

Legal Commentary

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Review and Practice Guidance on New Provisions of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil Matters between the Mainland and Hong Kong

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On 18 January 2019, the Supreme People's Court and the Department of Justice of the Government of the Hong Kong Special Administrative Region jointly signed the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and of the Hong Kong Special Administrative Region* (the "**New Arrangement**").

In Hong Kong, the New Arrangement was meant to be implemented via local legislation. Pursuant to a gazette published by the Government of Hong Kong dated 10 November 2023, the *Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645)* and the *Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Rules (Cap. 645A)* will come into effect on 29 January 2024. In the Mainland, we expect that the Supreme People's Court will issue relevant judicial interpretations in the near future. In any event, by mutual consent, the New Arrangement will be implemented simultaneously in the Mainland and Hong Kong from 29 January 2024.

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 "**Old Arrangement**") will be abolished on the date when the New Arrangement comes into effect (Article 30 (1) of the New Arrangement) but will continue to apply to recognition and enforcement applications where the relevant parties have signed a "choice of court agreement in writing" as referenced in the Old Arrangement prior to the New Arrangement coming into effect (Article 30(2) of the New Arrangement).

The coming into force of the New Arrangement will greatly facilitate the mutual recognition and enforcement of court judgments between the Mainland and Hong Kong. The Supreme People's Court estimates that after the implementation of the New Arrangement, about 90% of judgments in civil and commercial matters of the courts of the Mainland and Hong Kong are expected to be mutually recognisable and enforceable.

In light of this, we hope to share with fellow practitioners (a) some key points of practice as well as (b) an

overview of the operational procedures after the New Arrangement comes into effect.

Key points of practice on cross-border dispute resolution after the New Arrangement comes into effect

I. Under the New Arrangement, non-exclusive jurisdiction clauses and asymmetric jurisdiction clauses will no longer be obstacles impeding the recognition and enforcement of judgments.

Before the New Arrangement comes into effect, the recognition and enforcement of judgments between the Mainland and Hong Kong continues to be governed by the Old Arrangement. Under the latter, parties must have entered into a written jurisdiction agreement stipulating that courts either in the Mainland or Hong Kong have “exclusive” jurisdiction before it is possible to apply for the recognition and enforcement of a judgment of the Hong Kong court in the Mainland or vice versa. Furthermore, the judgment is enforced only as to the portions relating to payment of sums.

The requirement of a written agreement as to “exclusive jurisdiction” under the Old Arrangement presents obstacles for the recognition and enforcement of judgments between the Mainland and Hong Kong. In practice, the dispute resolution clauses of many foreign-related contracts stipulate that the relevant court has “non-exclusive jurisdiction” or “asymmetric jurisdiction” (“asymmetric jurisdiction” clauses refer to a jurisdiction agreement signed by parties to a foreign-related contract which expressly stipulates that one party may elect to file a lawsuit with a court of a range of countries whereas the other party may only file a lawsuit with a court of one country). Since both non-exclusive jurisdiction and asymmetric jurisdiction clauses may result in multiple courts possessing jurisdiction, a judgment obtained thereunder may not satisfy the “exclusive jurisdiction” requirement and if so, cannot be recognised and enforced under the Old Arrangement.

In practice however, the courts in both the Mainland and Hong Kong have in recent years gradually relaxed the requirement for “exclusive jurisdiction”. For instance, in one particular judgment (see [2018] HKCFI 1840 for details), the Hong Kong court held that when determining if a jurisdiction agreement stipulates for exclusive jurisdiction, the court should not be dogmatic about the need for “sole”, “exclusive” or similar wording in the agreement but should instead adopt a purposive approach and consider the contractual context when making a determination. In the *Record of Meeting of the National Court’s Symposium on Foreign-Related Commercial and Maritime Trial* promulgated in 2022, the Supreme People’s Court clearly provides for the presumption of exclusive jurisdiction: “*Where a jurisdiction agreement entered into by and between the parties to a foreign-related contract or other property right dispute expressly stipulates that the court of one country shall exercise jurisdiction, but the jurisdiction agreement does not stipulate that the jurisdiction agreement is a non-exclusive jurisdiction agreement, the jurisdiction agreement shall be presumed to be an exclusive jurisdiction agreement.*” Despite the above-mentioned judicial practice, the statutory requirement for exclusive jurisdiction still remains a major obstacle for the reciprocal recognition and enforcement of judgments rendered by the Mainland and Hong Kong courts.

After the New Arrangement comes into effect, this obstacle will no longer exist, thus rendering the recognition and enforcement of judgments between the Mainland and Hong Kong more efficient.

II. Applicants may apply for the recognition and enforcement of a relevant judgment in the competent court of both the Mainland and Hong Kong at the same time.

Under the New Arrangement, an applicant may seek the recognition and enforcement of a Mainland or Hong Kong judgment with the courts of both places. In these situations, the courts in the Mainland or Hong Kong will upon request by the court of the other place, provide information on the status of the enforcement of the judgment such that the total amount recovered from enforcement by the courts in the Mainland and Hong Kong will not exceed the amount determined under the relevant judgment (Article 21 of the New Arrangement).

III. Under the New Arrangement, the direct recognition and enforcement in Hong Kong of any preservation measures, anti-suit injunction, or interim relief order made by a court in the Mainland and vice versa is prohibited, but the applicant may apply for preservation or interim measures in the process of having a judgment recognised and enforced.

In the course of litigation, preservation measures granted by the Mainland courts and/or interim measures granted by the Hong Kong courts are often pivotal. Article 24 of the New Arrangement provides that “[a] court of the requested place may, before or after accepting any application for recognition and enforcement of a judgment, impose property preservation or mandatory measures in accordance with the law of that place.” Therefore, under the New Arrangement, an applicant may apply for preservation or interim measures with the court where the application for recognition and enforcement of a judgment is being made. This is consistent with the current practice of applying to Mainland courts for the recognition and enforcement of judgments in civil and commercial matters from other jurisdictions. It should be noted, however, that Mainland judgments which can be directly recognised under the New Arrangement include court rulings, mediation agreements and payment orders, but preservation measures are expressly excluded. Similarly, Hong Kong judgments that can be directly recognised do not include anti-suit injunctions and interim relief orders. This means that under the New Arrangement, no asset preservation ruling or interim measures ordered in ongoing proceedings before a Mainland court or a Hong Kong court can be directly recognised or enforced by a court of the other place.

Having said that, in addition to the recognition and enforcement procedures provided for under the New Arrangement, the litigation practice in Hong Kong is such that where a defendant in any ongoing Mainland litigation has assets in Hong Kong, an applicant may invoke section 21M of the High Court Ordinance (Cap 4) and request a Hong Kong court to grant interim relief to assist the future enforcement of the Mainland judgment.

In addition, for a Mainland judgment that has already been recognised in Hong Kong, an applicant may also request the Hong Kong court to issue a post-judgment injunction against the defendant’s assets in Hong Kong. In a recent case (see [2023] 1 HKLRD 342 for details), the plaintiff successfully applied for recognition of a Mainland judgment in Hong Kong and, on that basis, obtained a freezing order from the Hong Kong court over the other party’s assets (and those of its wholly-owned subsidiaries) in Hong Kong.

As for how the Mainland will handle applications for preservation and temporary measures in respect

of Hong Kong judgments, this remains to be seen.

In conclusion, where cross-border litigation involving the Mainland and Hong Kong is concerned, it is key when protecting a party's interest to consider how to effectively make use of interim preservation measures already available in both jurisdictions and as provided under the New Arrangement.

IV. The New Arrangement does not apply to certain types of civil and commercial judgments.

Article 3 of the New Arrangement excludes certain judgments, including cases heard by a Mainland court on maintenance of grandparents/parents/siblings, dissolution of adoptive relationships, succession/administration/distribution of estates, infringement of patents etc.

At the same time, Article 14 of the New Arrangement provides that the Hong Kong courts may not refuse to recognise and enforce a Mainland judgment solely because a preliminary issue determined in the judgment does not fall within the scope of the New Arrangement. One interpretation of how these two articles interact is related to the fact that many commercial disputes in the Mainland involve the disposition of intra-family interests and issues relating to maintenance, dissolution of adoptive relationships. Special attention should therefore be paid to whether such issues exist as preliminary issues which have to be determined before the substantive issue can be resolved, in which case they can still fall within the scope of the New Arrangement. Legal representatives also need to bear this in mind when formulating dispute resolution strategies.

V. Although the New Arrangement does not apply to bankruptcy/insolvency related judgments, relevant provisions and practices exist between the Mainland and Hong Kong for reciprocal recognition of and assistance in bankruptcy/insolvency judgments and the New Arrangement does not affect these.

Article 3 of the New Arrangement provides that “*for the time being*” it does not apply to “*bankruptcy (insolvency) cases*”. Note that the wording here is “*for the time being*” rather than a stipulation that such judgments are incapable of reciprocal recognition and enforcement.

In reality, there have previously been instances where the Mainland and Hong Kong courts have recognized and assisted the enforcement of bankruptcy/insolvency judgments from the court of the other place. Moreover, on 14 May 2021, the Supreme People's Court and the Department of Justice of the Government of Hong Kong also signed the *Record of Meeting between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Reciprocal Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region*. In accordance with the spirit of the latter, the Supreme People's Court subsequently formulated the *Opinions on the Pilot Program concerning the Recognition and Assistance in Bankruptcy Proceedings of the Hong Kong Special Administrative Region* in accordance with the relevant laws of the Mainland, specifying pilot areas (the people's courts of Shanghai Municipality, Xiamen City of Fujian Province and Shenzhen City of Guangdong Province) and clarifying various practical issues. Furthermore, the Department of Justice of the Government of Hong Kong has also issued the *Practical Guide on the Procedures for a Mainland Administrator's Application to the Hong Kong Special Administrative Region Court for Recognition and Assistance*,

which specifies court procedures for Mainland administrators applying for recognition and assistance from the Hong Kong High Court.

Notwithstanding the above, it is ultimately not the Department of Justice of the Government of Hong Kong but the Hong Kong court which reviews each case in accordance with the rules and common law principles which have been established for recognising and assisting cross-border bankruptcy proceedings in the Mainland, so in that regard there remains uncertainty as to the reciprocal recognition of bankruptcy proceedings in the Mainland and Hong Kong and judgments are relatively uncommon. Thus far, instances where the Hong Kong courts have recognised bankruptcy/insolvency proceedings in the Mainland courts include the insolvency proceeding of Shanghai Huaxin International Group Limited in 2019, insolvency proceeding of Shenzhen Nianfu Company in 2020, the application for recognition and assistance in restructuring proceedings of HNA Group and Beijing University Founder Group in 2021 as well as the insolvency proceeding of Guangdong Overseas Construction Corporation in 2023.

VI. The New Arrangement does not apply to judgments relating to the recognition of validity of arbitration agreements, setting aside of arbitral awards as well as recognition and enforcement of judgments and arbitral awards of other countries and regions.

In practice, a large number of cross-border disputes are resolved through arbitration. A common litigation strategy adopted by parties (for the purpose of engineering delay or avoiding the consequences of an adverse judgment etc.) is to request a court to confirm the invalidity of the arbitration agreement while arbitration proceedings are underway or apply to set aside the arbitral award after it has been issued.

According to Articles 3 (7) and (8) of the New Arrangement, the New Arrangement does not apply to cases on the “*confirmation of the validity of an arbitration agreement or the setting aside of an arbitral award*” and cases on “*the recognition and enforcement of judgments and arbitral awards of other countries and regions*”. Therefore, a judgment that an arbitration agreement is invalid, or a judgment setting aside an arbitral award by a court of one place does not necessarily result in that agreement/award being determined in the same way in the court of the other place. To that end and where circumstances permit, parties should seek to maximise their advantage by making use of every procedural avenue available to them.

VII. The New Arrangement does not in principle apply to the recognition and enforcement of punitive damages but contains an exception for punitive damages in respect of certain intellectual property and competition law cases.

In principle, the New Arrangement does not apply to the recognition and enforcement of punitive damages in a judgment but there are exceptions for intellectual property infringement cases and other cases. According to Article 17 (1) of the New Arrangement, in respect of tortious claims for intellectual property infringement, civil disputes over acts of unfair competition under Article 6 of the PRC Anti-Unfair Competition Law as heard by a Mainland court as well as passing off cases heard by the Hong Kong courts, the scope of reciprocal recognition and enforcement includes rulings on punitive and exemplary damages. This also applies to judgments concerning disputes over the infringement of

trade secrets (Article 17 (2) of the New Arrangement).

VIII. The New Arrangement also applies to the reciprocal recognition and enforcement of civil compensation judgments within criminal cases.

In recent years, there has been an increasing number of cases involving cross-border legal issues and containing both civil and criminal elements. The New Arrangement will also enhance the enforcement in Hong Kong (and later in the Mainland when implementation is carried out) of the civil compensation aspect of judgments relating to such cases.

IX. Due process: whether service of process/summons is lawful/valid is determined by applying the law of the place of the original court.

With respect to the materials to be submitted by the applicant under Article 8 of the New Arrangement, it is worth paying special attention to the provision stipulating: “(4) 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.” Read together with Article 12 (2) of the New Arrangement, it becomes clear that the law of the place of the original court which rendered judgment is to be applied when determining whether a summons is lawful/valid. Article 12 provides that “[w]ith respect to an application for recognition and enforcement of a judgment, a court of the requested place shall refuse to recognize and enforce a judgment if, having examined the evidence adduced by the respondent to show any of the following, it is satisfied that: ... (2) the respondent was not legally summoned in accordance with the law of the place of the original court; or although the respondent was legally summoned, the respondent was not given a reasonable opportunity to make representations or defend the respondent’s case”.

In practice, quite a number of Mainland cases involve overseas defendants who are absent. When advancing such proceedings, plaintiffs should pay particular attention to whether the Mainland court summoned the defendant in strict compliance with relevant laws and regulations (e.g. was the time limit for service of process by public announcement strictly observed etc.) and they are recommended to request the court to keep records of the relevant proof of service documents and include a description within the judgment.

In addition, it is worth noting that although the law of the place of the Court that rendered the judgment is used to determine whether a defendant/respondent has been validly/lawfully summoned and given a reasonable opportunity to present a defence, it should be borne in mind that when seeking to enforce a Mainland judgment in Hong Kong, it is the judges of the Hong Kong courts who adjudicate the application for recognition and enforcement and many of these judges come from common law jurisdictions/backgrounds. It may therefore be necessary to take into consideration the fact that Hong Kong court judges’ knowledge and application of PRC law will in part be influenced by their common law background.

For instance, Hong Kong proceedings adopt an adversarial system with less emphasis on judicial intervention re how parties present their case; there may be several rounds of submissions lasting for

longer durations. However, adjudication in the Mainland courts (including the mode of hearing) is comparatively more flexible and streamlined, with judges playing a more active role. To a Hong Kong judge, this may appear to be different from the standard procedures that they are used to.

To minimise the risk of non-recognition and non-enforcement of a judgment, applicants may need to pay more attention to the adjudication methods of the Mainland courts and ensure that the latter provide the parties with sufficient opportunities to present their case (e.g. permitting the reasonable questioning of witnesses, disclosure of documents in the possession of one party at the request of another party as well as effective examination of the evidence), and retain relevant evidence of the same (e.g. ensuring that the court takes audio and video recordings of the trial). At the same time, if in the process of having a judgment enforced by the Hong Kong court a respondent raises an objection, the applicant may also consider appointing a practitioner with a common law background as well as practical experience in the Mainland to act as an expert witness and provide a legal opinion to the Hong Kong courts to enable the latter to better understand the application of Mainland law and the differences between relevant concepts and practices under the two judicial systems.

1. A respondent has the right to request the court not to recognise and enforce a judgment on the grounds that the judgment was obtained by fraud -- in practice this may leave room for interpretation and dispute.

Article 12 of the New Arrangement provides grounds where a respondent can request a court not to recognise and enforce a judgment where “(3) the judgment is obtained by fraud”. The New Arrangement does not further elaborate on the meaning of fraud (e.g. whether it includes concealment of important evidence in one’s possession, submission of forged evidence, false litigation etc.) and whether the applicable standard for determining fraud is the law of the place where the court of the original judgment is located or the law of the place where enforcement is sought. This may require further clarification through relevant court guidance or judgments.

It should be noted that under PRC law, the standard for establishing fraud in criminal cases (beyond reasonable doubt) is usually higher than that which ordinarily applies in civil cases (preponderance of evidence). The position under Hong Kong law is similar. In this regard, due to the high threshold of proving fraud, the prospects of applicants seeking recognition and enforcement of a judgment from a court of the other place are relatively enhanced.

2. Dealing with parallel proceedings related to the judgment sought to be recognised and enforced.

In practice, where more than two actions arising from the same or similar facts are commenced simultaneously in the courts of the Mainland and Hong Kong (“**Parallel Proceedings**”) and there is no issue of exclusive jurisdiction, the courts of both places will allow them. In light of this, the New Arrangement has also made corresponding arrangements for the handling of Parallel Proceedings. If in the course of adjudicating a civil and commercial case, the court of one place 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 thereafter. The action shall be terminated or resumed depending on the ruling or order

made in respect of the application for recognition and enforcement (Article 22 of the New Arrangement).

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 action shall not be accepted, and any such action so accepted shall be dismissed. If the judgment has been recognised and enforced in whole by the court, another action brought by a party in respect of the same dispute shall not be accepted. Where the recognition and enforcement of a judgment has been refused in whole or in part, the applicant shall not file another application for recognition and enforcement, but the applicant may bring an action regarding the same dispute before the court of the requested place (Article 23 of the New Arrangement).

Overview of procedures for recognition and enforcement of judgments under the New Arrangement

I. Applications for Recognition and Enforcement of Hong Kong Court Judgments in the Mainland

Under the New Arrangement, the procedural steps for a party to apply for recognition and enforcement of a judgment made in one place by a court in the other place are summarised as follows (detailed instructions are expected to be issued by the Supreme People's Court):

1. **Time of Judgment:** The New Arrangement applies to Hong Kong court judgments that are rendered and in force on or after 29 January 2024.
2. **Deadline:** Two years in accordance with the relevant Mainland laws and regulations, calculated from the last day of the period specified in the legal document for satisfaction of the judgment; in the absence of a time period for satisfaction of the judgment, the deadline shall be the date when the legal document takes effect.
3. **Competent Court:** The 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 (Article 7 of the New Arrangement).

Note: The Intermediate People's Court of the place of residence of the applicant is an option additional to those provided for in the Old Arrangement. Such adjustment/supplement deals with the situation where the respondent is not domiciled and has no identifiable asset/property in the Mainland.

4. **Scope of Materials:** Relevant materials to be submitted to the court, such as the application (which shall address the matters required by Article 9 of the New Arrangement), copies of legally effective judgments affixed with the seal of the court which gave the judgment, identification documents (provision of foreign identification documents to Courts of Mainland requires notarization or to be certified) and information about the property etc. (Article 8 of the New Arrangement).
5. **Result of Rulings:** The Mainland courts may issue the following rulings after adjudication, but there are no specific rules regarding the time limit for delivering such rulings:

- All orders of the judgment are not to be recognised and enforced;

Note: In this case, the applicant cannot file another application for recognition and enforcement of the judgment, but is allowed to file a lawsuit with the requested court (i.e., the Mainland courts) regarding the same dispute (Article 23 of the New Arrangement).

- All or part of the orders of the judgment are recognised and enforced.

Note: In this case, during the enforcement phase, the Mainland court will use its investigation system to discover the relevant assets of the person subject to enforcement in the Mainland, preserve the relevant assets, and may also take measures against the person subject to enforcement, as well as the relevant responsible person, who fails to comply with the judgment in accordance with the relevant laws and regulations of the Mainland, such as restricting departure from the country, restricting spending beyond a certain amount as well as imposing fines.

6. **Appeal of Rulings:** After the Mainland court renders a decision with respect to an application for recognition and enforcement, if a party disagrees with the decision, it may apply to an upper tier people's court to appeal the ruling within 10 days from the date of service of the decision (Article 26 of the New Arrangement).

II. Applications for recognition and enforcement of Mainland court judgments in Hong Kong

The applicant needs to make the application pursuant to the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) and the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Rules (Cap. 645A). In summary:

1. **Time of Judgment:** The New Arrangement will apply to judgments of the Courts of the Mainland rendered and in force on or after 29 January 2024.
2. **Time Limit for Application:** In accordance with the relevant laws of Hong Kong, the time limit is **two years**, calculated from the last day of the period for satisfaction of the judgment specified in the legal document; if the legal document does not specify the period for satisfaction of the judgment, the time limit is calculated from the effective date of the legal document.
3. **Method of Application:** The applicant needs to make an ex-parte application to the Court of First Instance of the Hong Kong High Court by way of an originating summons.
4. **Affidavit in support of the application:** The applicant must submit to the court of Hong Kong an affidavit in support of the application stating in the affidavit, including, without limitation to, the following particulars: (a) the name, usual address, identification card number of the applicant or where the applicant is a company, the name and usual place of business of the company and the name, position, address, identification card number and contact details of one of its directors or authorized representatives; (b) to the best of the applicant's knowledge and belief, that the judgment applied for recognition is an effective civil or commercial judgment in the Mainland; (c) that the civil or commercial judgment in the Mainland requires the defendant to pay a certain amount of money or to perform a certain act; (d) to the applicant's belief that it is entitled to enforce the judgment in the Mainland and to inform the court of Hong Kong whether the applicant has

taken any measures of enforcement against the judgment; (e) to the applicant's belief, whether there are any pending proceedings in Hong Kong arising out of the same cause of action; (f) to the applicant's belief that if the judgment is recognized in the Mainland, the recognition as stated in Section 22 of the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) would not be set aside; (g) the amount of interest due and payable on the judgment under the laws of the Mainland until the date on which the judgment is recognized; (h) the amount of any fees ordered by a court of the Mainland.

5. **Other Supporting Documents:** The applicant must also provide the court with the following supporting documents: (a) the applicant's identification document and, where the applicant is a company, a certified copy of its certificate of incorporation; (b) the judgment sealed by a court of the Mainland together with a certificate from a court of the Mainland certifying that the judgment in question is an effective civil or commercial judgment in the Mainland.
6. **Order for recognition:** The applicant is required to submit to the court a draft order for recognition. The order must set out that the respondent has the right to apply to the court to set aside the order within 14 days of the receipt of the order (or such longer period as the court considers appropriate). In addition, the order must also state that the applicant will not be able to take action to enforce the judgment until the time limit within which the respondent is entitled to file to set aside has expired.
7. **Application to court by respondent to set aside an order for recognition:** The respondent is required to apply to the court by way of summons and furnish the court with an affidavit in support of the setting aside an order. On receipt of the summons from the respondent, the court may make an order for a hearing on any point in dispute between the parties.

Appeal of rulings: After a Hong Kong court has made a decision on an application for recognition and enforcement, any party who is dissatisfied with the decision may appeal in accordance with Hong Kong law (Article 26 of the New Arrangement).

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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