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ENFORCEMENT OF HONG KONG SAR COURT JUDGMENTS IN THE PEOPLE'S REPUBLIC OF CHINA

I. INTRODUCTION

ON 1 July 1997 Hong Kong entered a new era when it was transformed from a British colony into a Special Administrative Region (SAR) of the People's Republic of China (PRC). The impact of the handover of Hong Kong cannot be overstated but, for the time being perhaps, may lie more in the sphere of ideology than in institutions.

The rule of law has long played an important role in maintaining the stability and prosperity of Hong Kong. Taking account of this, the Chinese Government, whose long-term interests lie in the stability and prosperity of Hong Kong, committed itself, in both the Sino-British Joint Declaration¹ and the Basic Law of Hong Kong Special Administrative Region (the Basic Law),² to maintain the judicial system in the Hong Kong SAR. That judicial system has been strengthened by the power of final adjudication being vested in the Hong Kong SAR.³ As well, enforcement of court judgments in Hong Kong, although presenting few problems in the common law context, is to be reinforced.

This comment is intended, in the context of civil and commercial cases, to deal with the enforcement of the judgments of Hong Kong SAR courts in the rest of the PRC (hereinafter referred to as "mainland China" or "the mainland"). Before the handover from British rule the recognition and enforcement of Hong Kong judgments in China was treated by reference (*canzao*) as recognition and enforcement of foreign judgments.⁴ After handover Hong Kong became legally part of the PRC and, therefore, theoretically, the judgments of Hong Kong SAR courts should be deemed to be municipal judgments. However, because of the autonomy granted under the 1984 Joint Declaration and the Basic Law, the Hong Kong SAR should be deemed a separate jurisdiction from the judicial point of view. Thus, some questions arise: shall the judgments of Hong Kong SAR be treated as foreign judgments where they are supposed to be enforced on the

1. Part III of the Elaboration by the Government of the People's Republic of China of its Basic Policies regarding Hong Kong, as Annex I to the Sino-British joint Declaration, states: "After the establishment of the Hong Kong Special Administrative Region, the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the vesting in the courts of the Hong Kong Special Administrative Region of the power of final adjudication."

2. The second paragraph of Art.81 of PRC, the Basic Law of Hong Kong SAR, states: "The judicial system previously practised in Hong Kong shall be maintained except those changes consequent upon the establishment of the Court of Final Appeal."

3. Unlike that before handover when the United Kingdom Privy Council served as Hong Kong's final appeal judicial organ, the judicial system in Hong Kong SAR will become an independent and separate system, with its own court of final appeal, according to the Sino-British Joint Declaration and the Basic Law.

4. As well known to the rest of the world, the Chinese attitude towards the "question of Hong Kong", was based on the "unequal treaties" hypothesis. The status of Hong Kong judgments, like anything following from the "unequal treaties", was not officially viewed as "foreign". But, they were treated, not viewed, by reference to applicable foreign relations.

mainland? In other words, will judicial assistance be viewed as international assistance or domestic co-operation? This question is not only of theoretical interest, but of practical importance.

II. ECONOMIC IMPLICATIONS OF PROPER ENFORCEMENT OF HONG KONG SAR JUDGMENTS

It is necessary to consider the question of enforcement of Hong Kong judgments in relation to the economic links between the Hong Kong SAR and the mainland in light of the significance of Hong Kong's judicial system for economic prosperity.

It is no exaggeration to say that Hong Kong's economic prosperity depends on its economic linkage with other economies. The mainland is now the largest trading partner of the Hong Kong SAR. Reciprocally, the Hong Kong SAR has become the second largest trading partner. The Hong Kong SAR is a major services centre for the mainland and particularly for the neighbouring province of Guangdong, providing such supporting infrastructural facilities as ports and airports, as well as institutional services such as banking, insurance and other business services. Hong Kong is the most important source of external investment on the mainland; at the end of 1996, the cumulative value of realised direct investment from Hong Kong amounted to about US\$100 billion, accounting for nearly three-fifths of the total external direct investment there. On the other hand, the mainland is the second largest source of inward direct investment in Hong Kong. At the end of 1995, the cumulative value of realised direct investment from this source amounted to US\$4 billion, accounting for 20 per cent of the total.⁵ Financial transactions between the Hong Kong SAR and the mainland have grown substantially over the past years. The four specialised national banks,⁶ and other banks of the mainland, have their presence in the Hong Kong SAR, with the Bank of China being the second largest banking group in Hong Kong. Meanwhile, an increasing number of the Hong Kong SAR's banks is seen in mainland China. More importantly perhaps, the Hong Kong SAR is used as a major funding centre by the mainland. Most of the fund-raising activities in the territory are related to obtaining syndicated loans. Since the middle of 1993, an increasing number of the largest State-owned enterprises on the mainland have listed H shares in the Hong Kong Stock Exchange.

In addition, multinational enterprises wishing to develop a relationship with mainland China have established regional headquarters in Hong Kong. It can be argued that Hong Kong's role as an economic centre depends to a large extent on the mainland. With the expansion of the mainland's economy, the commercial opportunities arising will be increasingly targeted by multinational enterprises. It is quite possible that businesses in the Hong Kong SAR, whether Hong Kong incorporated companies or Hong Kong-based subsidiaries of multinational enterprises, will, over time, develop closer links with the mainland.

5. The figures can be obtained from the Internet web site of the Hong Kong SAR Government Information Centre.

6. These are the Bank of China, the Industrial and Commercial Bank of China, the Agriculture Bank of China and the China Construction Bank.

In this regard, it is essential to point out the interaction between Hong Kong's external economic links and its judicial practice. Though more study is needed to detect the empirical linkage between a judicial system and an economy, it is plausible to make an argument that where such a system is fair and efficient, it is by nature commerce-friendly.

With this assumption in mind, it is time to examine how important to the external economic linkage of the Hong Kong SAR is enforcement of its judgments in mainland China. Suppose that an extensive external economic linkage implies the prospect of disputes. As is known to the international business community, Hong Kong has earned fame for its rule-based commercial environment and fair and efficient judicial system. However, a rule-based commercial environment is only effective if there exists an efficient and equitable means to settle disputes in the event of breach of obligations, and an efficient and equitable means to settle disputes is indispensable to a fair and efficient judicial system. Further, since proper enforcement of judgments brings considerable legal certainty to the dispute settlement mechanism, it is also beneficial to Hong Kong's external economic ties and hence its economic prosperity.

In the context of Hong Kong's mainland link, such close economic ties inevitably produce disputes between mainland-based and Hong Kong-based parties, irrespective of whether the latter is a Hong Kong incorporated company or a foreign subsidiary in Hong Kong. The Hong Kong SAR courts have jurisdiction over part, if not a substantial part, of those disputes according to the recognised principles of territorial or personal jurisdictions. Moreover, it often occurs that the parties to a business transaction elect as the forum the court within whose jurisdiction the transaction was carried out and that forum's law as the applicable law for any prospective disputes. Many parties elect to refer prospective disputes and disputes *fait accompli* to the Hong Kong courts because of the reputation which those courts have gained through decades of adjudication. This tendency is heightened by the fact that the laws of Hong Kong are more developed and predictable than the laws of the mainland. Without doubt, where the person or property the subject of an action before the Hong Kong SAR courts is on the mainland, then the judgments must be enforced on the mainland.

An inadequate disposition of this matter would not only give rise to individual injustice, but would impair a proper execution of the judicial decision and thus be detrimental to the reputation of the Hong Kong judicial system. Because Hong Kong's economic links and judicial practice interact, such a disposition would consequently harm Hong Kong's status as an international economic centre, which is of critical importance to Hong Kong SAR's future.

III. ENFORCEMENT OF JUDGMENTS IN THE PRC

WITH the economic implications of enforcement of Hong Kong SAR judgments in mind, it is time to examine how judgments, municipal and foreign, are enforced in law and in practice in the PRC.⁷

7. According to the Civil Procedure Law of the PRC, there are two types of judicial awards: judgment (*panjue*) and decision (*caijue*). However, the distinction makes no difference to their enforcement. For the sake of convenience, no distinction is made in this article between the judicial awards.

A. Enforcement of municipal judgments

According to the current Civil Procedure Law of the PRC, a final judgment is enforced by the people's court which first accepts the lawsuit concerned ("*diyì shèng fǎ yuán*").⁸ The provision provides that as long as a people's court first accepts a lawsuit, that court is to be responsible for the enforcement of any legally effective judgments that may be made, either by the court itself or, on appeal, by the superior court, even outside its jurisdiction.

However, pursuant to Article 210 of the Civil Procedure Law, where the person or property subjected to enforcement is in another locality, the court of first instance may itself choose to enforce the judgment concerned or may delegate enforcement to the court in the second locality.⁹ In the latter case, the delegated court assumes the absolute obligation to enforce the judgment without any further examination or review. However, it is usual that the people's court of first instance prefers to enforce its judgments, even where the person or property subjected to enforcement is located outside its jurisdiction, primarily because of the prevalent local protectionism of the mainland's judiciary.¹⁰

It should be borne in mind that enforcement of judgments is one of the most controversial issues in the mainland's judicial system. It may seem extraordinary, but it is a fact that the people's courts simply cannot always enforce their judgments in civil and commercial cases. Given that China is traditionally a country where administrative power dominates political and social affairs and that the rule of law is far from being established, law enforcement in general is more a function of the political environment and of senior leaders' interests in seeing the laws implemented than it is a consequence of the legislative having enacted them. The people's courts do not enjoy the same high status as their counterparts in Hong Kong. Thus, it is not uncommon that influential interested parties interfere in the enforcement of judgments by courts. As a result, if the prestige and authority of the judges concerned cannot counteract external interference, then enforcement of judgments is inefficient and biased.

8. Art.207 of PRC, the Civil Procedure Law.

9. Art.210 of PRC, the Civil Procedure Law reads: "if the person against whom [a judicial award] is to be enforced or the property, which is the subject of enforcement, is at another place [outside the court's jurisdiction], the enforcement may be delegated to the local court. The delegated court shall, within fifteen days starting from the receipt of the letter of delegation, start enforcement, and shall not refuse to do so. The delegated court shall, after the enforcement is completed, notify via letter the delegating court the result of enforcement; in case the enforcement is not completed within thirty days, notify the particulars of the enforcement." "If the delegated court fails to enforce within fifteen days from the receipt of the letter of delegation, the delegating court may request the court at a higher level over the delegated court to instruct the delegated court to enforce the judicial award."

10. In dealing with cases involving local parties and parties from other jurisdictions, the local court is often seen as biased to the local parties, either driven by the interests of or under pressure from the locality.

B. *Enforcement of foreign judgments in the PRC*

According to Article 267 of the Civil Procedure Law,¹¹ where a legally effective judgment made by a court of a foreign country needs to be recognised and enforced by the people's court of the PRC, the interested party may directly apply for recognition and enforcement to the intermediate people's court (*zhongji renmin fayuan*) which has jurisdiction; the foreign court may also make the request in accordance with relevant international treaties to which the PRC and the foreign country are signatories or by virtue of reciprocity.¹²

Unlike enforcement of municipal judgments, enforcement of foreign judgments has three characteristics: first, enforcement of foreign judgments is dependent on the existence of an international treaty between the PRC and the foreign country involved, while the delegated enforcement of municipal judgments is an absolute obligation of the delegated court; secondly, enforcement of foreign judgments falls exclusively within the province of the intermediate people's courts; thirdly, the interested party can initiate enforcement of a foreign judgment in the PRC while delegated enforcement of a municipal judgment does not involve the interested party.

In conclusion, either the interested party may apply or the foreign court may request recognition and enforcement by a people's court. In this context, it is worthwhile to note that the foreign court may request recognition and enforcement pursuant to the international treaties to which the PRC and the foreign country concerned are signatories; where no international treaties have been concluded between the PRC and the foreign country, the foreign court may so request in accordance with the principle of reciprocity. It is also worth noting that the interested party making such an application is not required to prove the existence of a relevant international treaty or a practice of reciprocity between the PRC and the party's own country.

However, Article 268 of the Civil Procedure Law sets out the requirements for a foreign judgment to be recognised and enforced in the PRC:

The judgment itself is final or legally effective;

11. Art.267 reads "If a legally effective judgment or decision by a foreign court requires recognition and enforcement by a people's court of People's Republic of China, the party concerned may directly apply for recognition and enforcement to the competent intermediate people's court. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by that foreign country and the People's Republic of China or with the principle of reciprocity, request recognition and enforcement by a people's court."

12. As to which intermediate people's court has jurisdiction, it shall be referred to Art.22 and Art.243 of the Civil Procedure Law. Art.22 states that the people's court of the defendant's domicile has jurisdiction. Art.243 further provides that, where the defendant has no domicile in the PRC, the people's court shall have jurisdiction if the contract is signed or performed at, or the object of the lawsuit is at, or the defendant's distrainable property is located at, or the torts are done at, or the defendant's representative office is located at, the venue of the court.

The judgment is in compliance with the basic principles of the law of the PRC and is not detrimental to state sovereignty, security and social common goods;¹³

The provision mandates the people's court to review the judgments of the foreign court in accordance with the international treaties to which the PRC is a signatory or with the principle of reciprocity, with a view to determining whether the foreign judgments contravene the basic principles of the law of the PRC or are detrimental to State sovereignty, security and social common goods. No recognition shall be granted to those judgments which are found to be contradictory to the basic principles of the law of the PRC or detrimental to state sovereignty, security or social common goods and there shall be no enforcement thereafter. In contrast with the case of delegated enforcement of municipal judgments where no review is allowed, review of foreign judgments on their merits is a precondition for the enforcement of foreign judgments in the PRC.

It should be noted that Article 268 treats recognition of foreign judgments differently from enforcement of foreign judgments. In the event of recognition of foreign judgments, no writ is necessary; in the event of enforcement, the people's court shall issue a writ of enforcement to that end.

IV. THE STRUCTURING OF JURIDICAL RELATIONS BETWEEN HK SAR COURTS AND THOSE IN THE MAINLAND UNDER THE BASIC LAW

IN the Elaboration by the Government of the People's Republic of China of its Basic Policies regarding Hong Kong, set out as Annex I to the Sino-British Joint Declaration, the Chinese Government undertook to assist or authorise the Hong Kong SAR Government to make appropriate arrangements for reciprocal judicial assistance with foreign States. The Elaboration, understandably, does not mention the policy regarding judicial assistance between Hong Kong SAR and mainland China.

The Basic Law of Hong Kong, on the other hand, contains only a vaguely worded stipulation in this regard. Article 95 states: "The Hong Kong Special Administrative Region, may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of the country, and they may render assistance to each other". Apparently, the provision leaves much to be clarified.

First, it fails to answer whether the Hong Kong SAR courts may enforce their final judgments on the mainland. It is made clear by the Basic Law that, unless embodied in the Basic Law, no law of mainland China will apply to Hong Kong SAR.¹⁴ Therefore, the provision in the Civil Procedure Law regarding enforce-

13. Art.268 reads, "In the case of an application or request for recognition and enforcement of a legally effective judgment or decision of a foreign court, the people's court shall, after examining it in accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity and arriving at the conclusion that it does not contradict the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and social and common goods of the country, recognise the validity of the judgment or written order, and, where [the judgment or decision] are to be enforced, issue a writ of enforcement in accordance with the relevant provisions of this Law; if the application or request contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security and social and common goods of the country, the people's court shall recognise and enforce it."

14. Art.18 of PRC, the Basic Law of Hong Kong SAR.

ment of judgments of municipal courts may not be invoked where judgments of the Hong Kong SAR courts need to be enforced on the mainland. On the other hand, unless a reciprocal arrangement is made that mainland courts can enforce their judgments in the Hong Kong SAR, it seems unlikely that the Hong Kong SAR courts will be given such authorisation. In fact, such a reciprocal arrangement will, undoubtedly, cause great confusion and is therefore most undesirable to the Hong Kong SAR.

Secondly, the provision fails to clarify whether the Hong Kong SAR courts shall request assistance from individual courts in mainland China on a case-by-case basis. Given that there are thousands of courts at all levels across the mainland,¹⁵ it is a great burden for Hong Kong SAR courts, and taking into account local protectionism no assurance of faithful enforcement can be expected.

Thirdly, the provision fails to elaborate whether the law of the Hong Kong SAR or the law of the PRC shall be paramount?

Finally, the provision fails to address whether the people's court on the mainland shall review the judgments of Hong Kong SAR before recognising and enforcing them within its jurisdiction.

V. ADVANTAGES OF A FORMAL AGREEMENT TO FACILITATE THE ENFORCEMENT
OF THE HONG KONG SAR JUDGMENTS IN MAINLAND CHINA

THE absence of an enforcement arrangement does not mean that a Hong Kong SAR judgment cannot be enforced on the mainland. Before and immediately after the handover the only means available to the Hong Kong courts for enforcement of their judgments on the mainland was by a working relationship, established normally on a case-by-case basis, between the courts of Hong Kong SAR and those of mainland China whereby the requested people's court would recognise and enforce the Hong Kong judgment after reviewing the judgment on its merits, having assured itself that there was no contravention of the basic principles of the law of the PRC and that the judgment was not detrimental to the state sovereignty, security and social common goods of the PRC. In this context, it is not difficult to find that judgments of Hong Kong SAR are treated as foreign judgments.

However, the advantages of such an arrangement should not be underestimated. An appropriate arrangement could mandate the people's courts on the mainland to respect the judicial process of the Hong Kong SAR courts and to honour the Hong Kong SAR judgments, thus limiting the ability of the people's courts to review the judgments of Hong Kong SAR on their merits and avoiding retrial of the same case. In comparison with the situation where there exists no

15. The court system of the PRC may be illustrated as follows: the Supreme People's Court (SPC) is the court of final appeal of China but it also adjudicates cases which it regards fall within its jurisdiction; under the SPC there are 30 Higher People's Courts at the provincial level; further, under each HPC there are several to dozens of Intermediate People's Courts (IPC); again under each IPC, there are several to dozens of Basic-level People's Courts (BPC) that the SPC may establish from time to time, but normally in line with the administrative zoning.

arrangement regarding enforcement of Hong Kong SAR judgments on the mainland, an arrangement will ensure that the procedural aspect of enforcement of Hong Kong SAR judgments becomes simpler and more expeditious, for example by a simple registration process as opposed to obtaining a judgment of the enforcing court or the equivalent procedure of *exequatur*.

The necessity of formulating such an arrangement is also self-evident given the difficulty of enforcement of judgments in mainland China. A comparison between Hong Kong's rule of law and the historical "lawlessness" in China would suggest a clash of monumental proportions. With this in mind, it is, needless to say, most desirable for the courts of the Hong Kong SAR to enforce their judgments on the mainland. As explained before, however, the people's courts will enforce the Hong Kong SAR's judgments on the mainland. A formal arrangement will, to a large extent, reduce, if not eradicate, the possibility for some local courts on the mainland to manipulate the enforcement of judgments.

It is no easy task to formulate such an arrangement. The difficulty lies with the Chinese Government which has reiterated that the "question of Hong Kong" is a domestic affair after the handover. It is therefore less likely for the Central People's Government and the Hong Kong SAR Government to conclude an international treaty for mutual judicial assistance. Despite that, a formal agreement is feasible: first, for the mainland, a desirable state in the future will be neither that of a silent partner nor a paternalistic partner in its relationship with the Hong Kong SAR since its interests as well as its commitment necessitate a genuine partnership approach. Secondly, the safeguard of the Hong Kong SAR's autonomy, including the independent judicial system, rests on the Central People's Government. The latter is under an implicit obligation to take the necessary steps to ensure that Hong Kong SAR judgments be enforced as they are, not only in foreign countries, but in other jurisdictions within the same country. It can be argued that, unless the Standing Committee of the National People's Congress (NPC) makes a further explanation of Article 95 of the Basic Law,¹⁶ a new way must be instituted to this end.

One alternative is to continue the present working relationship between the courts of Hong Kong SAR and those of mainland China on a case-by-case basis without any underlying legal framework.

A second alternative is to conclude an agreement between the two sides. For example, the Supreme People's Court (SPC) and the Department of Justice of the Hong Kong SAR Government may agree an informal memorandum under which an order of enforcement must be obtained from the Higher People's Courts before an intermediate people's court may commence enforcement. Under this arrangement, the Higher People's Court and the Hong Kong SAR Higher Court would be the judicial organs responsible for accepting applications for enforcement of final judgments, delegating enforcement of the judgments within its

16. It should be noted, in this context, that, according to Art.158 of PRC, the Basic Law of Hong Kong SAR, the power of interpretation is vested in the Standing Committee of the National People's Congress. The Hong Kong SAR courts are only authorised to interpret, in adjudicating cases, the provisions of the Basic Law which are within the limits of the authority of the Hong Kong SAR. It is not clear whether the enforcement of judgments falls within the scope of "adjudicating cases" for the purpose of interpretation.

jurisdiction and accepting such delegation from the other side. The intermediate people's court would not accept applications for enforcement.

A third option would be that the two sides, respectively, announce an internal directive in which each directs its courts at all levels to enforce, upon application by the interested party or request by the courts of the other side, the judgments made by the other's competent courts. Under this arrangement the internal directives may be issued by the SPC on the part of mainland China¹⁷ and the Department of Justice of Hong Kong SAR Government on the part of Hong Kong SAR.

With respect to the first alternative, it should be borne in mind that a working relationship, regardless of how well it is elaborated, will be subject to arbitrary unilateral suspension. Nevertheless, the judgments of Hong Kong SAR are at risk of manipulative enforcement by the mainland courts. Therefore, a working relationship between the two sides is apparently inadequate to ensure the enforcement of Hong Kong SAR judgments in mainland China and an advisable arrangement will go beyond the purely working relationship.

The second alternative is a formal mode of co-operation. It enables a certain co-ordination between the two sides in respect of public policy, for example, sovereignty, security and social common goods. However, it is understandably slow and inefficient and will increase the cost to the parties involved in civil and commercial cases. It is not appropriate for Hong Kong's business-friendly environment.¹⁸

Comparatively, the third option is most advisable. An arrangement thus formulated would have the same effect as the second alternative, but is more efficient. This approach can be made more attractive by requiring that each court may not review the judgments to be enforced within its jurisdiction.

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17. Under the current legal framework in mainland China, the Ministry of Justice is responsible for negotiation of judicial assistance agreements with foreign countries. However, it has no power to issue orders that the courts must follow. It is up to the Supreme People's Court (SPC) to issue orders binding to the courts at all levels across the country. Since the Hong Kong SAR is not likely to be treated as a foreign entity, and because of practical considerations, it is better for the SPC to issue such a directive.

18. On 30 Mar. 1999 the Arrangement regarding Mutual Requests for Assistance in the Service of Juridical Documents between the Mainland and Hong Kong SAR was promulgated respectively by the Supreme People's Court of the PRC and the Higher Court of Hong Kong at the same time. It covers only the mutual assistance in service of juridical documents between the courts of the Hong Kong SAR and the mainland, leaving open the question of mutual assistance in enforcement of judgments. Further negotiation is reportedly being held for the purpose of mutual assistance in enforcement of judgments. The arrangement is by nature of an agreement between the SPC and the Higher Court of Hong Kong. However, it was viewed as an internal directive in the accompanying explanatory speech by a Vice President of the SPC. The arrangement is similar to the approaches embodied in the second and third suggested alternatives in this article.

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