

CHINESE LAW

DEVELOPMENT OF REGIONAL CONFLICT OF LAWS: ON THE ARRANGEMENT OF MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BETWEEN MAINLAND CHINA AND HONG KONG SAR



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Shortly after the ninth anniversary of Hong Kong's reunification, mainland China and the HKSAR signed an agreement on mutual recognition and enforcement of judgments in civil and commercial matters. This article first reflects upon the background of the long consultation process, having regard to the theoretical and practical difficulties arising within the unprecedented framework of "one country, two systems". The article proceeds to examine the major provisions of the agreement and critically analyses the agreement in the light of the recent comparable arrangement between the Mainland and the Macao SAR. Although the Mainland / HKSAR agreement represents a breakthrough in cross-border judicial cooperation, the authors argue that because of its very restricted scope the agreement will likely be of quite limited use in the future. The notable differences between the two legal regions may also give rise to a number of uncertainties when it comes to the practical implementation of the agreement.

The long-awaited agreement on mutual recognition and enforcement of judgments in civil and commercial matters between Hong Kong and mainland China was signed by the Secretary for Justice of the Hong Kong Special Administrative Region ("SAR"), Mr Wong Yan-Lung SC, and Vice President of the Supreme People's Court of China, Justice Huang Songyou, on 14 July 2006 in Hong Kong.¹ Although the agreement has only a Chinese version as its official text, an English translation has been provided by the Department of Justice of Hong Kong. The official title of the agreement is the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong SAR Pursuant to the Choice of the Court Agreement between Parties Concerned ("the Arrangement").²

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¹ See the News Bulletin of the Department of Justice: Arrangement on Reciprocal Enforcement of Judgments Signed, available at <http://www.doj.gov.hk/eng/public/pdf/pr2006714e.pdf>.

² The translation is available at <http://www.doj.gov.hk/eng/topical/mainlandlaw.htm>.

The agreement was concluded, after the ninth anniversary of Hong Kong's reunification with China, with the aim of enhancing the confidence of investors and trading parties on both sides of the border.³ In a broader sense, the Arrangement expresses the mandate of the Hong Kong Basic Law ("the Basic Law") to promote judicial cooperation between the Mainland and Hong Kong. However, reservations were expressed by some leading practitioners immediately after the signing ceremony on the effectiveness of Arrangement.⁴

Against this backdrop, this article seeks to analyse the history and development of the Arrangement and assess its potential impact with particular reference to theoretical and practical considerations at both international and regional levels. Hence Part 1 discusses the concerns and issues raised in the bilateral negotiations; Part 2 highlights the core provisions of the Arrangement; Part 3 critically considers the achievements and limitations of the Arrangement; Part 4 identifies concerns and problems with the future operation of the Arrangement; and Part 5 completes the article with some concluding remarks.

1. The Issues and Concerns in the Course of Negotiation

A. Background

Before the handover, despite rapid development in trade and investment between the two sides, the only bilateral document signed in that period was the Preliminary Agreement between the Guangdong High People's Court and the Supreme Court of Hong Kong in 1985 on Service Assistance in Civil and Commercial Matters. This Preliminary Agreement allowed the court on one side to entrust its counterpart to provide assistance with the service of judicial documents through registered mail.⁵ In addition, a couple of international conventions on judicial assistance could also be applied by virtue of the accession of both China and the United Kingdom, such as the United Nation Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the New York Convention"),⁶ and the Hague

³ Speech made by the Secretary for Justice Mr Wong Yan Lung SC at the Signing Ceremony of the Arrangement on 14 July 2006, available at <http://www.doj.gov.hk/eng/public/pdf/sj20060714e.pdf>.

⁴ Ng Kang-Chung, "Doubts over Widening Court Deal", *South China Morning Post*, 15 July 2006, A3.

⁵ The Agreement was printed in *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Sifa Jieshi Quanji* (The Full Collection of Judicial Interpretations of the Supreme People's Court 1949–1993), The Research Office of the Supreme People's Court (compiled), (Beijing: People's Court Publishing House, 1994), pp 1900–1901.

⁶ For a discussion in this field, see Xian Chu Zhang, "Enforcement of Arbitral Awards between Mainland China and Hong Kong: Before and After Reunification", in Raymond Wacks (ed), *The New Legal Order in Hong Kong*, (Hong Kong: Hong Kong University Press, 1999), pp 183–210.

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("the Hague Convention").⁷ However, the 1997 handover rendered all these bases inapplicable. The international conventions and local arrangement can no longer be used due to the fundamental change in the nature of the relationship between mainland China and Hong Kong, which is now governed by the Basic Law and the "one country, two systems" principle.

In Hong Kong (both before and after the handover) a foreign judgment may be enforced by either the statutory regime or the common law rules. The former refers to the Foreign Judgments (Reciprocal Enforcement) Ordinance ("the Enforcement Ordinance"),⁸ under which a final and conclusive judgment made by a foreign Superior court may be recognised and enforced in Hong Kong on a reciprocal basis by way of registration. Once a foreign judgment is registered in Hong Kong, it can be enforced like a Hong Kong judgment.⁹ Although the Ordinance was a standard piece of Commonwealth legislation based on the equivalent enactment in the UK, it has been extended to quite a few non-Commonwealth countries, including France, Belgium, Germany and Israel.¹⁰ A foreign judgment may also be enforced at common law, where the judgment creditor may commence an action by writ, pleading the foreign judgment, as long as the foreign court was a court of competent jurisdiction, the judgment is final and for a definite sum of money.¹¹ It is interesting to note that, before the handover, some judgments made by the People's Court in the Mainland had been pleaded before the Hong Kong court for enforcement by way of common law rules.¹² Despite the availability of enforcement at common law, the disadvantage is a rather cumbersome and expensive procedure which may raise many uncertainties when dealing with a foreign jurisdiction with very different substantive and procedural rules.

On the Mainland side, the problem has been in existence for an equally long time. Under the Civil Procedure Law of PRC, a party may apply to the Intermediate People's Court concerned for recognition and enforcement of a foreign judgment on the basis of international convention or the principle

⁷ For a discussion in this field, see Zhang Xian Chu, "The Extraterritorial Service of Judicial Documents from Hong Kong", (1999) 28 HKLJ pp 356–378.

⁸ Cap 319.

⁹ For a detailed discussion, see Philip Smart, "Enforcement of Foreign Judgments" (Ch 13) in Christine N Booth (ed), *Enforcing Judgments in Hong Kong* (Hong Kong: LexisNexis, 2004), pp 270–281.

¹⁰ *Ibid.*, and Camille Cameron and Elsa Kelly, *Principles and Practice of Civil Procedure in Hong Kong* (Hong Kong: Sweet & Maxwell Asia, 2001), p 358.

¹¹ Smart, n 9 above, p 258; and Cameron and Kelly, *ibid.*, p 357.

¹² For example, in *Chiyu Banking Corp Ltd v Chan Tin Kwun* [1996] 2 HKLR 395, a proceeding was commenced before the High Court of Hong Kong in 1996 to enforce a judgment of Fujian Intermediate People's Court after the defendant's appeal to the Fujian High People's Court was dismissed in 1995.

of reciprocity.¹³ The People's Court shall examine the foreign judgment and may enforce it by a court order if the scrutiny shows no violation of the basic principles of the Chinese law, national sovereignty and safety as well as social public interests of China.¹⁴ These provisions, although stipulated for "foreign related cases", have been applied to proceedings concerning parties from Hong Kong, Taiwan and Macao even after 1997.¹⁵ However, the new political situation and lack of clear rules have apparently divided People's Courts in practice. For instance, in an enforcement proceeding heard by the Changsha Intermediate People's Court of Hunan Province in 1999, a judgment of Hong Kong High Court was recognised and later enforced on the ground that the Hong Kong SAR had become part of China, the Changsha court referring to a Supreme People's Court Circular in 1998¹⁶ which permitted the mainland courts to recognise and enforce Taiwan civil judgments.¹⁷ But another enforcement petition before the Quanzhou Intermediate People's Court of Fujian Province was rejected in 2001. The Quanzhou court held that, after the handover, the judicial relationship was of neither international nor national in nature, but should be subject to regional conflict of laws rules. However, this kind of legal rule was not yet available and hence, the denial was justified for lack of applicable rules.¹⁸ In 2000 the Guangzhou Intermediate People's Court of Guangdong Province, while dealing with an enforcement application of a Hong Kong judgment, took an approach somewhat similar to enforcement at common law in Hong Kong by asking the party to file a new lawsuit with the relevant Hong Kong Ordinance and the Hong Kong judgment as the evidence of unpaid debts.¹⁹

However, the serious legal confusion attendant upon the reciprocal non-enforcement of judgments may even be less important when compared with

¹³ Civil Procedure Law of PRC of 1991, Art 267.

¹⁴ *Ibid.*, Art 268.

¹⁵ The latest example in this regard is the Provisions issued by the Supreme People's Court on Certain Issues Concerning Jurisdiction over Foreign Related Civil and Commercial Cases on 25 December 2001. Article 5 explicitly stipulates that "jurisdiction over cases concerning parties of Hong Kong SAR, Macao SAR and Taiwan shall be dealt with by reference to the Provisions"

¹⁶ The Supreme People's Court issued the Provisions on Recognition of Civil Judgments of Taiwan Courts by the People's Courts on 22 May 1998.

¹⁷ Zhong Zhiyuan, "Hunansheng Shouli Shenqing Chengren Xianggang Gaodeng Fayuan Shengxiao Panjueshu Daili Shimuo (Detailed Report on the First Case to Recognize Effective Judgment of Hong Kong High Court in Hunan Province)", *Zhongguo Faxi* (China Legal System), Vol 18 (2001), pp 42-43.

¹⁸ *Re: Application of Yuanqiao Investment Co of Hong Kong to Enforce Hong Kong Judgment*, reported in The National Judges' College and The People's University School of Law (compiled), *Zhongguo Shenpan Anli Yaolun* (Selected Trial Cases of China, Vol 2002 (civil cases)), (Beijing: People's University Press, 2003), pp 568-570.

¹⁹ Feng Mali and Wang Tianxi, "Report on Meidadou Financial Co Ltd v Ruichang Real Estate Co Ltd et al: Involving a Loan Contract", *China Law*, August 2000, pp 102-104; and Zhang Xianchu, "Foreign Law Applied by the People's Court in China", *CCH's China Law Update*, August 2000, pp 24 and 15.

the political embarrassment. In developing direct cross-border judicial assistance, Hong Kong, despite being the first SAR established in 1997 under the "one country, two systems" principle, has fallen behind both the Macao SAR²⁰ and Taiwan.²¹ In particular, the Mainland and the Macao SAR signed the Arrangements on Mutual Recognition and Enforcement of Judgments on Civil and Commercial Matters on 28 February 2006, which became effective on 1 April 2006 ("the Macao Arrangement"). Based on their experience, some mainland judges have pointed out that it is much more difficult for Mainland judgments to be recognised and enforced in Hong Kong than in Macao, where successful enforcement cases have been recorded and the judicial attitude seems relatively tolerant.²² The then Secretary for Justice, Elsie Leung, admitted that it would be ridiculous if after the handover Mainland judgments could be enforced in foreign countries, but not in Hong Kong.²³

The dynamic economic integration of the two sides has also suffered from the lack of support in the field of cross-border judicial assistance. In the period 1994 to 2004 bilateral trade increased 8 per cent per year. By 2005 commodity trade with mainland China, as the largest trading partner of Hong Kong, counted for 44 per cent of Hong Kong's total overseas trading; and Hong Kong occupied third place, after only the US and Japan, in the list of major trade partners with mainland China. Hong Kong and the Mainland are the largest investors on the other side. By 2005, the accumulated Hong Kong direct investment in the Mainland reached US\$242 billion, or 43 per cent of the total foreign investment received, with employment of 11 million workers; whilst in Hong Kong, over 2,000 mainland non-financial companies have been established.²⁴ In recent years Hong Kong has been playing an increasingly important role in raising capital for Mainland enterprises. By February 2006, 340 Mainland companies were traded on the Hong Kong Exchange, making up 30 per cent of total listed companies and 41 per cent of

²⁰ Macao SAR signed a judicial assistance agreement with the Mainland covering not only service of judicial documents, but also taking evidence in civil and commercial matters on 7 August 2001.

²¹ Although there has not been official contact between the Mainland and Taiwan, a mechanism of recognition and enforcement has been created in practice by each side adopting its own applicable rules since 1998. For this purpose, the Supreme People's Court promulgated Provisions on Recognition of Civil Judgments of Taiwan Courts by the People's Courts on 22 May 1998.

²² Zheng Xinjian and Hou Xianglei, "She Gangao Minshangshi Shenpan: Wenti, Sifa Duice yu Zhanwang" (Civil and Commercial Trials Concerning Parties of Hong Kong and Macao: Problems, Judicial Measures and the Prospects), in Lu Botao (ed), *She Gangao Shangshi Shenpan Redian Wenti Taixi* (Study on Questions of Commercial Trials Involving Hong Kong and Macao Affairs), (Beijing: Legal Press, 2006), pp 7–15.

²³ The report: "The Mainland and Hong Kong May Reach Mutual Recognition Agreement by the End of the Year", at <http://www.people.com.cn/GB/shizheng/1025/2152456.html>.

²⁴ The Information Service Department of Hong Kong SAR Government (ed), *Hong Kong 2004* (Hong Kong: The Information Service Department, 2005), pp 41–42.

the total market value.²⁵ Since 2003 the Closer Economic Partnership Agreement (“CEPA”) has given new momentum to cross-border economic development. Based on the latest agreement, all Hong Kong products can be exported to the Mainland with tariff-free treatment, 27 service sectors in the Mainland have been open to Hong Kong service providers with preferential treatment, and the Individual Visit Scheme has enabled 13 million mainlanders to come to Hong Kong.²⁶

Against this background of unprecedented integration, it would not be surprising to see various disputes arising. According to the statistics of the Guangdong People’s Court, since the mid-1990s the number of civil and commercial cases concerning parties from Hong Kong and Macao heard by different levels of the People’s Courts in the province has been over 3,000 a year (with 2002 being the peak year with nearly 6,000 cases). The disputed amount in some cases has exceeded US\$110 million.²⁷ However, the lack of any mutually agreed reciprocal cross-border recognition and enforcement regime inevitably stands as an obstacle to the smooth implementation of the “one country, two systems” principle, as well as the stable and healthy development of cross-border economic relations.²⁸

Quite clearly, economic developments have moved more rapidly than the legal framework, although since the handover the Hong Kong SAR and the Mainland have gradually developed cross-border judicial assistance measures.²⁹ After the conclusion of the Agreement on Service of Judicial Documents in 1998 and the Agreement on Mutual Enforcement of Arbitral Awards in 1999, the two sides started their first official negotiation on cross-border enforcement of civil and commercial judgments in July 2002. Before that the Hong Kong Government carried out its consultation in the SAR.³⁰

²⁵ The statement made by Chow Man Yiu, the Chief Executive of the Hong Kong Exchange at the Pan-Pearl River Delta Region Financial Service Forum in March 2006, *Ziben Zazhi* (Capital), April 2006, p 94.

²⁶ The speech of the Chief Executive Donald Tsang at the Opening of the Mainland, Hong Kong and Macao Trade and Economic Co-operation Forum on 29 June 2006; available at <http://www.info.gov.hk/gia/general/200606/29/p200606290119.htm>.

²⁷ Interview with Tao Kaiyuan, Vice President of the High People’s Court of Guangdong, *Renmin Sifa* (People’s Judicature), issue 8 (2005), p 4.

²⁸ For a recent comment, see Phyllis K. Y. Kwong, “Hong Kong Businessmen’s Development in the Mainland: Legal Conflicts Need to Be Dealt With”, *Xinbao Yuekan* (Hong Kong Economic Journal Monthly), June 2005, pp 23–28.

²⁹ Some writers held that “perhaps because of political scepticism and a lack of trust in each other’s legal system, both Mainland and Hong Kong courts appear none too eager to enter into a formal arrangement for the mutual recognition and enforcement of civil court judgments.” Priscilla M F Leung, “Mutual Recognition of Court Judgments amongst Hong Kong, Taiwan and Mainland China”, *Hong Kong Lawyer*, June 2006, p 49.

³⁰ See the Paper on Reciprocal Enforcement of Judgments in Commercial Matters between the HKSAR and the Mainland, CB (2)1431/01-02 (01) March 2002.

In the subsequent four years, several draft plans were exchanged, seven rounds of consultation were carried out and the current text was revised 26 times before its finalisation.³¹ Moreover, several forums involving judges, officials and scholars were held in this period to promote mutual understanding and facilitate the exchange of ideas.³²

B. Problem Areas

In the course of research and consultation both theoretical and infrastructural problems were raised. On the theoretical level, the practice of “one country, two systems” has posed major challenges to the design of the mutual enforcement framework. One serious issue concerned the status of such a framework within the national legal system. Under the Basic Law, Hong Kong is guaranteed to maintain its common law legal regime,³³ enjoy autonomy and have power of final adjudication.³⁴ The relationship between the Hong Kong SAR and the Mainland is, of course, not federal in nature.³⁵

For some time, experts and scholars were not all in agreement. Some believed that with the return of Hong Kong and Macao, China could conceivably become a country with multiple legal regions with each having its own legislative autonomy, judicial independence and final adjudicative power. “As a result, legal problems regarding inter-regional conflicts of law will inevitably arise on the political-legal horizon,”³⁶ and the reunification has made China a country with multiple socio-economic systems and multiple legal regions.³⁷ Other experts argued that centralism should be the first principle in developing cross-border legal relations. The SARs, while enjoying their high degree of autonomy, “must absolutely not be allowed to shake the unified supreme leadership of the Central Government in conducting inter-regional exchanges under any excuse; upholding unity of the motherland must be the central

³¹ The speech of Vice President of the Supreme People's Court, Justice Huang Songyou made at the signing ceremony of the Arrangement on 14 July 2006, available at <http://www.doj.gov.hk/eng/public/pdf/pr2006714e.pdf>.

³² They include the Legal Forum of the Mainland, Hong Kong, Macao and Taiwan organised by the Supreme People's Court in Beijing on 4 September 2005, the Symposium on Judicial Practice in Commercial Matter Concerning the Mainland, Hong Kong and Macao organised by the National Judges' College and the Foreign Related Trial Division of the Supreme People's Court in Shenzhen on 19–20 May 2004; and the Symposium of Inter-Regional Legal Issues among the Mainland, Hong Kong and Macao organised by the China Society of Private International Law and the Judges' Association of Guangdong in Fuoshan on 21–22 May 2005.

³³ The Hong Kong Basic Law, Art 8.

³⁴ *Ibid.*, Art 82.

³⁵ Jin Huang and Andrew Xuefeng Qian, “‘One Country, Two Systems,’ Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflict of Laws in China”, (1995) 5 *Duke Journal of Comparative & International Law*, pp 303–306.

³⁶ *Ibid.*, p 294.

³⁷ *Ibid.*, p 302.

point of all laws of the mainland and the special administrative regions.”³⁸ Moreover, although there is an argument that regards Hong Kong as a part of China, “theoretically its judgments should be deemed municipal judicial awards.”³⁹ Legal proceedings concerning parties of Hong Kong, Macao and Taiwan are still treated as foreign cases in the mainland.⁴⁰

The complexity of the debate is further compounded with the vagueness of the Hong Kong Basic Law. Article 95 of the Law merely states that: “The Hong Kong SAR may, through consultation and in accordance with law, maintain judicial relations with the judicial organs of other part of the country, and they may render assistance to each other.” Although the article provides the legal basis for cross-border judicial cooperation, it fails to specify any detail. As a result, different proposals have been put forward, including separate legislation by each legal region, formation of a national judicial assistance committee, adoption of a national code of conflict of law, and individual agreements between the concerned SAR and the province or municipality directly under the Central Government in the Mainland.⁴¹ However, none of them seem free from controversy. For example, some commentators have openly opposed the establishment of a relationship of judicial assistance between the Mainland and the SARs on the basis of lack of legal equality. They held that “the right direction to safeguard the national unity and judicial sovereignty would not be lost only if the unequal status of the cross-border judicial assistance is recognised.”⁴² Other modest experts believe that despite certain agreements having been concluded between the Mainland and Hong

³⁸ Wu Keqin *et al.*, “‘One Country, Two Systems’ and Inter-regional Conflict of Laws in China” (1989), *Jianghai Xuekan* (Journal of Jianghai), 90, quoted from Guobin Zhu, “Inter-Regional Conflict of Laws under ‘One Country, Two Systems’: Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance”, (2002) 32 *HKLJ*, pp 628–629.

³⁹ Qingjiang Kong, “The Enforcement of Hong Kong SAR Judgments in the Mainland”, (1999) 29 *HKLJ*, p 150.

⁴⁰ After China’s accession to the World Trade Organization, the Supreme People’s Court in its Circular entitled Provisions on Certain Issues Concerning Jurisdiction over Foreign Related Civil and Commercial Litigations on 25 December 2001, specifically instructed the lower People’s Courts to deal with cases concerning parties from Hong Kong, Macao, and Taiwan with reference to the rules concerning foreign parties (Art 5). Printed at *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao* (The Bulletin of the Supreme People’s Court), 2002, issue 2, p 52.

⁴¹ For the discussion of these proposed models, see Chen Li, *Yiguo Liangzhi Xiade Zhongguo Quji Sifa Xiezhu* (Inter-regional Judicial Assistance under “One Country, Two Systems”) (Shanghai, Fudan University Press, 2003), pp 49–52; and Yuan Gujie, *Zhongguo Neidi yu Gangao Rugan Falu Wenti Yanjiu* (A Study of Certain Legal Issues Concerning Mainland China, Hong Kong SAR and Macao SAR) (Guangzhou, Guangdong People’s Publishing House, 2006), pp 11–12.

⁴² Wang Qiansheng and Huang Shengchun, “Zhongguo Neidi yu Aomen Sifa Xiezhu de Xingzhi ji Moshi” (The Characteristics and Model of the Judicial Assistance between Mainland China and Macao), in Shan Changzong (ed), *Zhongguo Neidi yu Aomen Sifa Xiezhu Zonghengtan* (Judicial Assistance between Mainland China and Macao SAR) (Beijing: People’s Court Publishing House, 1999), p 110.

Kong, the conditions for rule-making through bilateral agreement are not complete yet due to the huge institutional disparities.⁴³

In addition to the theoretical controversies, the technical problems caused by the legal disparities between the Mainland and Hong Kong are of equal, if not greater, difficulty. Besides the differences between the civil law features of the Mainland and the common law traditions of Hong Kong, and the lack of other infrastructural support such as an agreement on evidence taking, three major concerns have been identified. First, problems concerning the conflict of jurisdiction have troubled smooth cross-border dispute resolution. Lack of any bilateral agreement in this regard has seen in recent years quite a few cases of controversial interpretation of parties' jurisdictional agreement,⁴⁴ parallel proceedings resulting in conflicting judgments,⁴⁵ purposeful selection of forum,⁴⁶ and using home court advantage for a declaratory ruling as a defensive tactic against any possible Mainland proceeding.⁴⁷ Without a breakthrough in this area, establishment of an effective cross-border recognition and enforcement mechanism may not be possible.⁴⁸

Secondly, the finality of Mainland judgments seems the most difficult issue thus far in enforcement proceedings in Hong Kong. Under the current Civil Procedure Law of PRC, there is a special institution known as the trial supervision procedure, which allows the parties to the litigation, the People's Court and the People's Procuratorate to make requests through petition or protest of a legally effective judgment for a new trial.⁴⁹ The procedure is intended to enable the People's Court to correct mistakes in trials despite the effectiveness of the judgments. Although a party's petition is subject to a two year statutory limitation period, starting on the effective date of the ruling,⁵⁰ the initiation of the new trial by the People's Court or the People's Procuratorate is governed by no time limit. In recent years, the political

⁴³ Guo Yanzhi, "A Study on Inter-regional Judicial Assistance in Civil and Commercial Matters between the Mainland and Hong Kong", (2002) *Falu Shiyong* (National Judger's College Law Journal), issue 11, p 51.

⁴⁴ For an example, see *Yu Lap Man v Good First Investment Ltd* [1998] 1 HKC 726.

⁴⁵ For an example, see *Sang Sang Handbag Factory Ltd v King's Ball International Trading Company Ltd*. (2003) HCA 9986/2000 (Default judgment for Sang Sang's favour for HK\$352,696.15 of repayment of the outstanding debt plus damages and interests); and the Final Judgment of the High People's Court of Guangdong on *King's Ball of Dongguan v Sang Sang Handbag Factory Ltd* dated 31 July 2003 (Ruling for King's Ball for RMB 1,588,629.80 plus interest); also see *Chan Chow Yuen v Nanyang Commercial Bank Trustee Limited and Others*, HCAP 4/2002.

⁴⁶ For an example, see *Man Tung Bank Ltd Zhuhai v Wangfoong Transportation Ltd*, [1999] 2 HKC 606.

⁴⁷ For an example, see *Ho Siu Pui v Yue Sheng Finance Ltd* [2003] 1 HKC 621.

⁴⁸ Zhang Xianchu, "Neidi yu Xianggang Minshangshi Anjian Guanxiaquan Chongtu Chuyi" (A Preliminary Analysis of Jurisdictional Conflict in Civil and Commercial Cases between Mainland China and Hong Kong), (2004) 9 *Falu Shiyong* (Legal Application – National Judges' College Journal), pp 6–11; and Zhang Li, "Jurisdictional Conflict on Civil and Commercial Matters between the Mainland and Hong Kong", *Hong Kong Lawyer*, August 2001, pp 45–49.

⁴⁹ Civil Procedure Law, Cap 16 (entitled "Trial Supervision Procedures").

⁵⁰ *Ibid.*, Art 182.

environment in which judicial practice may be influenced by the government and the Communist Party, together with serious concerns as to the quality of the judicial work, have made the situation even more complicated.⁵¹ This complexity has been reflected in enforcement proceedings in Hong Kong. In *Chiyu Banking Corporation Ltd. v Chan Tin Kwun*,⁵² a Mainland judgment was found by the Hong Kong court not to be final and conclusive because the Fujian People's Procuratorate had presented its petition to the People's Court for a new trial after the enforcement proceeding commenced in Hong Kong. Staying the Hong Kong proceeding, Cheung J held that "although no protest has been lodged yet, the procedure had actually been invoked. This demonstrated that the judgment is not final and conclusive."⁵³ The approach in *Chiyu Banking* has been followed in several decisions in Hong Kong after the handover.⁵⁴

Lastly, the scope of any mutual enforcement regime has given rise to concern amongst both practitioners and businessmen in Hong Kong. In a document provided by the Chief Secretary for Administration's Office in March 2002 to outline the mutual enforcement framework for consultation with the Legislative Council (the "Hong Kong outline"), some restrictions were carefully proposed. It limited the category of enforceable judgments to money award concerning commercial contracts; that are final and conclusive; rendered by the Hong Kong Courts above the district level or the People's Courts above intermediate level; and on a basis of parties' consented jurisdiction.⁵⁵ In order to safeguard the integrity of the mechanism, the Hong Kong Outline proposed several grounds for refusal to recognise and enforce a judgment of the other side, as follows: if the judgment has been completely performed; if the judgment was obtained by fraudulent means or in violation of natural justice; if enforcement would be contrary to the public policy of the enforcing region; if the judgment enforced is different from the original one; if the party subject to the enforcement did not have sufficient notice of the originating proceeding; and if the party is not subject to the jurisdiction of the judgment court.⁵⁶

⁵¹ Nanping Liu, "A Vulnerable Justice: Finality of Civil Judgments in China", (1999) 13 *Columbia Journal of Asian Law*, pp 33–98.

⁵² [1996] 2 HKLR 395.

⁵³ *Ibid.*, p 400.

⁵⁴ *Wuhan Zhong Shuo Hong Real Estate Co Ltd v The Kwong Sang Hong International Ltd*, [1998] HCA 14325/1998; *Tan Tay Cuan v Ng Chi Hung*, HCA 5477/2000; *Lin Zhemin and Richang Co Ltd v Lin Zhitao* (CACV354/2001, judgment in Chinese); *Lin Zhemin and Richang Co Ltd v Zhang Shunlian* (CACV1046/2001, judgment in Chinese).

⁵⁵ Annex to the letter from A. H. Y. Wong JP of the Administration Wing to Margaret Ng as the Chairperson of the Committee on Administration of Justice and Legal Service of the Legislative Council of Hong Kong dated 20 March 2002, Leg: CB(2)1431/01-02(01), item 7–item 13.

⁵⁶ *Ibid.*, item 15.

In 2004 a new working draft emerged which seemed to more reflect the Mainland expectations as to regional judicial cooperation (“the Working Draft”). According to this draft,⁵⁷ the enforceable judgments subject to the cross-border assistance scheme were not confined to awards concerning commercial contracts. The draft did not directly deal with the concept of final and conclusive judgment, but provided a definition of “final judgments that can be enforced”. In the Working Draft they were referred to as (1) all the judgments made by the Supreme People’s Court; (2) all the decisions of the appellate courts; (3) the judgments of the first trial instance, where the parties concerned are barred from appeal under the law, or failed to lodge an appeal in the statutory period; and (4) all the decisions made in the new trial under the trial supervision procedure. The draft included more detail on the enforcement procedures, but deleted violation of natural justice⁵⁸ as a ground for refusal.

2. The Major Provisions of the Arrangement

The 19-article Arrangement first defines its scope of application, namely where a party may petition the appropriate court for recognition and enforcement of a judgment in their favour. According to Article 1, such entitlement is confined to enforceable final judgments for a monetary obligation in civil and commercial matters pursuant to an exclusive jurisdiction selection agreement. The Arrangement, although signed on 14 July 2006, does not have a definite effective date since it is not known how soon the Hong Kong SAR may complete its amendment to the current ordinances through the formal legislative process. As such, Article 19 stipulates that the Arrangement will begin to be implemented on a date to be announced after the necessary legal procedures are completed on both sides.⁵⁹ Thus, Article 17 explicitly states that enforcement of judgments rendered on or after the date on which the Arrangement becomes effective will be subject to the rules of the Arrangement. Finally, Article 18 requires the Supreme People’s Court and the Hong Kong SAR to deal with problems arising in implementing the rules of, or the needs for amendment to, the Arrangement through consultation.

⁵⁷ The draft is on file with the authors.

⁵⁸ See the Hong Kong Outline; n 55 above.

⁵⁹ In the Mainland, the normal practice is the promulgation of the Arrangement by the Supreme People’s Court as its official judicial interpretation with binding force on all the local People’s Courts. Being an internal process, the promulgation may be made in a fairly timely manner.

A. *Enforceable Final Judgments*

“Enforceable final judgments” are defined with reference to judicial hierarchy as well as the nature of the judgments concerned. On the Mainland side, the courts whose judgments will benefit from this Arrangement include the Supreme People’s Court, Higher People’s Courts at the provincial level, Intermediate People’s Courts at the city level and 47 Basic People’s Courts in 15 provinces and municipalities directly under the Central Government which are designated to hear cases concerning parties of foreign countries, Hong Kong, Macao and Taiwan as of 31 May 2006.⁶⁰ Given the fact that the Basic People’s Courts are merely responsible for the first instance trial under the Civil Procedure Law of PRC,⁶¹ and appeals are allowed only once in the mainland,⁶² “enforceable and final judgments” under the Arrangement covers not only judgments rendered by the Supreme People’s Court, Higher People’s Courts and Intermediate People’s Courts as the appellant courts for the second level trial and courts for the supervision trials, but also judgments made by all these courts, as well as the Basic People’s Courts, as the first instance trial where the parties failed to lodge any appeal or their appeals are barred by the statutory limitation or for other reasons.⁶³

On the Hong Kong side, any legally effective judgment of the Court of Final Appeal, the Court of Appeal and the Court of First Instance, as well as the District Court will qualify as an “enforceable final judgment.”⁶⁴ In terms of categories of judicial decisions, the Arrangement includes judgments, rulings, conciliation statements, orders of payment of the People’s Courts in the Mainland and judgments, orders and allocaturs in the Hong Kong SAR.⁶⁵

In addition, the parties must conclude their agreement on jurisdiction in writing, referring their disputes over the “particular legal relationship” that either have arisen, or may materialise in the future clearly to a court either in the Mainland or in the Hong Kong SAR with sole jurisdiction for dispute resolution.⁶⁶ Moreover, under the Arrangement the so-called “particular legal relationship” is apparently a device to limit its application, so as only to include commercial contractual relationships between the parties concerned; however, employment contracts and contracts concluded by natural persons for personal consumption, family matters or other non-commercial

⁶⁰ The Arrangement, Art 2 and the Annex.

⁶¹ Civil Procedure Law of PRC of 1991, Art 18.

⁶² *Ibid.*, Arts 10 and 158.

⁶³ The Arrangement, Art 2 (1).

⁶⁴ *Ibid.*, Art 2 (2).

⁶⁵ *Ibid.*, Art 2.

⁶⁶ *Ibid.*, Art 3.

purposes are explicitly excluded from the Arrangement.⁶⁷ It is also stipulated that the effectiveness of the jurisdiction selection agreement shall not be affected by any modification, discharge, termination or voidness of the contract concerned, unless it provides otherwise.⁶⁸

The Arrangement sets out some rules governing the finality of judgments. In the Mainland, the People's Court may suspend the enforcement proceeding if the judgment debtor is lodging an appeal in Hong Kong or if the appellant court proceeding has not been completed yet. Where the original judgment is affirmed either wholly or partly, the enforcement procedure can be resumed; if the decision is completely changed, the enforcement proceeding should end.⁶⁹ A court in Hong Kong, after due verification, may suspend the recognition and enforcement proceeding if the Mainland People's Court has taken up the case according to the trial supervision procedure or if the Supreme People's Court has ordered a new trial. The enforcement proceeding may be resumed where the new trial upholds all or part of the original judgment; and the complete change of the original judgment shall terminate the enforcement proceeding.⁷⁰

Although the Arrangement confirms that cross-border judgments that are final, once recognised, shall have the same legal effect as the local judgment of the enforcing region,⁷¹ the Arrangement also stipulates a further petition procedure in order to ensure the quality of the enforcement proceeding. Under Article 12 a party in the Mainland may petition the People's Court of the upper level for reconsideration of the ruling of the Intermediate People's Court concerning the enforcement application if they are aggrieved with it; in Hong Kong an appeal may be allowed in accordance with the law of the SAR.

One of the principal purposes behind the mutual recognition and enforcement scheme is to avoid duplicated litigation. As a result, a rule of *res judicata* is introduced by the Arrangement. Article 13 provides that no court shall accept any lawsuit concerning the same parties and the same facts during the proceeding dealing with the recognition and enforcement of the judgment. Moreover, any new lawsuit concerning the same parties and the same facts shall not be accepted by the court of either side if the first judgment has been recognised and enforced. Once the application for recognition and enforcement of a cross-border judgment has been rejected, the applicant can no

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ The Arrangement, Art 10.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, Art 11.

longer file another application for the same purpose; but may bring a new action on the same facts with the court where the enforcement is sought according to the law of the region.

B. Procedure

As far as the procedure is concerned, the Intermediate People's Court of the Mainland (where the party subject to the enforcement has their domicile, ordinary residence, or assets) and the High Court of the Hong Kong SAR shall be the competent courts to receive applications for recognition and enforcement.⁷² If more than two Intermediate People's Courts in the Mainland are involved, the applicant may petition only one of these courts at his or her own discretion. However, if the party against whom the application is filed has their domicile, ordinary residence or assets in both the Mainland and the Hong Kong SAR, the recognition and enforcement application can be filed with the courts on both sides, except that the total amount recovered from both sides respectively shall not exceed the sum specified in the judgment concerned. The court on the one side shall provide the court on the other side with the information of its complete or partial enforcement of the judgment concerned, if so requested.⁷³

Under Article 6 of the Arrangement, an applicant shall provide the court concerned with the application for recognition and enforcement with details of the parties' identity, enforcement request, the condition of the assets of the party subject to the enforcement and the extent of the enforcement that has been carried out in the place of the originating judgment;⁷⁴ the copy of the judgment to be enforced with the seal of the final trial court; the certificate issued by the final trial court certifying that the judgment concerned is a final one as defined by the Arrangement and can be enforced at the place where the judgment was rendered; and the proof of the party's identification. Once the court certificate is issued by the originating court, no other notary public certificate is needed. In case of an application in the Mainland, a Chinese translation should be submitted, if the original judgment is not in Chinese.⁷⁵

Article 8 stipulates that the application and enforcement procedure shall comply with the law of the place of enforcement, unless the Arrangement provides otherwise. Enforcement is subject to the same statutory limitation period on both sides. If one of the parties is a natural person, the period is one

⁷² *Ibid.*, Art 4.

⁷³ *Ibid.*, Art 5.

⁷⁴ *Ibid.*, Art 7.

⁷⁵ *Ibid.*

year; where both parties are legal persons, or other types of organisations, the limitation period is shortened to six months. However, the period starts to run at different times in the Mainland and Hong Kong. In the case of a Mainland judgment to be enforced in Hong Kong, the clock starts to run from the last day of the performance period specified in the judgment. If a Hong Kong judgment is enforced in the Mainland, the limitation period starts from the date on which the judgment becomes enforceable, normally the date of the judgment.

In order to ensure the effective functioning of the enforcement scheme, the Arrangement empowers the courts of both sides, upon a party's request, to take restrictive measures to preserve the assets concerned in accordance with the local law, either before or after the enforcement application is filed.⁷⁶ An applicant, while filing their enforcement application, shall pay court fees and enforcement fees in accordance with local law.⁷⁷ If the judgment is successfully enforced, the party subject to enforcement may have to pay, in addition to the sum specified by the judgment, the interest accrued, the lawyers' fees and litigation costs that have been certified by the enforcing court. However, more generally, it will be noted that taxes and fines are excluded from the Arrangement.⁷⁸

C. Defences

According to Article 9 of the Arrangement, an application for recognition and enforcement of a cross-border judgment may be refused if: (1) the jurisdiction agreement is invalid, except where the chosen court has held the agreement is valid; (2) the judgment concerned has been fully performed; (3) under the law of the place of enforcement, the court shall have exclusive jurisdiction over the dispute;⁷⁹ (4) according to the law of the originating court, a default judgment is rendered without due service on the defeating party, or despite the due service the party was not allowed sufficient time to defend themselves as stipulated by the law. However, public notice as a means of service made in accordance with the law or provisions by the originating court shall not be included in this category; (5) the judgment concerned is obtained through fraudulent means; (6) the enforcing court already has recognised and enforced an award made by a foreign or overseas court, or an arbitral tribunal, on the same matter; and (7) finally, the recognition and

⁷⁶ *Ibid.*, Art 14.

⁷⁷ *Ibid.*, Art 15.

⁷⁸ *Ibid.*, Art 16.

⁷⁹ As compared with Hong Kong, the scope of the judicial exclusive jurisdiction in Mainland Law is broader. For example, according to Article 246 of the Civil Procedure Law of PRC all the disputes arising from performing Sino-foreign equity joint venture contracts, Sino-foreign contractual joint venture contracts and Sino-foreign contracts for joint exploration of natural resource in China must be subject to the exclusive jurisdiction of China.

enforcement would violate the public policy of Hong Kong or the social public interest of the Mainland.

3. Comments: Strengths and Weaknesses

The conclusion of the Arrangement should certainly be welcome as the first step towards establishing a broader cross-border judicial cooperative regime on substantive matters. The Arrangement also ends the legal vacuum in relation to mutual recognition and enforcement of judgments following the reunification in 1997. As Justice Huang Songyou pointed out, the signing of the Arrangement can be seen as a milestone in implementing the Hong Kong Basic Law and advancing judicial assistance under “one country, two systems”.⁸⁰ The adoption and implementation of the Arrangement, to an extent, will also improve the business environment and facilitate commercial transactions by allowing parties who meet the requirements under the Arrangement greater ease when it comes to enforcing a relevant judgment. The Arrangement in this regard may not only help to increase the confidence of business people concerning the protection of their legal interests, and the predictability of their dispute resolution, but it has even been suggested it may also help Hong Kong to develop itself into an international centre of dispute resolution.⁸¹ More generally it has been observed that “the process by which sensitive issues have been solved has set a good example for how obstacles that stand in the way of broader legal cooperation should be addressed. The negotiations have also enhanced the two sides’ understanding of the operation of each other’s system.”⁸²

Moreover, the signing of the Arrangement has further confirmed the way forward for future development. Since the reunification, the approach taken with reference to cross-border judicial cooperation has been “following in order from easy to difficult matters and advanced step by step.”⁸³ In this context, the conclusion of the agreements between the Mainland and Hong Kong on service of judicial documents and on mutual enforcement of arbitral awards apparently laid a solid foundation of mutual understanding and trust for both

⁸⁰ The summary of Justice Huang’s speech at the signing ceremony, available at <http://sc.info.gov/gb/www.info.gov.hk/gia/general/200607/14/P200607140162.htm>.

⁸¹ Wong, n 3 above; also see Stephen Kai Yi Wong, “Reciprocal Enforcement of Court Judgments in Civil and Commercial Matters between Hong Kong SAR and the Mainland”, *Hong Kong Lawyer*, October 2006, p 31; and Editorial: “The Business Opportunities Brought in by the Judicial Recognition Arrangement”, *Singdao* (Singdao Daily), 15 July 2006.

⁸² Editorial: “Legal Pacts Must Protect HK’s Separate System”, *South China Morning Post*, 14 April 2006.

⁸³ Huang, n 31 above.

sides' further cooperation. The practical and efficient feature of such an approach has also been reflected in adherence to the equality of the legal regions, rather than the political ideology of the supremacy of the Central Government and mainland China. Nevertheless, progress must be assessed with necessary caution and not be overstated. In a sense, the Arrangement looks more like a semi-finished product, rather than a success in ripe conditions. Apparently, in order to avoid further delay, both sides were willing to accept the current version despite substantial limitations on the scope of the agreement. As a result, the practical usefulness of the Arrangement may be affected, particularly from the Mainland's perspective.

In particular, under the Arrangement, for a judgment to be enforceable on the other side of the border the following conditions must (as a minimum) be established: (1) there is a valid agreement in writing between the parties on exclusive selection of the jurisdiction;⁸⁴ (2) the judgment concerned is "enforceable and final";⁸⁵ (3) the judgment must be for payment of money;⁸⁶ (4) the subject matters must fall within civil and commercial contractual relationship defined as "special legal relations";⁸⁷ (5) the application for enforcement must be filed within the specified limitation period, which is much shorter than the hitherto normal period under the rules in Hong Kong;⁸⁸ and (6) the judgment concerned does not fall into any of the categories under which enforcement may be refused by the recognising court.⁸⁹

These requirements bring to mind the path leading to the formulation of the recent international convention on recognition and enforcement of foreign judgments of the Hague Conference on Private International Law. It may be noted that the drafting of a comprehensive convention, dealing with both jurisdiction and rules of recognition and enforcement of foreign judgments across almost all fields of civil and commercial law may be dated back to 1992. But the controversy caused by the (initially ambitious) plan forced the project to be scaled down and to address only one core element: choice of court agreements between businesses parties. The new draft Hague Convention on Choice of Court Agreements ("the Hague Convention") was

⁸⁴ The Arrangement, Arts 1 and 3.

⁸⁵ *Ibid.*, Arts 1 and 2.

⁸⁶ *Ibid.*, Art 1.

⁸⁷ *Ibid.*, Art 3.

⁸⁸ *Ibid.*, Art 8. In Hong Kong a fresh action is barred on a judgment after the expiration of 12 years from the date on which the judgment becomes enforceable under s 4(4) of the Limitation Ordinance (Cap 347); and in enforcement by execution the judgment creditor may face no time constraints, although elapse of six years since the date of judgment will require the leave of the court to issue a writ of execution according to r 2(1) (a) of Rules of the High Court and the corresponding Rules of the District Court.

⁸⁹ *Ibid.*, Art 9.

completed and approved in 2005.⁹⁰ One particular lesson learned from this long drafting struggle is “to start small.”⁹¹

It is not difficult to find similarities between the Arrangement and the new Hague Convention. In many ways the Arrangement appears to follow much of the Hague Convention, such as exclusion of personal, family, household matters and employment contracts,⁹² exclusive selection,⁹³ and the writing requirement.⁹⁴ Against this background, the limited scope of the Arrangement should be understood.

Although the restrictions under the Arrangement may look similar to the general practice of recognising and enforcing foreign judgments in other jurisdictions, some special characteristics and concerns may be identified. For example, finality has been an issue preventing some mainland judgments from being enforced and is naturally a focal point of the Arrangement. In Hong Kong the applicable test in practice has been the statement of Lord Watson in *Nouvion v Freeman*, that a foreign judgment is only considered final if it is “final and unalterable in the court which pronounced it”.⁹⁵ However, in mainland China, the transitional economy, the developing legal system and the rapidly changing social relations mean that the judiciary (and their decisions) cannot be guaranteed to be immune from errors, despite such errors not being large in number.⁹⁶ As a result, the supervision procedure has been used as an indispensable means to correct judicial mistakes.⁹⁷

In this context some recent developments on both sides should be noted. In the Mainland, the Supreme People’s Court has realised some potential problems with the procedure and has been taking measures to reform it.⁹⁸ In

⁹⁰ The Convention on Choice of Court Agreement, concluded on 30 June 2005, available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98; also see Thalia Kruger, “The 20th Session of the Hague Conference: A New Choice of Court Convention and the Issue of EC Membership”, (2006) 55 *International & Comparative Law Quarterly* 447.

⁹¹ Report: Recent International Agreement – Convention on Choice of Court Agreements, Concluded June 30, 2005, (2006) 119 *Harvard Law Review* 935.

⁹² Hague Convention, Art 2.

⁹³ *Ibid.*, Art 3.

⁹⁴ *Ibid.*, Art 3(c)(i).

⁹⁵ (1889) 15 App Cas 1, p 13 (HL).

⁹⁶ It is noted that the number of petitions for retrial caused by judicial errors has been increasing and cases of abuse of judicial powers are also found. See The Division of Trial Supervision of the Higher People’s Court of Jiangsu Province, “On Legal Basis and Practical Implementation of the System to Supervise and Assess Trial Quality” in The Division of Trial Supervision of the Supreme People’s Court (compiled), *Shenpan Jiandu Zhidao* (Guide on Adjudication Supervision), 2005, No 1, p 162.

⁹⁷ The President of the Supreme People’s Court, Chief Justice Xiao Yang required to further enhance the trial supervision in accordance with the current law. Xiao Yang’s speech made at the 18th People’s Court Working Conference on 22 December 2002; printed at *Zhonghua Renmin Gongheguo Zuogao Renmin Fayuan Gongbao* (The Bulletin of the Supreme People’s Court) (2003) issue 1, p 4.

⁹⁸ For a recent discussion, see Zhang Wusheng, *Minshi Sifa Xiandaihua de Tansuo* (Probing into Modernization of Civil Justice) (Beijing: People’s Public Security University Press, 2005), particularly Part 13, noting that a sound balance should be struck between correction of mistakes and stabilisation of judicial decisions, respect for parties’ autonomy and prevention of abuse, exercising supervision power on the trial practice and the restriction needed, pp 246–264.

2001 a Supreme People's Court circular identified the goal of the current reform as streamlining the retrial procedure. If the party fails without reasonable justification to file their petition with the People's Procuratorate within two years of the judgment becoming effective, the People's Court shall not entertain the claim, even if the People's Procuratorate lodges a protest.⁹⁹ Later, the Supreme People's Court further strictly allowed the retrial only once.¹⁰⁰ Recently, the reform of the supervision procedure concerning civil cases has been set out as an important item in the Supreme People's Second Five Year Reform Outline (2004 to 2009).¹⁰¹ As a result, the possibility of retrial, in addition to finding of judicial errors or mistakes as the statutory condition, will be subject to further control of the Supreme People's Court.¹⁰²

Meanwhile, in Hong Kong both judges and scholars have developed some new thinking on this matter. Chung J, for example, in *李佑榮與李瑞群*¹⁰³ compared the supervision procedure of the Mainland with the relevant rules in Hong Kong and found there was no substantial difference in terms of the court's intervention if the court is satisfied that the conclusion reached is plainly wrong. Although in the Mainland the supervision procedure may be initiated by, in addition to the parties concerned, the president of the People's Court, the upper level People's Court or the People's Procuratorate, the conditions that prejudicial errors exist in the original trial must be ascertained before a retrial can be carried out. With regard to the lack of definite time limit for retrial, his lordship noted that in Hong Kong if justice so required, the court would have power and discretion to extend its time limits.¹⁰⁴

Chung J's view is perhaps shared by Deputy High Court Judge Poon in *New Link Consultants Ltd v Air China and Others*.¹⁰⁵ While commenting on the opinion of the plaintiff's Chinese law expert that the supervision procedure in mainland China was a peculiar "Chinese creature" without time limit for retrial, Judge Poon noted that, by making reference to the defendants'

⁹⁹ The Summary of the Meeting on Certain Issues Concerning Current Supervision Procedure of the Supreme People's Court dated 1 November 2000.

¹⁰⁰ The Provisions on Certain Issues Concerning Retrials of Civil Cases of the Supreme People's Court dated 31 July 2002.

¹⁰¹ The Supreme People's Court: The Outline of the Second Five Year Reform of the People's Courts, *Zhonghua Renmin Gongheguo Zuogao Renmin Fatyuan Gongbao* (The Bulletin of the Supreme People's Court), (2005) issue 5, p 9.

¹⁰² According to latest statistics of the Supreme People's Court, in 2005 the People's Court at all levels retried 46,468 criminal, civil and administrative cases, 5.14% lower than the number in 2004, among which the protested cases lodged by the People's Procuratorate dropped by 18.15% from 2004. Of all the cases in the supervision procedure, approximately 40% of judgments were changed, which made 0.31% of almost 5 million cases heard in the mainland of the year. Note on the 2005 Statistics of the Courts of the Nation, *Zhonghua Remin Gongheguo Zuigao Renmin Fayuan Gongbao* (The Bulletin of the Supreme People's Court), (2006) issue 3, pp 19–20.

¹⁰³ CACV 159/2004 (Judgment in Chinese).

¹⁰⁴ Chung J's dissenting opinion, para 62–65.

¹⁰⁵ [2005] 2 HKC 260.

Chinese law expert, Professor Jiang Ping, the procedure was rooted in the continental legal system and had equivalents in Germany, Japan and Taiwan. As compared with the available avenue under the common law system, the judge observed, “the supervision procedure is not so drastically different anyway. The analogy is drawn with the common law doctrine that a judgment can always *in principle* be reopened for fraud. Further, one of the grounds for the ordering of a re-trial is where new evidence is found to reverse the original judgment.”¹⁰⁶ He further noted that the circumstances under which the supervision procedure could be invoked were strictly circumscribed by law.¹⁰⁷ On this basis, Judge Poon accepted the submission that the criticisms of the plaintiff’s expert on the supervision procedure: “amounted to no more than a comparison between the Hong Kong system with the Mainland system and an invitation to find that the local system is better than, or superior to, the Mainland system. This is precisely the sort of exercise which the court should not embark upon.”¹⁰⁸

From the academic perspective it has been argued that the Hong Kong courts’ refusal to recognise the finality of Mainland judgments has taken Lord Watson’s statement on finality in *Nouvion v Freeman*, itself a case concerning merely interim or provisional foreign judgments, out of context and thus have applied a too rigid test. The point becomes plain once it is noted that a foreign default judgment can be enforced in Hong Kong despite the fact that the original court may in theory be required to reconsider its original decision at a later date.¹⁰⁹

These developments have certainly paved the way for better mutual understanding in implementing the Arrangement. Moreover, a special device is contained in the Agreement to deal with finality and retrial issues: unlike the practice under the current Civil Procedure Law, namely that a retrial may be carried out by the originating People’s Court (with a different bench),¹¹⁰ any retrial in the Mainland concerning cross-border recognition and enforcement in Hong Kong must be conducted by the People’s Court at the level directly above the original court.¹¹¹ As a result, a Mainland judgment would be final and unalterable to the extent that the originating court can no longer change it. It would appear that the Supreme People’s Court is trying its best to accommodate the new conditions of cross-border cooperation in an environment where the supervision procedure is still needed in the

¹⁰⁶ *Ibid.*, paras 93–94.

¹⁰⁷ *Ibid.*, para 94.

¹⁰⁸ *Ibid.*, para 96.

¹⁰⁹ P. St. J. Smart, “Finality and the Enforcement of Foreign Judgments under the Common Law in Hong Kong”, 5 *Oxford University Commonwealth Law Journal*, 2005, 301.

¹¹⁰ Civil Procedure Law, Arts 178, 177, and 184.

¹¹¹ The last paragraph of Article 2 of the Arrangement.

current legal-political structure.¹¹² Further reform may go beyond the authority of the Supreme People's Court and require amendment to the Civil Procedure Law.¹¹³

In addition to the finality issue, the natural justice concern deserves some further consideration. Although the concept of natural justice was deleted from the proposed draft presented by the Hong Kong side in the negotiation, allegations of breach of natural justice in the Mainland system may be anticipated.¹¹⁴ As a well-established ground to refuse recognition and enforcement of foreign judgments in Hong Kong as well as in other common law jurisdictions,¹¹⁵ natural justice may have two dimensions in the mutual enforcement framework. First, whether the current safeguard measures of the Arrangement are sufficient to deal with the future challenges in Hong Kong on natural justice; and second, if not, whether a further constitutional issue will be raised with respect to the civil rights protection provided by the Basic Law.

Natural justice is something of a broad "catch-all" concept in common law concerning judicial competence, due procedure and fair proceedings.¹¹⁶ With the developing conditions in the Mainland, the natural justice concern in relation to mutual enforcement is quite understandable. However, the principle is somewhat vague and may overlap with other defences.¹¹⁷ As such, it might be difficult for the Mainland, as a civil law region, to receive the concept in its legal system. Instead, the Arrangement recognises, *inter alia*, failure to provide the losing party with notice or sufficient defence time in accordance with the law,¹¹⁸ or obtaining a judgment by fraudulent means,¹¹⁹ as the grounds to refuse recognition and enforcement. At least arguably, the two provisions, together with the public policy doctrine, would enable the courts of either side adequately to deal with most of the challenges of this kind.

¹¹² Given the Mainland's current legal conditions, the supervision procedure is still of importance in safeguard the integrity and the normal function of the judicial system. See Chu Hongjun (ed), *Shenpan Jiandu Zhidu Shizheng Yanjiu* (An Empirical Study of the Supervision Procedure) (Beijing: People's Court Publishing House, 2004), pp 43–48.

¹¹³ The further reform will inevitably require a formal amendment to the Civil Procedures Law and restructure the relations between the People's Court and the People's Procuratorate.

¹¹⁴ Graeme Johnston, *The Conflict of Laws in Hong Kong* (Hong Kong: Sweet & Maxwell Asia, 2005), p 603.

¹¹⁵ Smart, n 9 above, p 270; W. S. Clarke, *Hong Kong Civil Court Practice* (Desk edn) (Hong Kong: Lexis Nexis Butterworths, 2005), p 824; and *Dicey and Morris on The Conflict of Laws*, (London, 12th edn, 1993), pp 514–515.

¹¹⁶ *Jacobson v Frachon* (1927) 138 LT 386 (CA); and Bradford A. Caffrey, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region: A Comparative Study of the Laws of Eleven Asian Countries Inter-se and with the EEC Countries* (Sydney, CCH Australia Ltd, 1985), p 224.

¹¹⁷ Caffrey, *ibid.*, p 224; also Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgment* (London, Norton Rose, 4th edn, 2005), p 556.

¹¹⁸ The Arrangement, Art 9(4).

¹¹⁹ *Ibid.*, Art 9(5).

But there may still be grey areas. For instance, there is a considerable gap between the two regions on judicial competence. Also, Article 9 (4) of the Arrangement stipulates that service of notice by the originating court in accordance with its domestic law shall not be deemed a violation of due process. In this regard, although the Hong Kong SAR and the Mainland signed the Arrangement on Mutual Trust to Provide Service on Civil and Commercial Matters in 1998, it creates no legal obligation on either side.¹²⁰ In practice, the pressure of the trial time limit¹²¹ and the unsatisfactory result of the implementation of the Service Arrangement¹²² have made the People's Courts more willing to use other means more convenient to them, rather than the Service Arrangement. In *Zhu Yanmin v Wenwei Publishing Co*, the Intermediate People's Court of Zhuhai notified the Hong Kong defendant of the lawsuit against it in mid-November 2000 by express mail, followed by a mainland public notice. The defendant failed to appear at the legal proceeding in December in the mainland and a default judgment was granted. In the appeal, although it was noted that the public notice in the mainland as the way of service was "not proper", the Guangdong High People's Court rejected the defendant's argument that the service violated the provisions of the Service Arrangement.¹²³ If the judgment in a case like this were to be brought before the Hong Kong court for enforcement, despite its arguable compliance with the Mainland law, the Hong Kong court might be asked to consider the legal protection for Hong Kong residents of their lawful rights in general under the Hong Kong Basic Law¹²⁴ and the constitutional guarantee for parties' rights and principles maintained in the civil and criminal procedures of Hong Kong.¹²⁵

Another measurement of the extent of the cross-border judicial cooperation, although it may not be directly comparable due to the different systems,

¹²⁰ Article 1 of the Service Arrangement provides that the courts of the two sides *may* entrust each other to provide service of civil and commercial matters (emphasis added).

¹²¹ Under Article 113 of the Civil Procedure Law the notice needs to be served on the defendant within five days of docketing the case and Article 135 requires that in normal situation hearing of a case of first instance shall be completed within six months of its docketing. Although Article 250 exempts the People's Court from the domestic limit in foreign related cases, the Law does not specify its application to Hong Kong.

¹²² According to a survey, in 2000 the successful rate of service from Hong Kong through Guangdong People's Court was 87%, whereas only 35% service documents entrusted by Guangdong People's Court were successfully delivered in Hong Kong. Hu Yixing, "Theories and Practice of Service in Civil and Commercial Litigation in Guangdong concerning parties in Hong Kong or Macao", in Lu, n 22 above, p 265.

¹²³ The case was reported in Tao Kaiyuan (ed), *Guangdong Zhishi Chanquan Anli Jingxuan* (Selected Cases of Intellectual Property Cases in Guangdong), Vol 2 (Beijing: Law Press China, 2004), pp 57-63.

¹²⁴ Hong Kong Basic Law, Arts 4 and 38.

¹²⁵ *Ibid.*, Art 87.

is to consider the Mainland–Hong Kong Arrangement together with the Mainland–Macao Arrangement on the mutual recognition and enforcement of judgments. Despite the much shorter consultation time, the broader coverage and closer cooperation under the Macao Arrangement is striking. First, the Macao Arrangement not only covers the scope of the Hong Kong Arrangement, but also applies to labour disputes and civil compensation in criminal proceedings.¹²⁶ Moreover, judgments without payment of money may also be petitioned for recognition through a separate proceeding or directly used in legal proceedings of the other region as effective evidence.¹²⁷ Secondly, a severance provision is included in the Macao Arrangement, which allows the court to recognise or enforce judgments of the other side as much as possible, even if the judgment may not be entirely recognised or enforceable.¹²⁸ This provision is not present in the Hong Kong Arrangement.

Thirdly, a retroactive scheme is provided in the Macao Arrangement enabling the parties concerned to enforce the judgments rendered in the period between Macao's reunification and the effective date of the Arrangement in accordance with the provisions of the Arrangement, even if the parties failed to apply for recognition and enforcement, or such applications were refused in the other region during this period.¹²⁹ This type of arrangement was also stipulated in the Agreement of Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR as to the remedy for the parties during the legal vacuum period.¹³⁰ However, a similar provision is not found in the Hong Kong Arrangement. According to Article 17 of the Arrangement, only the judgments rendered on or after the effective date of the Arrangement may benefit from the newly established rules.

Last, but not least, a cross-border cooperative scheme has been established under the Macao Arrangement, under which the courts of one side may, when needed, contact the courts of the other side to verify the genuineness of the judgment.¹³¹ The courts of both sides shall provide each other with the relevant legal materials in implementing the Arrangement, and report to each other as to the implementing conditions every year.¹³² Apparently these measures were not considered appropriate to help to mediate the sharp disparities between the common law system in Hong Kong and the mainland legal system.

¹²⁶ Macao Arrangement, Art 1.

¹²⁷ *Ibid.*, Art 3.

¹²⁸ *Ibid.*, Art 14.

¹²⁹ *Ibid.*, Art 21.

¹³⁰ The Agreement, Art 10.

¹³¹ Macao Arrangement, Art 7.

¹³² *Ibid.*, Art 23.

4. Comment: Further Practical Concerns

As stated above, the conclusion of the Arrangement is just the beginning of the cross-border assistance on substantive matters between the Hong Kong SAR and mainland China. The way forward may involve a number of challenges. First unlike the Mainland where the rules of Arrangement can be implemented by way of the Supreme People's Court circular to the local courts, in Hong Kong the implementation has to go through the legislative process to establish the new regime of inter-regional judicial cooperation.¹³³ Essentially, a new category of "mainland judgments" needs to be added to the current legal framework.¹³⁴ Thus, opinions expressed by the Hong Kong legislators and professionals should be considered, although the political landscape of the Legislative Council seems in favour of the implementation of the Arrangement.¹³⁵

Since the government first consulted with the Legislative Council in 2002, reservations have been expressed by its members on various aspects of the proposed mutual recognition and enforcement regime. Although these concerns have been well communicated to the mainland and reflected in the long course of consultation, some members of the Legislative Council raised their recent objections to an enforcement scheme on the basis of parties' agreement on the jurisdiction. Margaret Ng, for example, believed that the selection of jurisdiction between the Mainland and Hong Kong should not mean automatic entitlement to enforcement on the other side.¹³⁶ Certain legislators from business circles also expressed their reservations on the ground of incompetence concerning the Mainland judicial practice.¹³⁷

Such reservations, to an extent, are shared by some professional bodies in Hong Kong. For instance, the Hong Kong Bar Association in its first position paper on the Government Proposal for Reciprocal Enforcement of Judgments in Commercial Matters between the HKSAR and the Mainland dated

¹³³ The Arrangement, Art 19.

¹³⁴ Currently, neither Cap 319 nor Cap 9 can be used to implement the Arrangement with the Mainland.

¹³⁵ The latest example is the recent adoption of the controversial Interception of Communications and Surveillance Bill in early August 2006 where after 58 hour debate more than 200 amendments to the Bill proposed by legislative members were all rejected. See the VOA report of 6 August 2006, available at <http://www.VOANEWS.com/Chinese/w2006-08-06-voa35.cfm>.

¹³⁶ See the report of *Xinbao* (Hong Kong Economic Journal), 25 October 2005, p 4. However, it is argued that "The success of the New York Arbitration Convention demonstrates the value of a convention that combines enforcement of choice of forum with enforcement of the resulting award. The lack of any such global set of rules for litigation disadvantages persons with legitimate reasons for preferring litigation over arbitration." Ronald A. Brand, "Forum Selection and Forum Rejection in the US Courts: One Rationale for a Global Choice of Court Convention", in James Fawcett (ed), *Reform and Development of Private International Law*, (Oxford: Oxford University Press, 2002), p 84.

¹³⁷ *Ibid.* (the report).

19 April 2002, after highlighting its concerns with the mainland legal system, took the view that unless the Mainland would amend its current civil procedure law, the Hong Kong SAR should not implement any reciprocal enforcement of judgments arrangement with the Mainland. It asked the Hong Kong Government to adopt an approach more limited than that proposed in the consultation exercise.¹³⁸ In October 2004 a delegation of the Bar Association was surprised on its visit to Beijing when they were told that the conclusion of the proposed agreement on mutual judgment enforcement could be expected in 2005. Such “acceleration” was considered a “deviation” from the government’s original position in 2002 and amounted to a failure to carry out the consultation in a transparent way.¹³⁹ In its recent position paper, the Bar Association, while apparently recognising the urgency and importance of the mutual enforcement scheme, continued to express its concerns with the finality of mainland judgments. It proposed the issuing of a certificate of final judgment by the relevant Mainland court as a practical way to solve the problem.¹⁴⁰

Against this background, the deliberation of the Arrangement and implementing legislation before the Legislative Council will inevitably see further debates. As such, the Arrangement does not set out a definite date to become effective, but needs to wait for the completion of the relevant amendments to the current law of Hong Kong through the legislative procedures.¹⁴¹ In this regard both legal professionals and business people in Hong Kong may have their legitimate concerns due to the huge difference between the political, legal and economic systems of the two systems.

Regardless of legal terms and technical grounds, the real concern behind all the worries expressed seems to be the concern with the quality and competence of the judiciary of the Mainland. From the Hong Kong side, it might be argued that a more sensible understanding and political willingness is needed, otherwise the considerable differences between the regions will become an insurmountable barrier to cross-border judicial cooperation. In *Xingjiang Xingmei Oil-Pipeline Co Ltd v China Petroleum & Chemical Corp*,¹⁴² Stone J rejected challenges to the quality and experience of the judiciary in China and noted that it was candidly recognised by the Supreme People’s Court in its recent Annual Working Report to the National People’s

¹³⁸ Submission of the Hong Kong Bar Association on Proposal for Reciprocal Enforcement of Judgments in Commercial Matters between the HKSAR and the Mainland, dated 19 April 2002, paras 17 and 21.

¹³⁹ Submission of P. Y. Lo, the executive member of the Hong Kong Bar Association, to the Panel of Administration of Justice and Legal Services of the Legislative Council dated 11 November 2004.

¹⁴⁰ The Hong Kong Bar Association’s Position Paper on Reciprocal Enforcement of Judgments Arrangement between the HKSAR and the Mainland dated 21 February 2006.

¹⁴¹ The Arrangement, Art 19.

¹⁴² [2005] 2 HKC 292.

Congress that “it is an ongoing process to rectify various perceived inadequacies within the PRC legal system, it being stated that ‘further measures’ will be intensively and progressively instituted in order to solve the problems . . . in terms of the overall quality of justice administered in the Chinese courts.” As such, “at the end of the day all that a (Hong Kong) court fairly can do is to act on the quality of the evidence placed before it in any particular case.”¹⁴³ In building up an unprecedented regime of inter-regional cooperation within a country, this approach is apparently much more constructive than merely criticising the judiciary in the Mainland in a general and sweeping way.

On the other side, the judiciary of the Mainland and their work needs to be further improved. For a long time, wrongly decided cases caused by lack of training, corruption, local protectionism, political or command influence have made headlines from time to time both in and outside the Mainland.¹⁴⁴ In a recent report of the Standing Committee of the National People’s Congress on examination of the implementation of the Judges’ Law and Prosecutors’ Law, it was openly pointed out that judicial incompetence, corruption and lack of professional ethics of certain judges and prosecutors were major concerns of the people in mainland China.¹⁴⁵

In this context, effective measures are needed to safeguard the smooth function of the Arrangement. However, the current provisions of the Arrangement seem somewhat insufficient. Among the refusal grounds only public policy is available to challenge local protectionism or other wrongdoings. However, in the past, public policy has been considered by the Hong Kong court as a very rarely exercised ground for refusing to recognise foreign judgments or arbitral awards and the application of the doctrine is restricted to instances where enforcement would violate Hong Kong’s most basic notion of morality and justice.¹⁴⁶ Moreover, in order to deploy the public policy defence, the party against whom the enforcement is sought must bear the burden of proof of the wrongdoing in the Mainland. Without any institutional help, such a task may well amount to an almost impossible mission.

Indeed, in Hong Kong there have been deep worries about the exposure of Hong Kong businessmen to rulings obtained through questionable means on the Mainland. Simon Shi Kai-bui, Chairman of the Hong Kong Small and Medium Businesses Association, has commented: “if mainland businessmen sue Hong Kong people and win, even through corruption, they can ask

¹⁴³ *Ibid.*, pp 301–302.

¹⁴⁴ Jerome Cohen, “Party Lines Cloud Courts”, *South China Morning Post*, 7 November 2001.

¹⁴⁵ Report of the Vice Chairwoman Gu Xiulian of the Standing Committee of the National People’s Congress dated 26 August 2006: People’s Concerns with Judicial Injustice Caused by Minority Judges and Prosecutors, available at http://news.xinhuanet.com/politics/2006-08/28/content_5016788.htm.

¹⁴⁶ *Poklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39; and *Hebei Import-Export Corp v Polytek Engineering Co Ltd (No 2)* [1998] 1 HKC 193.

Hong Kong courts to enforce the judgment and will surely get their money in the end.” Ho Wei-wah, Director for the Society for Community Organization, adds that based on his personal handling of more than 100 cases in the big mainland cities, it is very difficult to prove foul play or personal influence, even when it is obvious.¹⁴⁷

In this regard, the scheme under the Macao Arrangement might from one perspective seem to have an advantage, in allowing the court of one side to contact the originating court of the other side in enforcement proceedings for verification of the genuineness of the judgment concerned¹⁴⁸ and exchange of legal information and materials in implementing the Arrangement between the Supreme People’s Court and the Court of Final Appeal of Macao.¹⁴⁹ These provisions would put the Macao Court in direct communication with the Mainland court, including the Supreme People’s Court, so that relevant issues can be dealt with on an institutional basis. Such court to court communication might, however, be expected to invoke widespread disquiet in Hong Kong legal and business circles.

Moreover, some Mainland commentators have even argued against the inclusion of a public policy doctrine. It is a concern that in determining whether a judgment was obtained by fraud in the originating proceeding the enforcing court may inevitably have to carry out substantive examination of the cross-border judgment. Such scrutiny not only increases the workload of the enforcing court, but also indicates doubt as to the abilities of the originating court.¹⁵⁰

In terms of application, the lack of a set of conflict of laws rules on jurisdiction issues significantly limits the usefulness of the Arrangement. Although it has been suggested that the Arrangement may encourage more people to take advantage of the cross-border scheme by litigating their disputes in Hong Kong through choice of jurisdiction, and thus bring in more business for Hong Kong lawyers,¹⁵¹ those who have reservations about the Mainland judicial system may choose not to enter into the agreement on jurisdiction selection so as to prevent the Arrangement from being applied. Moreover, given the considerable differences between the two legal systems, it may be difficult for

¹⁴⁷ Ravina Shamdasani, “Cross-Border Accord on Court Rulings Raises Fears about Bias”, *South China Morning Post*, 15 April 2006.

¹⁴⁸ Macao Arrangement, Art 7.

¹⁴⁹ *Ibid.*, Art 23.

¹⁵⁰ Lin Chaobin, “On Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Mainland and Hong Kong”, (2004) *Fujian Zhengfa Ganbu Guanli Xueyuan Xuebao* (The Journal of Fujian Institute of Political Science & Law), issue 7, p 68.

¹⁵¹ Interview with Professor Zhao Xianglin of China University of Political Science & Law and Ho Kwan Yiu, Vice Chairman of the Hong Kong Law Society, 21 *Shiji Jingji Baodao* (21st Century Economic Report), 26 July 2006; and Editorial: “Sifa Huren Dailai Guoji Shangji” (The Mutual Recognition brings in Business Opportunities), *Singtao Ribao* (Sing Dao Daily), 15 July 2006.

parties to reach such an agreement. Unlike an arbitration agreement, where the parties have autonomy to select the arbitrators, the agreement on jurisdiction selection would mean, in addition to the considerable difference in costs and complexity, the complete judicial control over the dispute and the proceedings and the winning party's entitlement to enforce the judgment concerned on the other side. In this circumstance, a prudent party may have to think twice before voluntarily entering into such an agreement.

Even where parties have concluded such an agreement, it still seems unclear to what extent the choice of court will be honoured and enforced. In *Yu Lap Man v Good First Investment Ltd*,¹⁵² the Court of First Instance and Court of Appeal held that the parties' agreement to subject to their dispute to the jurisdiction of the courts of the PRC was declaratory or permissive, but not exclusive of Hong Kong court's jurisdiction. In the Mainland, rampant local protectionism by way of denying parties' arbitration agreements, even in disregard of China's obligation under international treaties,¹⁵³ has forced the Supreme People's Court to take a series of measures. In particular, any local court decision not to recognise or enforce an arbitration agreement involving foreign parties must be reported to the Supreme People's Court; and before receiving the reply from the Supreme Court, the local court concerned shall not take the case.¹⁵⁴ In this regard the Arrangement sets out neither detailed rules, nor any safeguard. As a result, inconsistent approaches and applications may in practice prevent the parties' agreement from being effectively implemented.

From the perspective of parties to disputes, one may speculate as to how frequently cases falling under the Arrangement are likely to arise in the future. The limited scope of the Arrangement, excluding non-commercial and labour matters, has already been noted, yet it is suggested that the Arrangement may be little used even in the most typical cross-border commercial contract scenario. Where a Hong Kong business party and a Mainland business party are negotiating (at arms' length) the terms of their contract, it would be considered unusual for an exclusive choice of court agreement in favour of either Hong Kong or the Mainland to be included. This is because one may generally expect business parties to opt for arbitration rather than court litigation and there are well-established arbitral tribunals experienced

¹⁵² [1998] 1 HKC 726; [1999] 1 HKC 622.

¹⁵³ Alberto More, "The Revpower Dispute: China's Breach of the New York Convention" in Chris Hunter (ed), *Dispute Resolution in the PRC – A Practical Guide to Litigation and Arbitration in China* (Hong Kong: Asia Law Practice Ltd 1995), pp 151–158.

¹⁵⁴ Notice of the Supreme People's Court on Matters Concerning Foreign Related Arbitration dated 28 August 1995.

in handling China trade and investment disputes. One scarcely needs to mention the notorious costs of court litigation in Hong Kong,¹⁵⁵ nor the “difficulties” that have in the past accompanied foreign litigants in the Mainland courts.

On the other hand, where the parties are essentially contracting on the basis of one side’s standard terms and conditions, there may well be reason to include an exclusive choice of court agreement in the standard form. For example, there are many instances where a Hong Kong bank has lent money to a Hong Kong company, backed by a guarantee from a Mainland party, but subsequently had difficulty in recovering under the guarantee. In such circumstances, an exclusive choice of court agreement in favour of the Hong Kong courts would give the bank the prospect of a “second bite of the cherry”, in that, were there to be insufficient assets to recover fully in Hong Kong, a Hong Kong court judgment could be taken to the Mainland. Moreover, there is nothing in the Arrangement restricting its scope to instances where one party (or more) is from Hong Kong and one party (or more) is from the Mainland. With reference to the example given above, even if both the borrower and the guarantor were Hong Kong companies, any Hong Kong judgment would fall within the Arrangement and might be enforced accordingly, provided, of course, there were assets on the Mainland belonging to either the borrower or the guarantor.

Indeed, there is no reason, in theory, why the Arrangement should not apply where all the parties to the relevant contract are truly “foreign”, i.e. not Hong Kong or Mainland parties. But perhaps the most intriguing scenario (and likely not one envisaged by the drafters of the Arrangement) would be where two Mainland parties include an exclusive choice of court agreement in favour of the Hong Kong courts in their commercial contract. Let us say that goods are being sold by a party from the north of the Mainland to a party from the south of the Mainland, and that both parties are fearful of local protectionism should any dispute arise in the future and either side resort to the courts of their particular province or city. An exclusive choice of court agreement in favour of Hong Kong might carry with it the prospect of being able to have court proceedings without the spectre of local protectionism and would be attractive, in particular, if either party had dealings with Hong Kong businesses (as there would then likely be debts in Hong Kong that could be garnished). Even if there were no assets in Hong Kong, the judgment could be taken to the Mainland for enforcement.

¹⁵⁵ Chief Justice’s Working Party on Civil Justice Reform, *Executive Summary of The Interim Report and Consultative Paper* (Hong Kong, 2001), paras 11–16.

Furthermore, although the establishment of the cross-border cooperative regime is encouraging, its implementation may not necessarily guarantee the successful enforcement of any judgment. In Hong Kong execution of judicial judgments has not been considered a concern, but enforcement of judgments in mainland China has been a huge problem, even described as “the most difficult thing in the world”,¹⁵⁶ for almost two decades.¹⁵⁷ By the end of 1998, unexecuted judgments piled up to 536,338. This historical high even made the Central Committee of the Communist Party get involved and issued an unprecedented circular to mandate all the local party and government branches to deal with the problem. Despite significant efforts, at the end of 2003 there were still 383,887 judgments left unexecuted.¹⁵⁸ In recent years, auctions of judgments that cannot be enforced by desperate judgment creditors have even triggered a debate on not only their lawfulness, but also the authority and capacity of the People’s Court.¹⁵⁹ Apparently, there is little prospect of change in the short term, unless some institutional barriers including the local protectionism and bureaucratized judicial system can be removed.¹⁶⁰ Thus, the effective implementation of the Arrangement in the Mainland may only be expected on a realistic basis.

Besides the difficulties in executing judgments, there may be some additional situations where the petition for enforcement of a Hong Kong judgment in the Mainland will be denied. For example, The Supreme People’s Court in one of its circulars stipulates that the basic living support fund for laid-off workers of State owned enterprises, which is contributed by the debtor enterprise, the government and the social resource jointly, shall not be subject to any detention or execution against the debtor enterprise.¹⁶¹ Also recently, a sensitive question was raised by a judge in Guangdong: can an enforcement petition of a Hong Kong judgment against a State owned enterprise for an “extremely high” sum, which may lead to bankruptcy or job losses in the Mainland, be refused on the ground of “social public interests”?¹⁶² Although

¹⁵⁶ Qian Hongdao, “Economic Analysis of Enforcement Reform” in Wang E-Xiang (ed), *Zhongguo Sifa Pinglun* (China Judicial Review), Vol 2002, p 47.

¹⁵⁷ The difficulties to enforce judgments were first admitted in the Supreme People’s Court Working Report to the National People’s Congress in 1988.

¹⁵⁸ Tong Zhaohong (ed), *Minshi Zhixing Diaocha yu Fenxi* (Civil Enforcement: Investigation and Analysis), (Beijing: People’s Court Publishing House, 2005), pp 1–2.

¹⁵⁹ Ji Weidong, “The Worrying Thought on ‘Marketization’ of Judgments”, *Caijing* (Caijing Magazine), 21 August 2006, available at <http://caijing.hexun.com/text.aspx?sl=2290&id=1789561>.

¹⁶⁰ For a comprehensive discuss, see Donald C. Clarke, “The Execution of Civil Judgments in China” in Stanley Lubman (ed), *China’s Legal Reform* (Oxford: Oxford University press, 1996), pp 65–81.

¹⁶¹ The Notice of the Supreme People’s Court on Strictly Prohibition of Freezing and Transferring Basic Living Fund of Laid-off Workers of State Owned Enterprises dated 24 November 1999.

¹⁶² Cheng Wei, “Several Thoughts on Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Mainland and Hong Kong” in Liu Botao (ed), *Zhongguo Shewai Shangshi Shenpan Redian Wenti Tanxi* (Study on China’s Foreign Related Commercial Trials), (Beijing: Law Press China, 2004), p 288.

the question has not been answered by any Mainland authority, the deficiencies in the definition of the doctrine of "*ordre public*" as applied in the legislation and judicial practice of the Mainland are worthy of further concern.¹⁶³

Turning now to other issues, the Arrangement sets out further rules to minimise the potential disruption in case of the implementation of the supervision procedures. Under the Arrangement, enforcement proceedings in Hong Kong may not be affected if the retrial petition is filed by the parties concerned, or the People's Procuratorate lodges its protest. The Hong Kong court will suspend the enforcement proceedings only if the People's Court, including the Supreme People's Court, has made its ruling for retrial. Upon the completion of the new trial, enforcement can be carried out according to its result.¹⁶⁴ This arrangement is apparently designed to increase practical certainty, but may not solve all the problems. For instance, under the current Civil Procedure Law, a retrial is mandated if the protest of the People's Procuratorate is lodged. If the Hong Kong court ignores such an occurrence and continues its enforcement as the Arrangement allows, waste of judicial resource and injustice may result. Moreover, given the short statutory limitation under the Arrangement, it seems possible that a number of enforcement orders in Hong Kong may well be made before the People's Court makes its retrial ruling. The latter is not subject to any time limit under the current Civil Procedure Law. However, the Arrangement provides the rules only for suspension and termination of the enforcement proceedings in case of retrial or change of the original judgment, but fails to set out any clear rules for restitution claims which at some time in the future the courts, particularly on the Hong Kong side, may have to face.

Although the Arrangement is entitled, and intended to cover, both recognition and enforcement, it fails to set out sufficient rules for recognition. Under Articles 1 and 2 the judgments that fall within the Arrangement are confined to those with payment obligations. However, in practice there may be situations where the defendant wins the case and later wants to have the judgment in his or her favour recognised. Indeed, Article 11 stipulates that once a judgment is recognised in a cross-border court, it shall have equal legal force as that in the originating court. But it would seem that the Arrangement excludes the recognition of this kind of judgment in favour of the defendant due to the lack of any payment obligation.

Another grey area is the relationship between Article 3 and Article 17 on the effective time of the Arrangement. According to Article 17, judgments made after the effective date of the Arrangement shall be subject to the rules

¹⁶³ Yongping Xiao and Zhengxin Huo, "*Ordre Public* in China's Private International Law", 53 *The American Journal of Comparative Law*, 2005, p 675.

¹⁶⁴ Hong Kong Arrangement, Art 10.

of the mutual enforcement scheme. However, Article 3 explicitly stipulates that the parties' agreements on jurisdiction selection that would enable them to access the benefits of the Arrangement must be concluded after the effective date of the Arrangement. As a result, the real determining factor is whether the parties' jurisdiction agreement is concluded after the effective date of the Arrangement. Judgments made after the effective date, in respect of a contract entered into before the effective date appear not be subject to the rules of the Arrangement.

5. Conclusion

The Arrangement is a breakthrough in the establishment of a regime of cross-border judicial assistance between the Hong Kong SAR and mainland China under the "one country, two systems" principle. The implementation of the Arrangement will not only end the long period of having no mutual enforcement scheme, and help to promote the development of cross-border economic and trade relations, but may also pave the way for further development towards a more comprehensive system. However, given the Arrangement being a developing product with tough compromises, at the outset its use may be very limited and the operation of its rules needs to be tested in practice. The current legal conditions of the two sides will inevitably raise many more difficult issues in the operation of the Arrangement. Nevertheless, the first step in this very important legal area deserves a cautious welcome, rather than mere nitpicking.