



Judicial Assistance in Civil and Commercial Matters between Hong Kong and the Mainland

Introduction

With the strengthening ties between the HKSAR and the Mainland, it is inevitable that the number of legal cases involving parties from both jurisdictions has also increased. Are there any arrangements between the respective courts to handle these cross-boundary cases? What are the roles of respective parties and how are the arrangements implemented? This article introduces the three mutual judicial assistance arrangements on civil and commercial matters that the HKSAR and the Mainland have entered into pursuant to BL 95 and briefly describes their scope and key features.

Under the overarching principle of “one country, two systems”, the HKSAR has a legal system which is different from that in the Mainland, whether in respect of source of law, system of court, legal language, or system of legal profession.

On the other hand, the economic and social ties between Hong Kong and the Mainland have grown substantially over the past years. For instance, while the Mainland has been Hong Kong’s largest trading partner since 1985, Hong Kong was one of the Mainland’s leading trading partners for many years: the third largest in 2005. Further, both places have become important investors of each other. At the end of 2004, the Mainland was the second largest source of inward direct investment in Hong Kong, accounting for 29% of Hong Kong’s total stock, with an estimated cumulative value of US\$131.2 billion. At the end of 2005, Hong Kong was the Mainland’s largest source of realized foreign direct investment, accounting for about 42% of the national total, with a cumulative value of US\$259.5 billion.¹ Moreover, geographical proximity, family ties and population mobility have brought about diverse

cross-boundary civil relations such as employment, marriage, succession and adoption. Unsurprisingly, alongside these developments, there has been a rise in the number of Hong Kong-related civil cases handled by the Mainland courts each year in the past decade or so.² It is not an unreasonable conjecture that the same period witnessed a similar growth in the number of Mainland-related cases handled by Hong Kong courts, though this is not supported by actual statistics.

The changes outlined above underline the importance of establishing effective mutual judicial assistance arrangements between the two jurisdictions in order to safeguard the interests of the parties involved (for example, those who want to enforce a judgment or an award against, or serve process on, a debtor in the other jurisdiction). In this regard, BL 95 provides for the framework of such arrangements. It provides:

“The Hong Kong Special Administrative Region 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.”

Pursuant to BL 95, the HKSAR and the Mainland have entered into three mutual judicial assistance arrangements in civil and commercial matters to date. They are respectively on service of judicial documents, reciprocal enforcement of arbitral awards, and reciprocal enforcement of commercial judgments given pursuant to choice of court agreements. This article will give a brief account of the salient features of each of these arrangements.

Service of Judicial Documents

Before Reunification, service of judicial documents between the Mainland and Hong Kong was

¹ See pages 2, 6 and 7 of the article entitled “The Mainland of China and Hong Kong Special Administrative Region: Some Important Facts” available at the Trade and Industry Department’s website.

² In 1998, Mainland courts handled altogether 3,498 Hong Kong-related civil cases. In 2005, the figure rose to 4,152.



governed by the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* signed at The Hague on 15 November 1965 (“Hague Convention”). The Hague Convention continues to apply to the HKSAR as part of the PRC after 30 June 1997. However, being an international agreement, the Hague Convention is no longer applicable for the service of judicial documents between the Mainland and the HKSAR after Reunification. Hence, pursuant to BL 95, discussions were held with the CPG regarding the re-establishment of reciprocal arrangement for the service of judicial documents generally along the lines of the pre-97 arrangement and keeping to the principles of the Hague Convention.

The discussions resulted in the signing of a Memorandum of Understanding on 14 January 1999 between the Chief Judge of the High Court and Mr Yang Runshi, member of the Judicial Committee and Director General of the Research Department of the Supreme People’s Court, on the *Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Matters between the Mainland and Hong Kong Courts* (“Service Arrangement”). The Service Arrangement came into effect on 30 March 1999.

Under the Service Arrangement, the Supreme People’s Court of the Mainland (“SPC”) and the HKSAR High Court will oversee the operation of

the mechanism for the service of judicial documents. The two bodies will meet and consult if problems or disputes arise from the implementation of the Service Arrangement. Actual service of documents will be conducted between the relevant Higher People’s Courts in the various provinces and cities in the Mainland and the High Court in the HKSAR. Individuals who wish to serve judicial documents through this official channel will forward their applications to the respective courts.

The court making the request (ie the entrusting party) will ensure that the request includes the name of the entrusting party, the full name and address of the person to be served, and the nature of the proceedings involved. The information must be provided in Chinese or be accompanied with a Chinese translation. The entrusting party will produce a letter of entrustment duly sealed with its official seal when requesting service of judicial documents.

Service will be effected by the court entrusted to serve the documents (ie the entrusted party) within two months of receipt of a letter of entrustment and in accordance with the relevant local legislation. The entrusted party will provide a certificate of service (or non-service) after the documents have been successfully (or unsuccessfully) served. In cases of non-service, the reasons for failing to effect the service will be

given. Neither party will charge the service except when the entrusting party requests a special mode of service of documents.

The Service Arrangement sets out the type of judicial documents that can be entrusted for service. These documents include, for the Mainland, copy of originating process, copy of motion of appeal, letter of authorization or entrustment, summons, judgment, mediation decision, ruling, decision, notice, certificate, and return form on service; and for the HKSAR, copy of originating process, copy of notice of appeal, summons, pleading, affidavit, judgment, decision/ruling, notice, court order, and certificate of service/non-service. These documents shall conform to the samples exchanged by the SPC and the High Court of the HKSAR before the commencement of the Service Arrangement, which are attached to the signed memorandum.

The SPC promulgated the Service Arrangement by way of a judicial interpretation (Fashi [1999] No 9) on 29 March 1999. In Hong Kong, the Rules Committee of the High Court made the Rules of the High Court (Amendment) Rules 1999 to give effect to the Service Arrangement by amending Orders 11 and 69 of the Rules of the High Court.

The Service Arrangement was the first important agreement between the Mainland and the HKSAR on mutual judicial assistance after Reunification. It represents the fruits of judicial cooperation between the two jurisdictions under the principle of “one country, two systems”.

Reciprocal enforcement of arbitral awards

Prior to 1 July 1997, reciprocal enforcement of arbitral awards between the Mainland and Hong Kong was governed by the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”). The detailed arrangements for the enforcement in Hong Kong of Convention awards are set out in Part IV of the Arbitration Ordinance (Cap 341).

After Reunification, the New York Convention continues to apply to the HKSAR as part of the PRC. However, being an international agreement, it is not applicable to the enforcement of arbitral awards between the Mainland and the HKSAR.

Pursuant to BL 95, a Memorandum of Understanding on the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (“Awards Enforcement Arrangement”) was thus signed on 21 June 1999 by Mr Shen Deyong, Vice-President of the SPC, and Miss Elsie Leung, then Secretary for Justice. The SPC promulgated the Awards Enforcement Arrangement by way of a judicial interpretation on 24 January 2000 (Fashi [2000] No 3). In Hong Kong, it was implemented by enacting the Arbitration (Amendment) Ordinance 2000. With these implementation measures in place, the Awards Enforcement Arrangement came into effect on 1 February 2000.

The Awards Enforcement Arrangement generally reflects the pre-97 arrangement and the principles of the New York Convention. Under that Arrangement, the HKSAR courts shall enforce awards made pursuant to the Arbitration Law of the PRC by the recognized Mainland arbitral authorities (of which there are over 148 at present). On the other hand, the Mainland courts shall enforce the awards made in the HKSAR pursuant to the Arbitration Ordinance.

If a party fails to perform an arbitral award made in the Mainland or the HKSAR, the other party may apply to the relevant courts for enforcement. The relevant courts are, for the Mainland, the Intermediate People’s Court of the place where the domicile of the party against whom the application is filed is located or where the property of the above party is located, and for the HKSAR, the High Court of the HKSAR.

If the places where the domicile of the party against whom the application is filed, or where the properties of the above party are located, are in the Mainland as well as in the HKSAR, the applicant cannot apply to the relevant courts of



the two jurisdictions at the same time. Only when enforcement of an award by the court of one jurisdiction is insufficient to recover the debts may the applicant apply to the court of the other jurisdiction for enforcement of the outstanding part. The total amount of arbitral awards enforced by the courts of the two jurisdictions one after the other cannot exceed the amount awarded.

The time limit for the applicant to apply to the relevant court for enforcement of the arbitral award will be in accordance with the law of the place where the enforcement is sought.

The relevant court may refuse to enforce the award on one of the specified grounds. These grounds are modelled on the New York Convention, which include, for example, the arbitration agreement being void, a party to the arbitration agreement being under some incapacity, and the enforcement of the award being contrary to (in the case of the Mainland) the social and public interests or (in the case of Hong Kong) public policy.

Between the coming into effect of the Awards Enforcement Arrangement in February 2000 and July 2005, 63 applications for enforcement of Mainland arbitration awards were made in Hong Kong. The local court granted leave for the awards to be enforced in all 63 cases. In only four of

these cases were the court orders granting leave for enforcement subsequently set aside. Three of these orders were set aside with the consent of the parties. In the remaining case, the order was set aside upon the court finding that the award was not enforceable under section 40C of the Arbitration Ordinance. That section provides that, as a general rule, a Mainland award shall not be enforceable in Hong Kong if an application has been made in the Mainland for enforcement of the award.

When the Awards Enforcement Arrangement was set up, questions had been raised about the logistical challenge the Hong Kong courts might face in dealing with an influx of applications for enforcement of Mainland awards. However, the experience in the past 5 years shows that the Hong Kong courts have had no difficulties in coping with the Arrangement. The number of such applications each year has not been great. In the first year of its implementation (the year 2000) there were 30 applications. This number presumably reflected a back-log of cases after the previous mechanism ended in 1997. Since then, there has been an average of about 8 applications a year. Moreover, in about 75 percent of the cases the defendants did not seek to set aside the court orders granting leave for enforcement.



By enabling awards made in Hong Kong to be enforced in the Mainland, the Awards Enforcement Arrangement no doubt serves to encourage Mainland enterprises, as well as foreign investors in the Mainland, to employ arbitration services in Hong Kong and thereby strengthens Hong Kong's role as a regional disputes resolution centre.

Enforcement of commercial judgments given pursuant to choice of court agreements

On 14 July 2006, Mr Huang Songyou, Vice-President of the SPC, and Mr Wong Yan-lung, Secretary for Justice, signed 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 the Parties* ("REJ Arrangement"). Its aim is to establish a new and convenient mechanism for the reciprocal enforcement of judgments given by specified courts of the two jurisdictions pursuant to exclusive choice of court agreements.

The Foreign Judgments ("Reciprocal Enforcement") Ordinance (Cap 319), which provides for foreign judgments to be enforced in Hong Kong summarily on a reciprocal basis, does not apply to the Mainland. A Mainland judgment may be recognized and enforced in Hong Kong under the common law. However, a judgment creditor who seeks to enforce a Mainland judgment under common law in the HKSAR will suffer certain disadvantages. Firstly, he cannot use the simplified procedure of registration provided under Cap 319. The proceedings will take longer time to complete and involve higher legal costs. Further, he will have to bear the burden of proof whereas in proceedings for registration of a foreign judgment under Cap 319, the burden of proof falls on the judgment debtor to show why the judgment should not be enforced.

It is also the case that the Mainland law has not clearly provided for the recognition and enforcement of Hong Kong judgments. As a civil law jurisdiction, the Mainland does not have any rules that are similar to the common law rules on

the registration and enforcement of foreign judgments as those applied in Hong Kong.

The REJ Arrangement covers judgments that:

- (a) require payment of money in business-to-business cases (cases involving employment contracts and contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party will therefore be excluded);
- (b) relate to disputes in which the parties concerned have agreed in written form, after the REJ Arrangement has come into effect, to designate a people's court of the Mainland or a court of the HKSAR as the forum to have sole jurisdiction for resolving such disputes; and
- (c) are final and conclusive between the parties.

Judgments from the following courts of the Mainland and HKSAR are enforceable under the REJ Arrangement:

- (a) in the case of the Mainland, any judgment:
 - i. of the SPC;
 - ii. of first instance made by a Higher or Intermediate People's Court or a designated Basic Level People's Court which has been authorized to exercise jurisdiction in civil and commercial cases of first instance involving foreign parties, or Hong Kong, Macau and Taiwan parties from which no appeal is allowed according to the law, or in respect of which the time limit for appeal has expired and no appeal has been filed;
 - iii. of second instance; or
 - iv. made in accordance with the trial supervision procedure by bringing up the case for retrial by a people's court at the next higher level.
- (b) in the case of HKSAR:
 - a judgment of the District Court or above.



The Arrangement on Reciprocal 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 was signed in Hong Kong (14 July 2006). Photograph shows the Secretary for Justice, Mr Wong Yan Lung, SC(right), and the Vice President of the Supreme People's Court, Grand Justice Mr Huang Songyou (left), exchanging the text of the Arrangement at the Signing Ceremony held at Central Government Offices.

For the purposes of the REJ Arrangement, a judgment includes any judgment, ruling, conciliation statement and order of payment in the case of the Mainland, and includes any judgment, order and allocatur in the case of HKSAR.

The REJ Arrangement provides for grounds for refusal of enforcement which are similar to common law rules and those stipulated under Cap 319. An application for recognition and enforcement of a judgment will be refused if:

- (a) the choice of court agreement is invalid under the law of the place chosen by agreement of the parties where the original trial was conducted, unless the chosen court has determined that the choice of court agreement is valid;
- (b) the judgment has been fully executed;
- (c) the court of the place where enforcement is sought has exclusive jurisdiction over the case according to its law;
- (d) the losing party has not been given sufficient time to defend his case;
- (e) the judgment has been obtained by fraud;
or

- (f) the court of the place where enforcement is sought has made a prior judgment on the same cause of action.

In addition, the court concerned shall refuse an application for recognition and enforcement of a judgment if it is contrary to (in the case of the Mainland) the social and public interests, or (in the case of the HKSAR) public policy.

The REJ Arrangement will be implemented in the HKSAR by means of legislation. The Administration is currently preparing the legislative proposals. The SPC will promulgate a judicial interpretation to set out the details of the REJ Arrangement. When these implementation measures are ready, the REJ Arrangement will come into effect.

Conclusion

Without doubt, mutual interest will continue to provide a strong impetus for further cross-border judicial assistance between the Mainland and the HKSAR. The REJ Arrangement is an encouraging step in the development of mutual legal assistance with the Mainland.