

Legal Commentary

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Dispute Resolution

A Review of the New Mainland-HK Judgment Recognition Arrangement

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On January 18, 2019, the Supreme People's Court and the Department of Justice of the Hong Kong Special Administrative Region (“**HKSAR**”) 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* (the “**New Arrangement**”).¹ As the head of the Research Office of the Supreme People's Court put it: “The arrangement is the sixth judicial assistance arrangement reached between the Mainland and HKSAR, the one with the broadest coverage and of great significance.” “The purpose of the arrangement is to establish an institutional arrangement for reciprocal recognition and enforcement of judgments in civil and commercial matters between the courts of the Mainland and of the HKSAR, aiming to achieve a ‘flow’ of the judgments in civil and commercial matters between the Mainland and HKSAR.” “The execution of the new arrangement, together with the marriage and family matters arrangement previously executed,² will possibly make 90% of judgments in civil and commercial matters be mutually recognized and enforced between the Mainland and HKSAR.” “The arrangement marks the attainment of goal of extending the coverage of mutual legal assistance to substantially the entire civil and commercial fields between the Mainland and HKSAR.” Hence, the execution of the New Arrangement serves as another milestone in cross-border litigation in China and deserves much attention and study by the legal and business communities.

This article integrates the main provisions of the New Arrangement with interpretations of the institutional arrangements for reciprocal recognition and enforcement of civil and commercial judgments as stipulated in the New Arrangement. This article is for the reference of legal practitioners, and we look forward to exchanging views on these issues.

¹ A courtesy English translation of the New Arrangement is available at https://www.doj.gov.hk/eng/public/pdf/2019/Doc3_477379e.pdf.

² Refers to the *Arrangement on Mutual Recognition and Enforcement of Judgments in Marriage and Family Matters between the Courts of the Mainland and of the Hong Kong Special Administrative Region* signed on June 20, 2017.

I. Applicable Scope of the New Arrangement

According to Articles 1 and 2 of the New Arrangement, all legally effective judgments in civil and commercial matters as defined under both Mainland law and Hong Kong law, including effective judgments on civil compensation in criminal cases, are eligible for reciprocal recognition and enforcement between the Mainland and HKSAR. Moreover, reciprocal recognition and enforcement of judgments includes both monetary and non-monetary rulings (Art. 16, para. 1). Previously, reciprocal recognition and enforcement has only applied in cases where a “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**” (emphasis added), according to the August 1, 2008 effective version of 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* (the “**Former Arrangement**”).³

A “judgment” referred to in the New Arrangement includes, in the case of the Mainland, judgments, rulings, conciliatory statements and orders of payment, but does not include rulings concerning preservation measures; in the case of the HKSAR, includes judgments, orders, decrees and allocators, but does not include anti-suit injunctions or orders for interim relief (Art. 4, para. 1). A “legally effective judgment” referred to in the New Arrangement means, in the case of the Mainland, a judgment of the second instance, a judgment of the first instance from which no appeal is allowed or no appeal has been filed by the expiry of the statutory time limit for appeal, as well as the above types of judgments given in accordance with the trial supervision procedure; in the case of the HKSAR, means a legally effective judgment given by the Court of Final Appeal, the Court of Appeal and the Court of First Instance of the High Court, the District Court, the Labour Tribunal, the Lands Tribunal, the Small Claims Tribunal or the Competition Tribunal (Art. 4, para. 2).

II. Judgments Explicitly Excluded Under the New Arrangement

According to Article 3, the New Arrangement does not presently apply to judgments in the following civil and commercial matters:

- a. cases heard by a Mainland court on maintenance of parent(s) or grandparent(s), maintenance between siblings, dissolution of adoptive relationships, guardianship of adults, disputes after divorce on liability for damages, or division of property arising from a co-habitation relationship; or cases heard by a court of the HKSAR on whether a decree of judicial separation should be granted;
- b. cases on succession, administration or distribution of an estate;
- c. cases on the tortious infringement of invention patents and utility model patents heard by a Mainland court; cases on the tortious infringement of standard patents (including “original grant” patents) and short-term patents heard by a court of the HKSAR; cases on the

³ A complete English copy of the Former Arrangement is available at <https://www.doj.gov.hk/eng/Mainland/pdf/Mainlandrej20060719e.pdf>.

confirmation of the license fee rate of a standard-essential patent heard by a Mainland court or a court of the HKSAR; and cases concerning intellectual property rights not covered under Article 5 of the New Arrangement;⁴

- d. cases on marine pollution, limitation of liability for maritime claims, general average, emergency towage and salvage, maritime liens, and carriage of passengers by sea;
- e. bankruptcy (insolvency) cases;
- f. cases on the determination of a natural person's qualification as a voter, declaration of disappearance or death of a natural person, or the determination of limited or lack of legal capacity of a natural person for civil acts;
- g. cases on the confirmation of the validity of an arbitration agreement or the setting aside of an arbitral award;
- h. cases on the recognition and enforcement of judgments or arbitral awards of other countries or regions.

According to the head of the Research Office of the Supreme People's Court, the judgments in above-mentioned cases are excluded for various practical reasons, such as "certain types of cases lack basis for reciprocal recognition because they do not simultaneously exist in the Mainland and HKSAR; there are major differences in the legal system between the Mainland and HKSAR in certain fields, therefore a special consultation is required for implementing reciprocal recognition and enforcement of judgments in those fields ... some types of judgments are only temporarily excluded from the scope of reciprocal recognition and enforcement, and a special discussion will be held on those judgments based on actual needs." Besides, "these excluded cases ... only account for a small portion of civil and commercial cases."

As mentioned above, the New Arrangement also does not apply to rulings concerning preservation measures made by Mainland courts and anti-suit injunctions and orders for temporary relief made by Hong Kong courts (Art. 4).

III. Restrictions on the Content of Judgments that are Eligible for Recognition and Enforcement under the New Arrangement

According to Article 16, paragraph 2 of the New Arrangement, punitive damages contained in a judgment are, in principle, not eligible for reciprocal recognition and enforcement.

However, the New Arrangement makes exceptions for cases regarding intellectual property infringement. According to Article 17, paragraph 1 of the New Arrangement, for tortious claims for infringement of intellectual property rights, civil disputes over acts of unfair competition under Article 6⁵ of the *PRC Anti-*

⁴ "Intellectual property right" referred to in the New Arrangement means an "intellectual property" as stipulated in Article 1(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, as well as an intellectual property right enjoyed by an owner in respect of new plant varieties as stipulated in Article 123(2)(7) of the General Provisions of the Civil Law of the People's Republic of China and the Plant Varieties Protection Ordinance of Hong Kong.

⁵ According to Article 6 of the Anti-Unfair Competition Law of the People's Republic of China, a business operator shall not perform any of the following misleading acts that will cause people to mistake its products for the products of another

Unfair Competition Law heard by a Mainland court or disputes over passing off heard by a Hong Kong court, where reciprocal recognition and enforcement of the judgments is confined to rulings on monetary damages for acts of infringement committed in the requesting place, the scope of reciprocal recognition and enforcement includes punitive damages imposed in the judgments. Additionally, reciprocal recognition and enforcement of judgments concerning disputes over the infringement of trade secrets also includes punitive damages imposed in the judgments (Art. 17, para. 2).

In addition to the above restrictions, the scope of reciprocal recognition and enforcement shall not include taxes and penalties (Art. 18, para. 1). Rulings made by the original court on the validity of an intellectual property right or whether an intellectual property right is established or subsists are also not recognized or enforced (Art. 15).

IV. Application Process

1. Competent Court

According to the New Arrangement, in the case of the Mainland, an application for recognition and enforcement of a judgment should be filed with “an Intermediate People’s Court of the place of residence of the applicant or the respondent, or the place where the property of the respondent is located” (Art. 7, para. 1, clause (1)); in the case of the HKSAR, the application should be filed with the High Court (Art. 7, para. 1, clause (2)).

It is worth noting that the New Arrangement stipulates that the Mainland Intermediate People's Court at the place where the applicant resides is competent to recognize and enforce judgments made by a Hong Kong court, which is different from the Former Arrangement which limits jurisdiction only to the Intermediate People's Court of the place where the respondent or its properties were located. This new rule provides convenience to applicants in the Mainland, because, under the previous provisions, an applicant may not have been able to initiate the proceeding in the Mainland court and request the court to trace the respondent’s property in the Mainland if the respondent did not have a domicile in the Mainland and the applicant was temporarily unable to provide information about the respondent’s property.

An application for recognition and enforcement of a judgment in a competent Mainland or Hong Kong court in accordance with the New Arrangement does not affect the applicant’s rights to apply to enforce the judgment with the competent court of place where the original court is located. However, in this case, the court of one place shall, at the request of the court of the other place, provide information on the status of the enforcement of the judgment, so as to ensure the total amount recovered from

business or believe certain relations exist between its products and the products of any business,

1. unauthorized use of a mark that is identical or similar to the name, packaging or decoration of another business's commodity, which has influence to a certain extent,
2. unauthorized use of another business's corporate name (including its shortened name, trade name, etc.), the name of a social group (including its shortened name, etc.), or the name of an individual (including his or her pen name, stage name, translated name, etc.), which has influence to a certain extent;
3. unauthorized use of a main domain name, website name or webpage, which has influence to a certain extent; and
4. other misleading acts that are sufficient to cause people to mistake its products for the products of another business or believe certain relations exist between its products and the products of any other business.

enforcing the judgment in the courts of the two places must not exceed the amount determined in the judgment (Art. 21).

2. Application Materials

According to Article 8, an applicant applying for recognition and enforcement of a judgment as stipulated in the New Arrangement shall submit the following documents:

- a. an application, which shall specify the basic information of the parties concerned, details of the request and justifications for the application, status and location of the property of the respondent, and status of the judgment's enforcement in other courts (Art. 9);
- b. a copy of the legally effective judgment affixed with the seal of the court which gave the judgment;
- c. a certificate issued by the court which gave the judgment certifying the judgment to be legally effective and, if the judgment has content which requires enforcement, certifying the judgment to be enforceable in the requesting place;
- d. where the judgment is a default judgment, a document certifying that the party concerned has been legally summoned, unless the judgment expressly states the same, or the absent party is the party applying for recognition and enforcement;
- e. identity documents, which, if issued in a place outside the requested place, shall be certified in accordance with the law of the requested place. Other application materials created outside the requested place need not be certified.

3. Application Term

Different from the Former Arrangement, which generally stipulates that “the time limit ... to apply for recognition and enforcement ... is two years”, the New Arrangement provides that “the time limits, procedures and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place” (Art. 10).

In the case of the Mainland, according to Article 551 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (“Interpretation”)*, Mainland courts may hear civil litigation cases involving the HKSAR with reference to the special provisions on foreign-related civil procedures. According to Article 547 of the Interpretation, “the provisions of Article 239 of the *Civil Procedure Law* (i.e., the time limit for application is two years, calculated from the last day of the performance period stipulated in the legal document) shall be applicable to the time limit for a party concerned to apply for recognition and enforcement of legally effective judgments or rulings rendered by foreign courts or foreign arbitral awards.” Therefore, the time limit for applicants to file applications with a Mainland court for recognition and enforcement of judgments given by a Hong Kong court should be two years, calculated from the last day of the performance period stipulated in the legal document.

In the case of the HKSAR, the time limit for an applicant to apply to a Hong Kong court for recognition and enforcement of a judgment given by a Mainland court is currently subject to requirements provided

in *Mainland Judgments (Reciprocal Enforcement) Ordinance* (Chapter 597) (the “**Mainland Judgments Ordinance**”), which stipulates that the “time limit for applying for registration of a judgment given by a Mainland court shall be two years” (Mainland Judgments Ordinance, Art. 7, para. 2). As a detailed rule to implement the Former Arrangement in the HKSAR, the Mainland Judgments Ordinance reiterates the time limit provided in the Former Arrangement. After the execution of the New Arrangement, however, the HKSAR will amend the Mainland Judgments Ordinance correspondingly or enact a new law to implement the New Arrangement, in which case, the time limit for applying for recognition and enforcement of a judgment given by a Mainland court may remain to be two years, or it could also be extended to a longer period of time in reference to the Hong Kong local laws.⁶

4. Property Preservation or Enforcement Measures

According to Article 24 of the New Arrangement, a court of the requested place may, before or after accepting an application for recognition and enforcement of a judgment, impose property preservation or mandatory measures according to the law of that place. Therefore, when applying to a Mainland court for recognition and enforcement of a judgment given by a Hong Kong court, an applicant may apply to the Mainland court to impose preservation measures on the respondent's property; when applying to a Hong Kong court for recognition and enforcement of a judgment given by a Mainland court, the applicant may also apply to the Hong Kong High Court to impose preservation measures on the respondent's property.

V. Examination Procedures

1. Examination Criteria

According to the New Arrangement, in order to be recognized and enforced, a judgment should meet the following conditions:

- a. **The court which gave the judgment has jurisdiction over the case.** A court of the requested place will refuse to recognize and enforce a judgment if the court considers the court which gave the judgment does not have jurisdiction over the relevant action (Art. 12, para. 1, clause (1)).

According to Article 11 of the New Arrangement, the court of the requested place should consider the original court to have jurisdiction over the relevant action if one of the following conditions is satisfied and if, according to the law of the requested place, the courts of the requested place do not have exclusive jurisdiction over the action:

- at the time the original court accepted the case, the place of residence of the defendant is within the requesting place;
- at the time the original court accepted the case, the defendant maintained in that place a branch or office without separate legal personality, and the action arose out of the activities

⁶ According to Art. 4, para. 1 of the *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap 319), the time limit for an applicant to apply to a Hong Kong court for recognition and enforcement of a foreign judgment is 6 years from the date of the foreign judgment.

of that branch/office;

- the action was brought on a contractual dispute and the place of performance of the contract is in the requesting place;
- the action was brought on a tortious dispute and the infringing act was committed in the requesting place;
- the parties to a contractual dispute or other dispute concerning interests in property had expressly agreed in writing that the courts of the requesting place shall have jurisdiction over the relevant proceeding, but where the place of residence of all the parties to the judgment was in the requested place, the requesting place should be the place where the contract was performed or signed, or where the subject matter was situated etc., being a place which has an actual connection with the dispute;
- the parties did not raise objection to the jurisdiction of the original court and appeared before and defended in the proceedings, but where the place of residence of all the parties to the judgment was in the requested place, the requesting place should be the place where the contract was performed or signed, or where the subject matter was situated etc., being a place which has an actual connection with the dispute.

For tortious claims for infringement of an intellectual property right, civil disputes over acts of unfair competition under Article 6 of the PRC Anti-Unfair Competition Law heard by a Mainland court and disputes over passing off heard by a Hong Kong court, however, aside from the above-mentioned place of infringing act (should be in the requesting place) condition, the original court will be considered to have jurisdiction only if, at the same time, the intellectual property right or interest concerned is subject to protection under the law of the requesting place. (Art. 11, para. 3).

For actions that do not meet the above conditions, the original court may also be considered to have jurisdiction if the requested court considers that the exercise of jurisdiction over the relevant action by the original court is consistent with the law of the requested place (Art. 11, para. 4).

- b. **The requested court *may* refuse to recognize and enforce a judgment if the action in the original court was contrary to a valid arbitration agreement or a valid jurisdiction agreement entered into by parties on the same dispute** (Art. 13). It is worth noting that under existing Hong Kong law, the requested court *must* refuse to recognize and enforce a judgment if the action in the original court was contrary to a valid arbitration agreement or a valid jurisdiction agreement entered into by the parties. However, under the New Arrangement, to expand the applicable scope of reciprocal recognition and enforcement, the situation was provided as a *discretionary* circumstance based on which the court *may* refuse to recognize and enforce a judgment.
- c. **The judgment was given without major procedural errors and was not given as the result of a malicious “parallel lawsuit” filed by the parties concerned, otherwise the judgment should not be recognized and enforced.** According to Article 12 of the New Arrangement,

procedural errors mainly include:

- the respondent was not legally summoned in accordance with the law of the place of the original court, or was not given a reasonable opportunity to make representations and defend the case.
 - the judgment was obtained by fraud;
 - the judgment was rendered in an action which was accepted by the original court after a court of the requested place has already accepted an action on the same dispute;
 - a court of the requested place has rendered a judgment on the same dispute or has recognized a judgment on the same dispute given by another country or place;
 - the requested place has made an arbitral award on the same dispute or has recognized an arbitral award on the same dispute made in another country or place.
- d. **Finally, the judgment given by the original court must not be contrary to the basic principles of law or the public interest/policy of the requested place.** Where a Mainland court considers that the recognition and enforcement of a judgment given by a Hong Kong court is manifestly contrary to the basic principles of the laws of the Mainland or the social and public interests of the Mainland, or where a Hong Kong court considers that the recognition and enforcement of a judgment given by a Mainland court is manifestly contrary to the basic principles of the laws of the HKSAR or the public policy of the HKSAR, the judgment should not be recognized or enforced (Art. 12, para. 2).

2. Examination Period

The New Arrangement does not stipulate the specific time period for the Mainland and Hong Kong courts to examine applications for recognition and enforcement of judgments, but only stipulates that “the courts shall examine the application for recognition and enforcement as soon as possible and make a decision or order” (Art. 25). The time period for a Mainland court to examine an application for recognition and enforcement of a Hong Kong judgment may refer to Article 14 of the *Regulations on the Recognition and Enforcement of Taiwan Judgments*, which stipulates that “the people's court shall make a decision within six months from the acceptance of an application for recognition and enforcement of a judgment given by a Taiwan Court.” No rules currently exist as to the time period for a Hong Kong court to examine an application for recognition and enforcement of a Mainland judgment, and thus the time period may be decided on a case-by-case basis.

3. Examination Results, Reconsideration or Appeal

After examination, a court of the requested place will rule or order recognition and enforcement of a judgment or refuse to do so with respect to the applicant's application. Where a court of the requested place cannot recognize and enforce a judgment in whole, it may recognize and enforce it in part (Art. 19).

Where any party is aggrieved by a decision or an order made by a court of the requested place on an application for recognition and enforcement, the party may, in the case of the Mainland, apply

to the Mainland court at the next higher level for review within 10 days from the date of service of the decision or, in the case of the HKSAR, lodge an appeal according to Hong Kong law (Art. 26).

4. Suspension, Resumption and Termination of the Recognition and Enforcement Proceedings

During a requested court's examination of an application for recognition and enforcement of an effective judgment, if a party has lodged an appeal against the effective judgment (in the case of the HKSAR) or the Mainland court has ruled for retrial for the effective judgment (in the case of the Mainland), the requested court should suspend the recognition and enforcement proceeding. Specifically, if a party has already filed an appeal against an effective judgment given by a Hong Kong court,⁷ then upon examination and verification of the situation, the Mainland court should suspend the recognition and enforcement proceeding. After the appeal, if the original judgment is wholly or partly upheld, the recognition and enforcement proceeding should be resumed; if the original judgment is wholly reversed, the recognition and enforcement proceeding should be terminated. Similarly, if a Mainland court has ordered a retrial for the effective judgment, upon examination and verification of the situation, the Hong Kong court should suspend the recognition and enforcement proceeding. After the retrial, if the original judgment is wholly or partly upheld, the recognition and enforcement proceeding should be resumed; if the original judgment is wholly reversed, the recognition and enforcement proceeding should be terminated (Art. 20).

5. Conflict between Recognition and Enforcement Proceedings and Adjudicating Proceedings Regarding the Same Dispute

According to Article 22 of the New Arrangement, if, in the course of adjudicating a civil and commercial case, the court receives an application brought by a party for the recognition and enforcement of a judgment made by the court of the other place in respect of the same dispute, the application shall be accepted, and the action shall be suspended. The action shall be terminated or resumed depending on the examination results in respect of the application for recognition and enforcement of the judgment. However, if in the course of examining an application for recognition and enforcement of a judgment, a party brings another action in respect of the same dispute, the requested court should not accept this action, and should dismiss any such action which has been accepted (Art. 23, para. 1).

Additionally, after the judgment has been wholly recognized and enforced, the court of either side will no longer accept any other action brought by any party concerned in respect of the same dispute (Art. 23, para. 2). For judgments which have not been wholly recognized and enforced, the parties concerned cannot file another application for recognition and enforcement either, but they could bring an action regarding the dispute before the court of the requested place (Art. 23, para. 3).

VI. Commencement of the New Arrangement and the Relationship between the New

⁷ Strictly speaking, under Hong Kong law, after a legally effective judgment is appealed, it will remain in force during the appeal (until the judgment is overturned by the Court of Appeal). In other words, a judgment given by the Hong Kong court will remain valid and enforceable until it is overturned. This is somewhat similar to the effect of the trial supervision procedure under the Mainland law.

Arrangement and the Former Arrangement

The New Arrangement will commence on the same date in both the Mainland and HKSAR following the promulgation of a judicial interpretation by the Supreme People's Court and the completion of the relevant procedures in the HKSAR. Judgments made by courts of both sides on or after the date of commencement will be subject to the New Arrangement (Art. 29, para. 2). Upon commencement of the New Arrangement, the Former Arrangement will be terminated (Art. 30, para. 1). However, for a "choice of court agreement in writing" within the meaning of the Former Arrangement and signed before the commencement of the New Arrangement, the Former Arrangement remains effective (Art. 30, para. 2).

The New Arrangement is not yet in force and its exact commencement date remains uncertain. However, the legislative process of similar laws may serve as a reference point for the commencement date of the New Arrangement: the Former Arrangement was signed on July 14, 2006 and commenced on August 1, 2008; the *Arrangement on Marriage and Family Matters* was signed on June 20, 2017 and has not yet commenced.

VII. Conclusion and Outlook

In the context of promoting the "Belt and Road Initiative" initiative, the Mainland and HKSAR have accelerated the pace in promoting judicial assistance since 2015. In March 2016, the two sides signed the *Minutes of Talks between the Supreme People's Court and the Department of Justice of the Hong Kong Special Administrative Region on Negotiating Arrangement to Promote Mutual Assistance in Civil and Commercial Matters*, which set the schedule and steps for negotiating and concluding mutual legal assistance. Subsequently, the two sides signed the *Arrangements of the Supreme People's Court for Mutually Commissioned Obtaining of Evidence in Civil and Commercial Cases between the Courts of the Mainland and the Hong Kong Special Administrative Region* in December 2016, and signed the *Arrangement on Marriage and Family Matters* in June 2017. The execution of the New Arrangement is another major breakthrough achieved by the Mainland and HKSAR in the area of mutual legal assistance.

In the future, the Mainland and HKSAR are expected to continue to promote further consultations on certain matters that are not included in the New Arrangement, such as cross-border insolvency assistance and arbitration preservation assistance, and are expected to make substantial progress soon. Although the New Arrangement still awaits to be formulated into local law in the HKSAR through formal legislative procedures and awaits to be formulated into effective judicial interpretations in the Mainland, we have every reason to believe that, in the context of the deepening and accelerating cooperation between the Mainland and HKSAR in the field of mutual legal assistance, the New Arrangement will be successfully implemented in both the Mainland and HKSAR in the near future, which will open a new chapter in reciprocal recognition and enforcement of civil and commercial judgments between the two sides.

Important Announcement

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