

Greater clarity, more certainty: the new arrangement between the PRC and HKSAR for mutual recognition and enforcement of judgments

January 2019

Introduction

A new arrangement between the Mainland and the Hong Kong Special Administrative Region (“HKSAR”) for the mutual recognition and enforcement of judgments (the “Arrangement”) was signed earlier this month. This is the sixth arrangement between the Mainland and HKSAR concerning various aspects of mutual legal assistance in civil and commercial matters and the third of these to provide for mutual recognition and enforcement of judgments in civil and commercial matters. In this article we consider the developments introduced by the new Arrangement, and some of its limitations.

The Arrangement was signed on 18 January 2019. When it comes into effect, the Arrangement will largely supersede the current arrangement for the reciprocal recognition and enforcement of judgments in civil and commercial matters pursuant to choice of court agreements between parties concerned (the “Choice of Court Arrangement”) which came into effect in August 2008. The Arrangement envisages that a wider range of civil and commercial judgments will be recognised and enforced by the courts of both jurisdictions than currently under the Choice of Court Arrangement.

It is anticipated that the Arrangement will allow disputes with cross-boundary elements to be dealt with more efficiently by avoiding parties having to re-litigate claims and giving them greater confidence that their rights will be protected whether they pursue litigation in the Mainland or Hong Kong.

“even if the parties have not specifically agreed to submit to the exclusive jurisdiction of the HKSAR courts, the judgment creditor can still apply for recognition and enforcement of the HKSAR judgment in the Mainland”

Key features of the Arrangement

The Choice of Court Arrangement currently enables parties to have a final judgment made by a people’s court of the Mainland or a court of the HKSAR in respect of a civil and commercial case recognised and enforced in the other jurisdiction without re-litigating the underlying dispute. However, the Choice of Court Arrangement applies only where the parties have reached an agreement in writing, expressly designating the courts of the Mainland or HKSAR to have sole jurisdiction for resolving any dispute which has arisen or may arise in respect of their commercial contract. Further, only a final judgment requiring payment of money will be recognised and enforced under the Choice of Court Arrangement. As such, the Choice of Court Arrangement is far from being a comprehensive mechanism for reciprocal recognition and enforcement of judgments.

The Arrangement has expanded the types of judgments which the courts of each jurisdiction may enforce from the other:

- To avail themselves of the mechanism under the Arrangement, the parties do not need to agree in advance to the exclusive jurisdiction of a Mainland or HKSAR court. This means that, for instance, even if the parties have not specifically agreed to submit to the exclusive jurisdiction of the HKSAR courts, the judgment creditor can still apply for recognition and enforcement of the HKSAR judgment in the Mainland.
- The application may still be refused if the requested court considers that the original court (i.e. the court which made the subject judgment) does not have jurisdiction over the action¹. The requested court needs to be satisfied that one of six jurisdictional conditions is met and it is implicit in the six conditions that some connection between the requesting place and the dispute has to be shown. The jurisdictional conditions are:
 - (i) at the time the original court accepted the case, the place of residence of the defendant is within the requesting place;
 - (ii) at the time the original court accepted the case, the defendant (being a legal person) maintained in that place a representative office, branch or such other establishment without separate legal personality, and the action arose out of the activities of that establishment;
 - (iii) the action was brought on a contractual dispute and the place of performance of the contract is in the requesting place;
 - (iv) the action was brought on a tortious dispute and the infringing act was committed in the requesting place;

- (v) the parties to a contractual dispute or other property-related dispute had a written agreement that the courts of the requesting place shall have jurisdiction over the relevant proceeding; and/or
- (vi) the judgment debtor appeared before the original court and defended in the proceedings without raising objection to the jurisdiction of the original court.

If either (v) or (vi) above applies, where all the parties to the judgment reside in the requested place, the requested court needs to be satisfied by the judgment creditor that the requesting place has an actual connection with the dispute (for example, it is where the contract was performed or signed, or where the subject matter was situated).

- The types of judgments enforceable under the Arrangement include judgments for both monetary and non-monetary relief. For instance, injunctive relief granted in a tortious claim for infringement of trade secrets will be covered by the Arrangement. Having said that, the Arrangement excludes reciprocal recognition and enforcement of anti-suit injunctions and interim relief. Further, where a judgment provides for punitive or exemplary damages, the punitive or exemplary part of the damages would not be recognised and enforced except for tortious claims for infringement of intellectual property rights.
- The Choice of Court Arrangement covers judgments made by the Court of Final Appeal, the Court of Appeal and the Court of First Instance of the High Court and the District

¹ The Arrangement sets out other grounds for refusal to recognise and enforce a judgment. Since these other grounds are already provided in the Choice of Court

Arrangement, the authors do not intend to cover them in this article.

Court. The application of the Arrangement is extended to cover also judgments made by the Labour Tribunal, the Lands Tribunal, the Small Claims Tribunal and the Competition Tribunal.

What constitutes a “civil and commercial” case is not defined in the Choice of Court Arrangement. The Arrangement provides greater clarity as to the types of matters it is applicable to. It excludes non-judicial proceedings and judicial proceedings relating to administrative or regulatory matters, for example, an application brought by the Competition Commission before the Competition Tribunal under section 92 of the Competition Ordinance or proceedings brought by the Securities and Futures Commission under section 214 of the Securities and Futures Ordinance². A number of types of matters which may otherwise be considered as “civil and commercial” (at least in certain circumstances) are specifically excluded. These include matrimonial or family matters which are already covered by the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases³, succession cases, corporate/personal insolvency and debt restructuring cases, certain types of judgments involving intellectual property rights, maritime matters, judgments on the validity of an arbitration agreement and the setting aside of an arbitral award.

Conclusion

It is not yet known when the Arrangement will come into effect as local legislation is needed to enable implementation. Whilst the Choice of Court Arrangement was signed in July 2006, it was not implemented until August 2008 when the Mainland Judgments (Reciprocal Enforcement) Ordinance came into effect. Once the Arrangement is implemented, it will apply to judgments made on or after the commencement date of the Arrangement. The Choice of Court Arrangement will be superseded although it will continue to apply in respect of any judgment granted pursuant to a choice of court agreement made between the parties before the commencement of the Arrangement.

Whilst the Arrangement may not be a comprehensive mechanism for reciprocal recognition and enforcement of judgments in civil and commercial matters between the courts of the Mainland and the HKSAR, it is a welcome development in terms of its widened scope and greater clarity as compared to the Choice of Court Arrangement.

² Follow-on actions brought before the Competition Tribunal under section 110 of the Competition Ordinance by a person who suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule are, however, covered by the Arrangement.

³ Disputes between family members on division of property and disputes on property arising from engagement agreements are covered by the Arrangement.

If you have any queries, please contact:



Mark Hughes
T +852 2901 7204
E Mark.Hughes@slaughterandmay.com



Wynne Mok
T +852 2901 7201
E Wynne.Mok@slaughterandmay.com

© Slaughter and May 2019

**This material is for general information only and is not intended to provide legal advice.
For further information, please speak to your usual Slaughter and May contact.**