

RECOGNITION AND ENFORCEMENT OF COURT JUDGMENTS BETWEEN HONG KONG AND CHINA: A REVIEW OF THE 2019 ARRANGEMENT

Date: 19 December 2019

Asia Complex Commercial Litigation & Dispute Resolution Alert

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On January 18, 2019, Hong Kong and China signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region ("2019 Arrangement"). When it comes into operation (no date has yet been announced), the 2019 Arrangement will establish a more comprehensive mechanism for the mutual recognition and enforcement of court judgments between the two jurisdictions, and it will supersede the previous arrangement signed in 2016, which was far more limited in scope. This article discusses the rationale for such arrangements between Hong Kong and China and the key elements of the 2019 Arrangement.

THE PRINCIPLE OF "ONE COUNTRY, TWO SYSTEMS"

On July 1, 1997, Hong Kong was reunified with China and became a special administrative region of the People's Republic of China pursuant to Article 31 of China's constitution.

Even prior to reunification, Hong Kong enjoyed close social and economic ties with China. The adoption of the open-door policy by China beginning in the 1980s in pursuit of economic reform brought about a further expansion of cross-border economic activities.

Hong Kong is governed in accordance with the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law"). It sets out a dual system of governance referred to as the principle of "one country, two systems." In particular, Article 5 of the Basic Law provides that the socialist system and policies shall not be practiced in Hong Kong, and the previous capitalist system and way of life shall remain unchanged for 50 years (i.e., until 2047), while Article 8 of the Basic Law provides that the laws previously in force in Hong Kong shall remain in force (except those that contravene the Basic Law). In short, this dual system of governance gives Hong Kong a high degree of autonomy from China, including an independent executive, legislature, and judiciary and control over its own domestic affairs.

Whereas Hong Kong's legal system is based on common law and is largely similar to jurisdictions such as the United Kingdom, Singapore, and Australia, China's legal system is officially referred to as the "socialist legal system with Chinese characteristics" and is based primarily on the model of civil law.

ARRANGEMENTS FOR MUTUAL LEGAL ASSISTANCE IN CIVIL AND COMMERCIAL MATTERS

In order to foster closer legal, economic, and administrative cooperation, Hong Kong and China have entered into a number of mutual legal assistance arrangements covering civil and commercial matters. These arrangements currently comprise:

1. Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and the Hong Kong Courts, signed on January 14, 1999 (entered into force on March 30, 1999).
2. Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Special Administrative Region, signed on June 21, 1999 (entered into force on February 1, 2000).
3. Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, signed on July 14, 2006 (entered into force on August 1, 2008) (the "Choice of Court Arrangement").
4. Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region, signed on December 29, 2016 (entered into force on March 1, 2017).
5. Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region, signed on June 20, 2017 (but not yet entered into force) (the "Matrimonial Arrangement").
6. The 2019 Arrangement, signed on January 18, 2019 (but not yet entered into force).
7. Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region, signed on April 2, 2019 (entered into force on October 1, 2019).

KEY ELEMENTS OF THE 2019 ARRANGEMENT

Scope

It will cover matters that are considered to be of a "civil and commercial" nature under both Hong Kong and Chinese law, and it will include both monetary and nonmonetary relief.

Relationship With the Choice of Law Arrangement and New Jurisdictional Threshold

It supersedes the Choice of Court Arrangement; however, there will be a transition period for any choice of court agreements entered into prior to the commencement of the 2019 Arrangement. The Choice of Court Arrangement is of limited use to litigants because it applies only to commercial contracts and places a number of requirements on those contracts in order to come within its scope. The new regime set out in the 2019 Arrangement removes these restrictions. Instead, a judgment must satisfy certain jurisdictional criteria to come within the 2019 Arrangement. In essence, this will mean showing a connection between the dispute and the requesting place, such as the defendant's place of residence, place of business, or place of performance of the contract, or the commission of the tort. In addition, jurisdiction can also be established by an express agreement in writing to

submit to the jurisdiction of the requesting court or by participating in the legal proceedings without raising a jurisdictional challenge.

Simultaneous Action in Hong Kong and China

It allows simultaneous applications for enforcement in both Hong Kong and China if the assets of the party against whom enforcement is sought are situated in both places. However, a party may not recover in excess of the sum specified in the judgment.

Grounds for Refusal

An application for recognition and enforcement of a judgment must be refused if, among others, it does not meet the jurisdictional criteria (see above), it was obtained by fraud, there was some occurrence of procedural impropriety, or where a judgment or arbitral award has been issued on the same cause of action. It must also be refused where it is considered by the requested court to be manifestly contrary to the basic legal principles or public policy interests of its jurisdiction.

Exclusions

It expressly excludes, among others, administrative or regulatory matters (e.g., judicial review, cases brought under the Securities and Futures Ordinance or Competition Ordinance); judgments on corporate insolvency, debt restructuring, and personal bankruptcy; matters in relation to the succession, administration, or distribution of the estate of a deceased person; judgments in matrimonial or family matters already covered by the Matrimonial Arrangement (see above), decrees of judicial separation, and certain types of disputes as categorized in China as matrimonial or family related; certain types of patent infringement disputes (however, judgments on contractual disputes and tortious claims for infringement of intellectual property rights are covered); maritime matters; and arbitration matters. It also excludes rulings on preservation orders, anti-suit injunctions, and interim relief.

The Hong Kong Decision in *First Laser* (FACV 6/2011, July 6, 2012)

First Laser is a decision of the Hong Kong Court of Final Appeal ("CFA"), which means it is of the highest precedent and authority in Hong Kong. The CFA held that although Hong Kong and China are part of one country, for the purpose of the conflicts of laws they are separate legal jurisdictions, and a judgement of the Supreme People's Court of China is a foreign judgment and will be recognized and enforced in Hong Kong only if it fulfills the conditions for recognition and enforcement at common law.

The 2019 Arrangement does not exclude the recognition and enforcement of foreign judgments by way of common law in Hong Kong. Therefore, pending the implementation of the 2019 Arrangement, the *First Laser* case will remain pivotal in Hong Kong for the enforcement of final judgments issued by courts in China. After the 2019 Arrangement comes into operation, it should largely replace the need to rely on the common law position insofar as Chinese judgments are concerned. However, the case will still be relevant for all other foreign judgments, save for the 15 designated jurisdictions covered by the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319).

CONCLUSION

The 2019 Arrangement is a welcome development for parties conducting business in Hong Kong and China. When it comes into operation, it will provide a comprehensive mechanism for reciprocal recognition and

enforcement of court judgments in civil and commercial matters between Hong Kong and China. A party seeking to enforce a court judgment covered by the 2019 Arrangement will be able to move far more quickly to protect and take control of assets. The outcome should mean greater certainty, expediency, and lower legal costs for litigants, as well as fewer difficulties navigating through the two legal systems.

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