

Article 95 of the Basic Law and Mutual Legal Assistance in Civil and Commercial Matters between Hong Kong and the Mainland

I. Introduction

1. Year 2022 marks a significant milestone as the HKSAR celebrates the 25th anniversary of its establishment. Since 1 July 1997, the HKSAR has entered into nine arrangements on mutual legal assistance (“MLA”) with the Mainland in civil and commercial matters. There is also reciprocal assistance in taking of evidence in criminal matters on a case-by-case basis. This article will discuss the features and significance of these nine arrangements as well as the reciprocal assistance in taking of evidence in criminal matters with the Mainland. Some way forward in improving the arrangements will also be considered.

II. Legal Basis for Maintaining Juridical Relations with the Mainland

2. The overarching principle of “one country, two systems” implemented under the Basic Law allows different systems to be instituted in the HKSAR in light of its specific circumstances. Since the HKSAR’s common law system is different from the legal system of the Mainland, the Basic Law makes provisions for the HKSAR to develop and maintain juridical relations with judicial organs of other parts of the Mainland. BL 95 provides the relevant legal basis and reads as follows:

“The [HKSAR] may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.”

3. BL 95 establishes a framework for the HKSAR and the Mainland to develop and maintain juridical relations through consultations which promote consensus, reciprocity and comity.

III. The Nine Arrangements in Civil and Commercial Matters: The Past and the Present

A. Three chronological stages

4. The chronological development of these nine MLA arrangements on civil and commercial matters can be divided into three stages:

- (1) the initial development stage from July 1997 to 2006, where three arrangements were signed;
- (2) the experience consolidation stage from 2006 to 2016, which served as a solid foundation for the subsequent stage; and
- (3) the rapid development stage from 2016 till now, where six arrangements were signed.¹

B. Three categories

5. In terms of mutual legal assistance provided, these nine arrangements can be classified into three categories:

- (1) procedural assistance;
- (2) arbitration-related assistance; and
- (3) reciprocal recognition and enforcement of judgments (“REJ”).

IV. The Features and Significance of the Nine Arrangements

A. First category: Procedural assistance

6. The first category provides procedural assistance to litigants and comprises (1) the Arrangement for Mutual Service of Judicial Documents in Civil and

¹ Supreme People’s Court, “The Report on the Practice of Judicial Assistance in Civil and Commercial Matters between the Mainland and the HKSAR” (“關於內地與香港特別行政區民商事司法協助實踐的報告”), January 2021 at p. 4.



Commercial Proceedings² (“Service Arrangement”); and (2) the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters³ (“Evidence Taking Arrangement”). They serve to alleviate the problems on cross-boundary service of judicial documents and evidence collection and to protect litigants’ legitimate interests.

(i) The Service Arrangement

7. The Service Arrangement, signed in January 1999 and came into force in March 1999, marked the beginning of a MLA regime between the two places.

8. Prior to 1 July 1997, service of judicial documents between the Mainland and Hong Kong was principally effected pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Convention”). The Hague Convention continues to apply to the HKSAR as part of the PRC after June 1997. However, as the Hague Convention, being an international agreement, is no longer applicable between the two places, there was an imminent need after June 1997 to re-establish the reciprocal arrangement on service of judicial documents between the two places.

9. The Service Arrangement has re-established the reciprocal arrangement on service of judicial documents between the two places, reflecting the principles of the Hague Convention. The Supreme People’s Court (“SPC”) and the High Court of Hong Kong (“High Court”) oversee the operation of the Service Arrangement.⁴ Actual service of judicial documents will be conducted by the people’s courts in the relevant provinces and municipalities in the Mainland and the High Court in the HKSAR. For parties in the HKSAR who wish to serve judicial documents in the Mainland through this official

channel, they must serve judicial documents according to Order 11, rule 5A of the Rules of the High Court (“RHC”).

10. As held by the CA in *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* (張紅力) [2016] 3 HKLRD 303, Order 11, rule 5A(1) of the RHC applies to the situation where service of a writ is to be effected in the Mainland, and provides that the writ must be served through the judicial authorities of the Mainland.⁵ This does not preclude the applications for order for substituted service under Order 65, rule 4 of RHC if the requisite conditions are satisfied.

11. According to the SPC, during the period of over 20 years since the commencement of the Service Arrangement, the number of requests of mutual service of judicial documents between the two places increased more than 6 times, from 359 requests in 1999 to 2,826 in 2021, with a total of over 32,000 requests.⁶ As compared between the number of requests sent in 1999 and 2021, there is an increase of about 5 times on the number of requests sent by the Mainland courts to the Hong Kong court whereas there is a soaring increase of about 32 times on those sent by the Hong Kong court to Mainland courts, indicating a great rise in cross-boundary disputes. Between 2016 and 2021, over 30% of the requests of mutual service of judicial documents originated from both places were on matrimonial and family cases.⁷

12. Given that the Service Arrangement was signed over 20 years ago and users encounter difficulties from time to time, the Department of Justice (“DoJ”) has been actively discussing with the Judiciary and the SPC on possible improvements of the Service Arrangement.

² The full title is “Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and the Hong Kong Courts” (“關於內地與香港特別行政區法院相互委托送達民商事司法文書的安排”).

³ The full title is “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托提取證據的安排”).

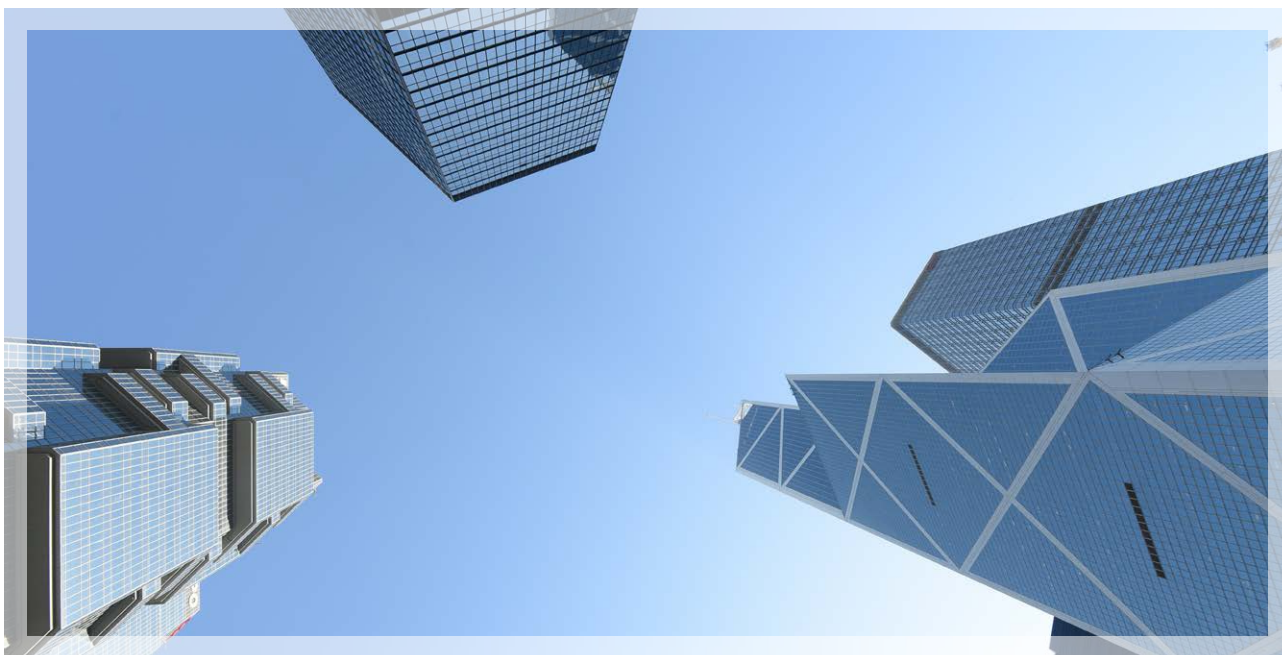
⁴ Article 10 of the Service Arrangement states that:

“Any problem arising from the implementation of this Arrangement and any amendment to be made to this Arrangement shall be resolved through consultation between the Supreme People’s Court and the High Court of the HKSAR.” (“本安排在執行過程中遇有問題和修改、應當通過最高人民法院與香港特別行政區高等法院協商解決。”)

⁵ See paragraph 54 of the judgment.

⁶ The statistics were provided by the SPC.

⁷ Ditto.



(ii) The Evidence Taking Arrangement

13. The Evidence Taking Arrangement, signed in December 2016 and entered into force in March 2017, aims at helping litigants of the Mainland and the HKSAR to obtain evidence in civil and commercial matters with enhanced efficiency and greater certainty. It designates the competent authorities in the Mainland (*i.e.* the SPC and the High People's Courts) and in the HKSAR (*i.e.* Chief Secretary for Administration's Office) for the receipt and transmission of letters of request ("LoRs"), and specifies the scope of assistance such as obtaining witnesses' statements and documents available under the respective laws of the Mainland and the HKSAR. LoRs to the HKSAR are processed under ss. 74 to 77A of the Evidence Ordinance (Cap. 8) and Order 70 of the RHC.

14. With greater certainty in securing the essential evidence, the Evidence Taking Arrangement assists the parties in civil litigation and courts in the Mainland and the HKSAR to resolve civil and commercial disputes, thereby promoting justice and fairness and enhancing confidence in the judicial systems.

15. This can be illustrated by a 2015 Mainland court

case,⁸ where the plaintiff instituted proceeding against the defendant in Tianjin, claiming that the defendant had failed to repay a loan of approximately US\$6.5 million. According to the plaintiff, the funds were transferred to a bank account held at the HSBC in the HKSAR under the defendant's name. The defendant denied existence of the loan agreement and transfer of the funds. The record of transfer of funds to the HSBC bank account in the HKSAR was, therefore, an essential piece of evidence in the legal proceedings in Tianjin.

16. Pursuant to the Evidence Taking Arrangement, a LoR was successfully executed and the bank records showed that there was in fact a transfer of funds from the plaintiff to the defendant's HSBC bank account in the HKSAR. The Mainland court was satisfied of the existence of the loan agreement and ordered the defendant to repay the loan to the plaintiff, together with interest.

B. Second category: Arbitration-related assistance

17. The second category provides assistance in the area of arbitration. It comprises the Arrangement Concerning Mutual Enforcement of Arbitral Awards⁹

⁸ 新好投資集團有限公司 (New Best Investment Group Limited) 訴 耿長和案, Case No. (2015) Er Zhong Min Yi Chu Zi No.0147 ((2015) 二中民一初字第0147號).

⁹ The full title is "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region" ("關於內地與香港特別行政區相互執行仲裁裁決的安排").



(“Arbitral Awards Arrangement”), the Supplemental Arrangement to the Arbitral Awards Arrangement¹⁰ (“Supplemental Arrangement”), and the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings¹¹ (“Interim Measures Arrangement”). This category facilitates the development of alternative dispute resolution in cross-boundary disputes and enhances the HKSAR as a leading centre for international legal and dispute resolution services in the Asia-Pacific Region.

(i) The Arbitral Awards Arrangement

18. Before July 1997, reciprocal enforcement of arbitral awards between the Mainland and Hong Kong was regulated by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). Due to the inapplicability of the New York Convention between the two places after June 1997, it was replaced by the signing of the Arbitral Awards Arrangement in June 1999 which has been implemented since 1 February 2000. The Arbitral Awards Arrangement generally reflects the principles of the New York Convention.

19. S. 92 of the Arbitration Ordinance (Cap. 609) provides the legal basis for enforcement of Mainland arbitral awards in Hong Kong. It is stated that a Mainland award is enforceable in Hong Kong either by action in the Court, or in the same manner as an award to which s. 84 of the Ordinance applies. From February 2000 to December 2021, 231 applications were made to the Hong Kong court for enforcement of Mainland arbitral awards¹² whereas the Mainland courts handled 128 cases.¹³

20. Cases in the HKSAR have embodied the spirit of the Arbitral Awards Arrangement and shaped the

development in reciprocal enforcement of arbitral awards between the Mainland and the HKSAR. For example, the landmark decision *Ennead Architects International LLP v Fuli Nanjing Dichan Kaifa Youxian Gongsi* ((2016) Su 01 Ren Gang No. 1)¹⁴ involves the enforcement of unpaid interest of an arbitral award pursuant to property design contracts, which marked for the first time that a Mainland court has enforced an arbitral award made by CIETAC Hong Kong. The landmark decision is a clear message that the Mainland courts recognize awards rendered by the Hong Kong branch of a Mainland arbitration institution under the Arbitral Awards Arrangement. It instilled confidence in arbitration practitioners and users in considering different institutional options for arbitrations seated in the HKSAR.

21. Another notable case, *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* (2020) 23 HKCFAR 348, concerns a dispute arising from a land development agreement. By expressly referring to the Arbitral Awards Arrangement, the CFA in that case addressed the two alternative methods of enforcing Mainland arbitral awards in Hong Kong, namely, either by a court action or by the summary procedure. In the context of the summary procedure, the court’s task is said to be “as mechanistic as possible” so as to endow the award with the status of a compulsorily executable judgment without itself scrutinizing the merits of the award and only entertaining challenges within the limits laid down in the legislation.

22. To gain more practical insights, a copy of the Compendium of Notable Cases relating to the Arbitral Awards Arrangement is available on the DoJ’s website.¹⁵

23. Over the years, implementation under the Arbitral Awards Arrangement has provided solid

¹⁰ The full title is “Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region” (“關於內地與香港特別行政區相互執行仲裁裁決的補充安排”).

¹¹ The full title is “Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings 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就仲裁程序相互協助保全的安排”).

¹² The statistics were provided by the Judiciary.

¹³ The statistics were provided by the SPC.

¹⁴ See DoJ, “Compendium of Notable Cases relating to the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR”, at https://www.doj.gov.hk/tc/publications/pdf/compendium_c_e.pdf at pp. 22 to 24.

¹⁵ See Publications (Deal Making and Dispute Resolution) of the DoJ’s website at https://www.doj.gov.hk/tc/publications/pdf/compendium_c_e.pdf.



experience for improvements leading to the signing of the Supplemental Arrangement.

(ii) The Supplemental Arrangement

24. The Supplemental Arrangement, signed in November 2020, aims to refine the existing mechanism under the Arbitral Awards Arrangement and offer better protection to arbitration parties. The Supplemental Arrangement was fully implemented in the HKSAR through the Arbitration (Amendment) Ordinance 2021 which came into operation on 19 May 2021.

25. The Supplemental Arrangement excels the Arbitral Awards Arrangement in several aspects. It provides greater certainty by expressly including “recognition” when it refers to enforcement of arbitral awards in the Arbitral Awards Arrangement,¹⁶ and clarifying that a party may apply for preservation measures before or after the court’s acceptance of an application to enforce an arbitral award. It also aligns the definition of the scope of arbitral awards with the prevalent international approach of “seat of arbitration” under the New York Convention.

26. The Supplemental Arrangement also removes a drawback of the Arbitral Awards Arrangement, namely, restriction against concurrent enforcement proceedings in the HKSAR and the Mainland. Due to this restriction, the award creditor in *CL v SCG* [2019] 2 HKLRD 144 spent a number of years seeking to enforce a Hong Kong arbitral award in the Mainland but in vain. When the creditor later sought enforcement of the award in the HKSAR, it was time-barred. The Supplemental Arrangement allows parties to make simultaneous applications to both the courts of the Mainland and the HKSAR for enforcement of an arbitral award, while ensuring that the total amount recovered by the applicant would not exceed the amount determined in the arbitral award. The implementation of the Supplemental Arrangement is crucial in safeguarding the interest of arbitration parties, as clearly illustrated by the case of *CL v SCG*.

(iii) The Interim Measures Arrangement

27. The Interim Measures Arrangement was signed in April 2019 and came into effect on 1 October 2019. Hong Kong is the first jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral

¹⁶ The “recognition” and “enforcement” of arbitral awards are two related but different concepts. The recognition of an arbitral award is not necessarily followed by enforcement of the award. However, since an award which is enforced by a Court must have first been recognized by the relevant court, the amendment provides clarity that recognition of arbitral awards is also covered under the Arbitral Awards Arrangement, in line with the practice of international arbitration.



proceedings administered by designated arbitral institutions would be able to apply to the Mainland courts for interim measures, including property preservation, evidence preservation and conduct preservation.

28. On the other hand, the Interim Measures Arrangement clarifies the current legal position in Hong Kong without the need for legislative amendments. Under existing Hong Kong legislation, any parties to arbitral proceedings in any place, including the Mainland, may apply to the CFI of the High Court of the HKSAR for interim measures in relation to the arbitral proceedings. Such legal position is reflected in ss. 21L(1) and 21M(1) of the High Court Ordinance (Cap. 4), as well as ss. 45(2) and 60(1) of the Arbitration Ordinance (Cap. 609).

29. The first application made by parties to an arbitration seated in the HKSAR under the Interim Measures Arrangement was a property preservation application made to the Shanghai Maritime Court on 8 October 2019, just one week after the Arrangement came into effect. Given a party's failure to comply with the settlement agreement arising from a charterparty dispute, the Shanghai Maritime Court granted a property preservation order against that party on the same day, demonstrating high efficiency in handling applications under the Interim Measures Arrangement.

30. Between October 2019 and July 2022, 79 applications were made to the Mainland courts for interim measures.¹⁷ The total value of assets sought to be preserved across all applications amounted to RMB 18.7 billion, proving that the Interim Measures Arrangement is effective in providing an avenue for

parties to arbitral proceedings in the HKSAR to apply for interim measures in Mainland courts. On the other hand, five applications were made to the Hong Kong court for interim measures between October 2019 and December 2021.¹⁸

C. Third Category: REJ

31. The third category comprises (1) the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Pursuant to Choice of Court Agreements between Parties Concerned¹⁹ ("Choice of Court Arrangement"), (2) the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases²⁰ ("Matrimonial Arrangement"), (3) the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters²¹ ("REJ Arrangement"), and (4) the Record of Meeting on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings²² ("Record of Meeting on CBI"). The third category promotes the mutual recognition and enforcement of civil and commercial judgments between the two places, reduces the need for re-litigation of the same disputes in both places and offers better protection to parties' interest. This category makes Hong Kong the first jurisdiction to have the four arrangements with such a wide coverage in civil and commercial matters with the Mainland, reflecting the unique advantages of "one country, two systems".

(i) The Choice of Court Arrangement

32. The Choice of Court Arrangement, signed in July 2006, marked another milestone as it was the first arrangement on REJ between the Mainland and

¹⁷ The statistics were provided by Hong Kong International Arbitration Centre.

¹⁸ The statistics were provided by the Judiciary.

¹⁹ The full title is "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").

²⁰ The full title is "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").

²¹ The full title is "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" ("關於內地與香港特別行政區法院相互認可和執行民商事案件判決的安排").

²² The full title is "Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region" ("最高人民法院與香港特別行政區政府關於內地與香港特別行政區法院相互認可和協助破產程序的會談紀要").



the HKSAR. The Arrangement has been implemented in the HKSAR through the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) since 1 August 2008.

33. Prior to the Choice of Court Arrangement, a Mainland judgment which is for a fixed sum of money might be recognized and enforced in the HKSAR under the common law but the relevant proceedings could be time-consuming and costly. More specifically, an applicant might encounter difficulties in proving the finality of the Mainland judgment, a prerequisite for enforcement under common law. Furthermore, there was no clear legal basis for enforcement of Hong Kong judgments in the Mainland and parties might need to re-litigate the same disputes in the Mainland.

34. Pursuant to the Choice of Court Arrangement, judgment creditors are allowed to seek enforcement of court judgments of one jurisdiction in the other jurisdiction within the specified scope of the arrangement, without undergoing the time-consuming and costly re-litigation proceedings. It has benefited, in particular, members of the business community who are doing business in the Mainland. The Arrangement covers only monetary judgments on disputes arising from business-to-business agreements and excludes

judgments relating to consumer and employment, *etc.* On an application for registration under Cap. 597, the judgment creditor should prove, amongst others, that the Mainland judgment was made by a designated Mainland court pursuant to a “choice of Mainland court agreement” granting exclusive jurisdiction to the Mainland court.

35. The cases on Cap. 597 demonstrate the Hong Kong courts’ pro-enforcement attitude. A paramount issue in a number of these cases²³ was whether the parties had entered into a “choice of Mainland court agreement” conferring the Mainland court exclusive jurisdiction. Hong Kong courts have consistently adopted a substance-over-form approach in deciding whether the relevant jurisdiction clause is exclusive. Despite the use of words such as “可以” (“may”), “應” (“should”) or “可” (“can”), or the absence of the word “exclusive” or the like, as long as such clause, when properly construed in accordance with the governing law of the contract, does confer exclusive jurisdiction on the Mainland Courts, Hong Kong courts have decided that it constitutes a “choice of Mainland court agreement” for the purposes of Cap. 597.

36. Similarly, Mainland courts also consider whether the relevant Hong Kong judgment falls within the

²³ See, for example, *Bank of China Limited v Yang Fan* [2016] 3 HKLRD 7, *The Export-Import Bank of China v Taifeng Textile Group Co Ltd and another* [2018] HKCFI 1840 and *黄书建 v 代威* [2019] HKCFI 1386. Compare *四川順利昌隆科技有限公司 v Sze Ming Yee and Others* [2021] HKCFI 2289 which was a case on disputing the Hong Kong court’s jurisdiction. The court considered that the words “均可” and “可” were couched in permissive term and the relevant clauses were in the nature of non-exclusive jurisdiction clauses. The court also touched upon Cap. 597.



scope of the Choice of Court Arrangement. For example, in a 2009 Mainland case,²⁴ the Mainland court only recognized and enforced part of the Hong Kong judgment as the part relating to transfer of real property did not involve “payment of money in a civil and commercial case” pursuant to Article 1 of the Choice of Court Arrangement.²⁵

37. From August 2008 to 31 December 2021, the Mainland courts handled 35 cases under the Choice of Court Arrangement²⁶ whereas the Hong Kong court handled a total of 134 cases.²⁷ With the increasingly close interaction and cooperation between the HKSAR and the Mainland in terms of economic activities as well as social interactions, the limited coverage of Choice of Court Arrangement may not be able to fully address the needs for a comprehensive REJ mechanism between the two places.

(ii) The Matrimonial Arrangement

38. While the Choice of Court Arrangement primarily covers business-to-business disputes, the Matrimonial Arrangement deals with private family matters.

39. The Matrimonial Arrangement was signed in June 2017. It establishes a clear and comprehensive mechanism for REJ on matrimonial and family matters as well as recognition of Mainland divorce certificates. Prior to the implementation of the Matrimonial Arrangement, Mainland judgments on matrimonial or family matters were generally not recognized and enforceable in the HKSAR.²⁸ Nor did Mainland law expressly provide for the recognition and enforcement of Hong Kong judgments in matrimonial or family matters in the Mainland. In view of the large number of cross-boundary marriages and related matrimonial and family matters, there existed a pressing need to conclude the Matrimonial Arrangement so as to

minimize the need for re-litigation, thereby reducing the parties’ burden on time and cost, mitigating the impact of matrimonial proceedings on the parties to the marriage and their children as well as relieving their emotional distress.

40. Examples of Mainland judgments which may be recognized and enforced in Hong Kong under the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap. 639) include an order granting a divorce, an order in relation to spousal maintenance or an order in relation to custody or right of access of a person under 18 years. Mainland divorce certificates issued by the relevant Mainland authorities may also be recognized. On the other hand, in a case where a child and the custodial parent relocate to the Mainland, a Hong Kong court order relating to custody and access may be recognized and enforced in the Mainland pursuant to the Matrimonial Arrangement. More importantly, in cases where a child has been wrongfully removed from the HKSAR to the Mainland, Hong Kong court orders requiring return or delivery of the child may be recognized and enforced in the Mainland.

41. Cap. 639, which implements the Matrimonial Arrangement in the HKSAR, came into operation on 15 February this year. Up to 22 September 2022, the Hong Kong courts have already received the first application for registration of specified court orders in a Mainland judgment and also five applications for certified copies of Hong Kong judgments for the purpose of making applications in the Mainland pursuant to the Matrimonial Arrangement.

42. It was reported that a divorce decree absolute made by the District Court on 12 April was recognized by the Beijing No.4 Intermediate People’s Court on 11 August, shortly 4 months after the divorce

²⁴ 誠信置業有限公司與香港國源投資有限公司股權轉讓合同糾紛案, Case No. (2009) Xia Min Ren Zi No. 124 ((2009)廈民認字第124號).

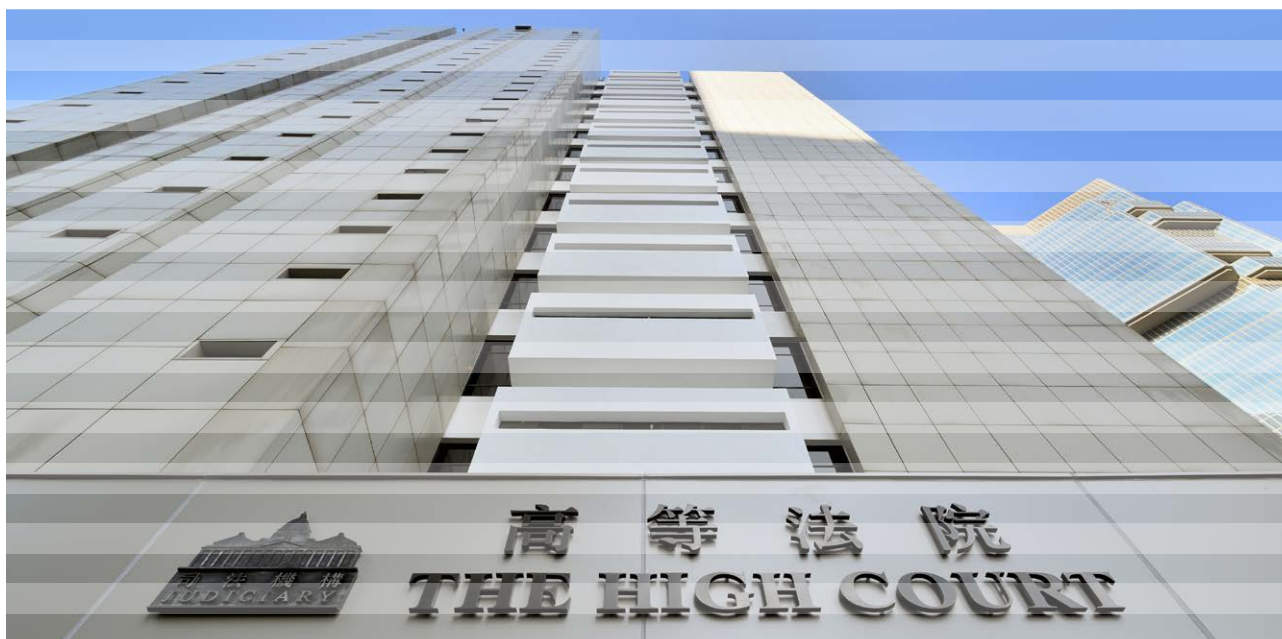
²⁵ Article 1 of the Choice of Court Arrangement states that:

“Where any people’s court of the Mainland or any court of the HKSAR has made an enforceable final judgment requiring payment of money in a civil and commercial case pursuant to a choice of court agreement in writing, any party concerned may apply under this Arrangement to a people’s court of the Mainland or a court of the HKSAR for recognition and enforcement of the judgment.” (“內地人民法院和香港特別行政區法院在具有書面管轄協議的民商事案件中作出的須支付款項的具有執行力的終審判決，當事人可以根據本安排向內地人民法院或者香港特別行政區法院申請認可和執行。”)

²⁶ The statistics were provided by the SPC.

²⁷ The statistics were provided by the Judiciary.

²⁸ The few exceptions include non-Hong Kong divorces recognized under Part IX of the Matrimonial Causes Ordinance (Cap. 179) and non-Hong Kong adoptions given legal effect under s. 17 of the Adoption Ordinance (Cap. 290).



decree absolute was made.²⁹ This is the first case, as reported, where recognition was made pursuant to the Matrimonial Arrangement by a Beijing court.

(iii) The REJ Arrangement

43. The REJ Arrangement, which goes beyond the scope of the Choice of Court Arrangement, seeks to establish a more comprehensive REJ mechanism in civil and commercial matters.

44. Same as the Matrimonial Arrangement and the Choice of Court Arrangement, the REJ Arrangement will be implemented in the HKSAR by way of legislation.

45. Over the years, there have been calls from the stakeholders for widening the scope of REJ mechanism between the two places. Under the existing laws and except when the Matrimonial Arrangement applies, the enforcement of a Mainland judgment in civil or commercial matters would be subject to certain hurdles. Currently, a person may enforce a Mainland judgment pursuant to Cap. 597 or under common law. Under Cap. 597, a Mainland judgment would only be enforceable in Hong Kong, if (a) the parties have

entered into a “choice of Mainland court agreement”; (b) the judgment concerned is monetary in nature; (c) the judgment is given in relation to a specified contract which excludes, for instance, consumer or employment matters; and (d) the Mainland judgment must be given by a designated Mainland Court specified in Schedule 1 to Cap. 597. Otherwise, a person may seek to enforce a Mainland monetary judgment under common law by a writ suing on the judgment.

46. On the other hand, there is no clear legal basis for enforcement of Hong Kong judgments in the Mainland beyond the scope of Matrimonial Arrangement and Choice of Court Arrangement. A party would often have to re-litigate the same dispute in the Mainland in order to seek judicial relief in the Mainland.

47. Against this background, the implementation of the REJ Arrangement³⁰ through the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill (“the REJ Bill”) would bring various benefits. First, the REJ Arrangement expressly covers judgments given in respect of certain types of disputes over intellectual property rights, as well as non-

²⁹ See the news report published on 15 August 2022 on the website of the Beijing No. 4 Intermediate People’s Court at <http://bj4zy.bjcourt.gov.cn/article/detail/2022/08/id/6849191.shtml>.

³⁰ Upon commencement of the REJ Arrangement, the Choice of Court Arrangement will be terminated. However, the latter Arrangement remains applicable to a “choice of court agreement in writing” within the meaning of that arrangement and signed before the commencement of the REJ Arrangement.



monetary judgments. It was estimated that coupled with the Matrimonial Arrangement, the REJ mechanism between the two places will comprehensively cover the majority of the cross-boundary civil and commercial cases.³¹ Together with the Record of Meeting on CBI which will be discussed below, these mechanisms signify an almost full coverage of REJ in civil and commercial cases and would enable parties to enforce in the Mainland a variety of such applicable judgments given by Hong Kong courts, and *vice versa*.

48. Second, the enactment of the REJ Bill would provide a straightforward mechanism for enforcement. Under this new mechanism, enforcement of a Mainland judgment no longer requires the presence of a “choice of Mainland court agreement”.³² It would also help avoid disputes concerning the finality of the Mainland judgments. It would enhance certainty and predictability of the cross-boundary enforceability of judgments in civil and commercial matters between the two places, and at the same time reduce the risks, legal costs, and time usually associated with the cross-boundary enforcement of such judgments.

(iv) Record of Meeting on CBI

49. Before the signing of the Record of Meeting, recognition of and assistance to Mainland bankruptcy proceedings have been available to Mainland administrators in the HKSAR under common law, which are evident in the following two cases: (a) *Re CEFC Shanghai International Group Ltd (Mainland liquidation)* [2020] 1 HKLRD 676, which was decided in January 2020, and (b) *Re Shenzhen Everich Supply Chain Co, Ltd (in liquidation in the Mainland)* [2020]

HKCFI 965, decided in June 2020. Nonetheless, in the Mainland, there was no legal basis to grant similar recognition of or assistance to Hong Kong liquidators and provisional liquidators.

50. The Record of Meeting on CBI signed on 14 May 2021 is the ninth and the latest MLA arrangement signed with the Mainland. With its implementation on the same day, Hong Kong has become the only jurisdiction to have established a cooperation mechanism for mutual recognition of and assistance to insolvency proceedings with the Mainland.

51. The new mechanism signifies a breakthrough, whereby Hong Kong liquidators and provisional liquidators may apply to the Mainland courts in the current three pilot areas, namely, Shanghai, Xiamen and Shenzhen³³ for recognition of insolvency and debt restructuring proceedings in the HKSAR, and also for assistance to perform their duties in the Mainland, such as taking over the debtor’s property, investigating into the financial position of the debtor, and participating in legal actions and arbitrations on behalf of the debtor.³⁴

52. In terms of implementation, there has already been a case in which the Hong Kong court has issued a letter of request to the Shenzhen Intermediate People’s Court (“Shenzhen Court”),³⁵ and subsequently the Shenzhen Court has, pursuant to the mechanism, recognized the relevant Hong Kong insolvency proceedings³⁶ and the liquidators appointed therein. On the other hand, the Hong Kong court has continued to recognize orders made by Mainland courts in bankruptcy reorganization procedures and grant assistance to the relevant bankruptcy administrators pursuant to the common law mechanism.³⁷

³¹ 人民法院報, “不斷完善中國特色區際司法協助體系—專訪最高人民法院研究室負責人”(People’s Court Daily, “Bu duan wan shan zhong guo te se qu ji si fa xie zhu ti xi – zhuan fang zui gao ren min fa yuan yan jiu shi fu ze ren”), 19 January 2019, at http://rmfyb.chinacourt.org/paper/html/2019-01/19/content_1511150.htm?div=-1.

³² See paragraph 63 of *黃書建 v 代威*, *supra*.

³³ On 14 May 2021, the SPC promulgated an opinion, “Supreme People’s Court’s Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region” (“最高人民法院關於開展認可和協助香港特別行政區破產程序試點工作的意見”), to implement the Record of Meeting. The SPC Opinion provides detailed guidance to the relevant Mainland courts, and has designated Shanghai, Xiamen and Shenzhen as the pilot areas.

³⁴ See Article 14 of “Supreme People’s Court’s Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region” (“最高人民法院關於開展認可和協助香港特別行政區破產程序試點工作的意見”).

³⁵ *Re Samson Paper Company Limited (In Creditors’ Voluntary Liquidation)* [2021] 3 HKLRD 727.

³⁶ 森信洋紙有限公司破產清盤案, Case No. (2021) Yue 03 Ren Gang Po No. 1 ((2021) 粵 03 認港破 1 號).

³⁷ In *Re HNA Group Co., Limited* [2021] HKCFI 2897, the Hong Kong court granted recognition of and assistance to the bankruptcy administrators appointed by the Hainan High People’s Court; and in *Re Peking University Founder Group Company Limited* [2021] HKCFI 3817, the Hong Kong court provided recognition of and assistance to the bankruptcy administrators appointed by the Beijing First Intermediate People’s Court.



V. MLA in Criminal Matters

53. Currently, while there is no concluded arrangement between the two places on MLA in criminal matters, the HKSAR courts may assist the Mainland courts to obtain evidence in accordance with s. 77B as read with ss. 75-77 of Cap. 8 and Order 70 of the RHC.

54. Similarly, the prosecuting authority in the HKSAR may use LoRs issued on a court-to-court basis pursuant to s. 77E of Cap. 8.³⁸ Processing of these requests is dependent on the exercise of discretion by the Mainland courts and often takes time.

55. There are precedents of successful prosecutions in the HKSAR based on evidence obtained by the Mainland court by means of LoRs. In a CFI jury trial (HCCC No. 254/2007) heard in 2009, the prosecuting authority adduced crucial evidence from two accomplice witnesses given by way of video-recorded examinations conducted in the Guangdong High People's Court pursuant to a LoR made to the Mainland Court. The evidence formed the main basis of the prosecuting authority's case and eventually resulted

in a conviction of two defendants for the offences of stealing from and damaging the grave of the deceased wife of a Hong Kong businessman.

56. Likewise, in two District Court cases (DCCC No. 3/2011 and DCCC No. 1035/2015 respectively), both involving criminal activities of smuggling and money laundering, LoRs were issued to seek assistance in obtaining evidence from witnesses who were arranged to give evidence in the Shenzhen Court and the Shaoguan Intermediate People's Court in Guangdong Province respectively. Convictions were secured against the defendants, with the use of evidence obtained via LoRs.

57. The results in these cases demonstrate the importance and encouraging results of legal cooperation in criminal matters between the Mainland and the HKSAR over the years.

VI. The Future: The Way Forward

58. The two places have been striving to address the evolving needs of the society by constantly reviewing the MLA arrangements.

³⁸ Under s. 77E of Cap. 8, the CFI may order that a LoR shall be issued and transmitted in such manner as the CFI may direct to a court or tribunal specified in the order and exercising jurisdiction in a place outside Hong Kong, requesting such court or tribunal to assist in obtaining evidence for the purposes of criminal proceedings that (a) have been instituted in Hong Kong; or (b) are likely to be instituted in Hong Kong if evidence is obtained for the purposes of those criminal proceedings by virtue of an order made under s. 77E. In respect of criminal proceedings that have been instituted in Hong Kong, an application to the CFI for an order of letter of request to be sent to a court or tribunal outside Hong Kong may be made *ex parte* supported by affidavit by the Secretary for Justice or any person charged with an offence to which such criminal proceedings relate.



A. Improving the Service Arrangement

59. As stated above, the DoJ has been working closely with the Judiciary and the SPC on the possible refinement of the Service Arrangement. According to the statistics provided by the Judiciary, the success rate of service of judicial documents handled by Mainland courts was around 49.89% and 60.55% in 2020 and 2021 respectively. For the delivery of judicial documents handled by the Hong Kong court, the success rate was around 35.91% and 34.45% in 2020 and 2021 respectively.³⁹

60. Common reasons for failure to effect service in both places include unclear address, no such recipient at the given address and the whereabouts of the recipient is unknown. In the event the judicial documents could not be delivered to Mainland recipients through the existing modes of service or the whereabouts of the Mainland recipients are unknown, the Hong Kong parties very often cannot proceed further with their court case.

61. In view of the above, the DoJ, the Judiciary and the SPC are discussing the feasibility of increasing the possible modes of service and means to enhance the efficacy of the Service Arrangement.

B. Enhancing use of the Evidence Taking Arrangement

62. It is noted that the rate of successful execution is not high in respect of requests made under the Evidence Taking Arrangement. According to the SPC's observation, the two places need to work on unifying their understanding of the arrangement, including its scope of application. In light of this observation, the two places may hold consultations to review implementation of the arrangements and explore ways to enhance use of the arrangement to yield more assistance to litigants of the two places.

C. Enactment of the REJ Ordinance

63. To implement the REJ Arrangement, the REJ Bill was introduced to the LegCo on 4 May 2022 and passed by the LegCo on 26 October 2022. Relevant rules would be made by the CJ of the High Court

for the operation of the relevant mechanisms as empowered under the REJ Ordinance.

D. Exploring the possible expansion of pilot areas under the Record of Meeting on CBI

64. With regard to the mutual recognition of and assistance to bankruptcy (insolvency) proceedings, the DoJ would work closely with the stakeholders of both Mainland and the HKSAR and continue to support relevant initiatives for strengthening professional exchanges between the two places on the implementation of the new mechanism. The DoJ would also carefully consider the suggestions for expanding the pilot areas in the Mainland under the new mechanism.

E. Publicity Campaign to Promote the Nine Arrangements

65. The DoJ is currently mapping out plans for publicity of the MLA arrangements as part of the Department's overall strategy plan. The Department will reach out to both the legal and business sectors as well as the general public. It is our goal to reinforce Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia-Pacific Region.

VII. Conclusion

66. The MLA regime bears strong testimony to the unique advantages of the "one country, two systems" principle under the Basic Law, under which Hong Kong is able to maintain its own legal system and at the same time conclude MLA arrangements with the Mainland. Hong Kong is also able to score "the first jurisdiction" in several areas as a result of these arrangements. The conclusion and implementation of these arrangements would in turn improve the environment for cross-boundary trade and investment, and further complement the 14th Five-Year Plan as well as the Guangdong-Hong Kong-Macao Greater Bay Area development by reinforcing Hong Kong's competitiveness as a leading centre for international legal and dispute resolution services in the Asia-Pacific Region.

³⁹ The statistics were provided by the Judiciary.