference may be made to the common law in Hong Kong on indirect jurisdictional rules when considering whether a Mainland judgment should be recognised and enforced.

(b) However, in the case of Mainland law, it is understood that there are currently *no express provisions on indirect jurisdictional rules*[44]. Therefore, it would seem that the recognition and enforcement of a Hong Kong judgment may be subject to a Mainland court's decision on a case by case basis.

(c) It is noted that this approach alone may offer less certainty to the parties given that the law of the requested place may change over time.

29. It should be noted that in any event it is a matter for the requested court to decide in accordance with the laws of the requested place (including its conflict of law rules) whether a judgment from another jurisdiction is to be recognised and enforced. The first approach in sub-paragraph 28(1) above already reflects that the requested court would refuse to recognise and enforce a judgment made by the requesting court if it considers that the courts of the requested place have exclusive jurisdiction over the matter. The question therefore is whether, on top of the approach set out in sub-paragraph 28(1) above, additional jurisdictional rules in express terms along the lines set out in second approach in sub-paragraph 28(2) above would be more reassuring. **DoJ invites views on which of the approaches discussed in paragraph 28**

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[44] The *Civil Procedure Law of the PRC* (民事訴訟法) only provides for *direct jurisdictional rules* (regulating the exercise of jurisdiction among different levels of courts and courts of different localities in the Mainland) but not *indirect ones* in the context of recognition and enforcement of non-Mainland judgments.

above would be the most appropriate as well as views on the related issues mentioned in this paragraph.

V. Grounds for Refusal

30. Having regard 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 (particularly the Draft Hague Judgments Convention), DoJ suggests that the requested court must refuse to recognise and enforce the judgment if any of the following grounds is satisfied upon proof by the party against whom recognition or enforcement is sought (in this paragraph, the "**respondent**"):

(1) the respondent was not summoned according to the law of the requesting place, or although the respondent was summoned, the respondent was not given a reasonable opportunity to make representations or defend the respondent's case[45];

(2) the judgment was obtained by fraud[46];

(3) 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[47];

(4) an arbitral award was already given in the requested place on the same dispute, or a court of the requested place 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

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45 Reference may be made to Article 9(1)(4) of the Choice of Court Arrangement, Article 9(1)(1) of the Matrimonial Arrangement, section 6(1)(a)(iii) of Cap. 319 and Article 7(1)(a) of the Draft Hague Judgments Convention.

46 Reference may be made to Article 9(1)(5) of the Choice of Court Arrangement, Article 9(1)(2) of the Matrimonial Arrangement, section 6(1)(a)(iv) of Cap. 319 and Article 7(1)(b) of the Draft Hague Judgments Convention.

47 Reference may be made to Article 9(1)(3) of the Matrimonial Arrangement and Article 7(2) of the Draft Hague Judgments Convention.

or place, or has recognised or enforced an arbitral award on the same dispute given in another country or place[48];

(5) the bringing of the relevant proceedings in the requesting court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the requesting court, and the respondent:

(a) did not bring or agree to the bringing of those proceedings in that court; and
(b) did not counter-claim in the proceedings or otherwise submitted to the jurisdiction of the requesting court.

However, the requested court shall not be bound by any decision of the requesting court on the validity of the said agreement[49]; and

(6) according to the law of the requested place, the judgment is rendered in respect of a matter which is within the exclusive jurisdiction of the courts of the requested place[50].

31. In addition, recognition and enforcement must 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[51].

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48 Reference may be made to Article 9(1)(6) of the Choice of Court Arrangement, Article 9(1)(4) of the Matrimonial Arrangement, section 6(1)(b) of Cap. 319 and Articles 7(1)(e) and 7(1)(f) of the Draft Hague Judgments Convention.

49 Reference may be made to sections 3(1), 3(2) and 3(3) of Cap. 46 and Article 7(1)(d) of the Draft Hague Judgments Convention.

50 Reference may be made to Article 9(1)(3) of the Choice of Court Arrangement. See discussions in sub-paragraph 28(1) of this paper and in particular, sub-paragraph 28(1)(d) (and the accompanying footnotes) in which it is suggested that this ground may be reflected as a jurisdictional rule.

51 Reference may be made to Article 9(2) of the Choice of Court Arrangement, Article 9(2) of the Matrimonial Arrangement, section 6(1)(a)(v) of Cap. 319 and Article 7(1)(c) of the Draft Hague Judgments Convention. In line with the Choice of Court Arrangement and the

32. **DoJ welcomes views on the above suggested grounds for refusal.**

VI. Types of relief

Relief ordered after determination of the merits of the underlying claim

33. As for what types of relief would be enforced under the Proposed Arrangement, DoJ has identified the following two options which may be considered.

(1) The first is to cover *only monetary relief* (i.e. an order for payment of a definite sum of money), not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, or multiple or punitive damages.

This option reflects the current position under common law, Cap. 319, Cap. 597 as well as the Protection of Trading Interests Ordinance (Cap. 471).

(2) The second option is to cover *all types of relief (whether monetary or otherwise) as long as they are available under the law of the requested place*; in other words, types of relief available under both Hong Kong and Mainland law.

Under this option, relief common under both Hong Kong and Mainland law includes an order for payment of a sum of money (i.e. monetary relief, including punitive damages payable to private parties), injunction and specific performance. This option would go beyond Hong Kong's existing REJ mechanism for enforcement of Mainland and other non-Hong Kong judgments.

34. In relation to *intellectual property* matters, as discussed in sub-paragraphs 20(D)(1) to (6), specific consideration is called for in light of

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Matrimonial Arrangement, it is suggested that this ground may be invoked by the requested court on its own motion.

the territoriality principle applicable to such matters. It is suggested that irrespective of whether the first or second option outlined in paragraph 33 is to be adopted, a judgment relating to an intellectual property right would only be enforced to the extent it provides a monetary remedy. In other words, the enforcement of non-monetary relief in a judgment relating to an intellectual property right would be excluded from the Proposed Arrangement.

35. We note that the Draft Hague Judgments Convention currently covers both monetary and non-monetary relief except that in intellectual property matters, a judgment ruling on an infringement shall be enforced only to the extent that it rules on a monetary remedy in relation to harm suffered in the State of origin[52].

Interim relief

36. Another relevant issue to be considered is whether the Proposed Arrangement should cover *interim relief* granted by the courts of both sides and if so, what specific types of interim relief are to be covered. In the Mainland, examples of interim relief include orders for preservation of assets of a party, requiring a party to perform certain acts or prohibiting a party from committing certain acts[53]. In Hong Kong, the court is empowered to grant interim relief in appropriate circumstances[54], such as interlocutory injunction, interim payment, provisional damages for personal injuries, as well as detention, preservation and inspection of property.

37. **DoJ invites views on the issues concerning the types of relief to be covered by the Proposed Arrangement.**

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52 Article 11 of the Draft Hague Judgments Convention (with the words "recognised and" appearing in square brackets before "enforced") which should be read on the assumption that intellectual property matters are to be included in the Convention.

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

54 Such powers 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.

VII. Relationship with the Choice of Court Arrangement

38. As mentioned in paragraph 3, the Choice of Court Arrangement, implemented in Hong Kong through the enactment of Cap. 597, provides for reciprocal recognition and enforcement of money judgments made by the courts of either side where the parties to a commercial contract have agreed in writing that a court of one side will have exclusive jurisdiction to determine a dispute arising from that contract. Employment contracts and contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party, are excluded from the application of Cap. 597.

39. When we consider the scope of application of the Proposed Arrangement, we need to take into account its relationship with the Choice of Court Arrangement. On this issue, the following options have been identified:

(1) The Choice of Court Arrangement would *continue to be in operation* when the Proposed Arrangement is in place. In this case, the Proposed Arrangement would not apply to those judgments eligible for reciprocal recognition and enforcement under the Choice of Court Arrangement as such would continue to be governed by the Choice of Court Arrangement.

(2) Alternatively, the Proposed Arrangement would *also cover those judgments eligible for recognition and enforcement under the Choice of Court Arrangement, thereby superseding the Choice of Court Arrangement*.

If this option is adopted, the following issues would be relevant:

Coverage of Basic People's Courts[55]

(a) As far as it concerns the recognition and enforcement in Hong Kong of Mainland judgments pursuant to the Choice of

[55] DoJ has proposed in the Statue Law (Miscellaneous Provisions) Bill 2017 that the references to "Basic People's Court(s)" in Cap. 597 be amended to "Primary People's Court(s)" so as to align with the usage of the term in the Mainland and avoid confusion. The Bill was passed by the LegCo on 11 April 2018. The amendments to Cap. 597 will come into operation on a date to be appointed by the Secretary for Justice by notice in the Gazette.

Court Arrangement, Cap. 597 provides that the Mainland judgment must be made by a designated court of the Mainland and, in the case of a judgment made by a court at the lowest level in the Mainland, i.e. a Basic People's Court, the judgment must be made by a "recognized Basic People's Court" as defined under Cap. 597 and a list of which is published in the Gazette from time to time.

We need to consider if the mechanism of "recognized Basic People's Court" under Cap. 597 should be mirrored in the Proposed Arrangement or whether it is desirable to lift the restriction such that a Mainland judgment made by any Mainland court at any level, whether made in pursuant of an exclusive choice of court agreement or otherwise, could be recognised and enforced under the Proposed Arrangement[56].

Transitional provisions

(b) Transitional provisions should be set out in the Proposed Arrangement. Such provisions should address the question whether the Choice of Court Arrangement would continue to apply to those judgments made pursuant to an exclusive choice of court agreement concluded *before* the Proposed Arrangement comes into effect, even when those judgments are made by the relevant court *after* the Proposed Arrangement has come into effect.

Grounds for refusal

(c) The grounds for refusal under the Proposed Arrangement should provide for the circumstances applicable to judgments made pursuant to an exclusive choice of court agreement, including situations when the court chosen under the exclusive choice of court agreement has determined the validity of the relevant agreement, similar to what has been provided for under Article 9(1) of the Choice of Court Arrangement.

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[56] Please also refer to the discussions in paragraph 25.

40. **DoJ welcomes views in this regard.**

IMPLEMENTATION

41. The Proposed Arrangement will need to be implemented by local legislation in Hong Kong. This would 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.

SUMMARY OF ISSUES

42. In summary, DoJ wishes to invite views and comments on the following issues:-

(1) the ambit of "civil and commercial" matters for the purpose of the Proposed Arrangement (paragraphs 13 to 18);
(2) the specific types of matters to be excluded from or covered under the Proposed Arrangement (paragraphs 19 to 21);
(3) the principle of enforceability and level of courts to be covered by the Proposed Arrangement (paragraphs 22 to 26 above);
(4) the jurisdictional basis for reciprocal recognition and enforcement under the Proposed Arrangement (paragraphs 27 to 29);
(5) the grounds for refusal (paragraphs 30 to 32);
(6) the types of relief (paragraphs 33 to 37); and
(7) the relationship between the Proposed Arrangement and the Choice of Court Arrangement (paragraphs 38 to 40).

43. Please send your views in writing to the China Law Unit of the Legal Policy Division of DoJ on or before 24 September 2018:

Address: China Law Unit
Legal Policy Division

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5/F, East Wing, Justice Place
18 Lower Albert Road
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Legal Policy Division
Department of Justice
July 2018