



CHINA DISPUTE RESOLUTION

# NEWS LETTER

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# NEWS ALERT

## **1. The Interpretation of the Supreme People's Court on Several Issues Regarding the Application of the General Provisions on Contracts of the Civil Code of the People's Republic of China Came Into Effect on 5 December 2023.**

On 1 January 2021, the Civil Code of the People's Republic of China came into effect, leading to the repeal of the previous Contract Law. As a result, the Supreme People's Court abolished previous judicial interpretations on the Contract Law, and new interpretations were issued to address emerging issues in judicial practice. The Interpretation of the Supreme People's Court on Several Issues Regarding the Application of the General Provisions on Contracts of the "Civil Code of the People's Republic of China" serves as a valuable supplement to the general rules on Contract, and clarifies important issues in that area of law. The Interpretation covers issues on, *inter alia*, the determination of reservation contracts (Articles 6-8), situations in which the breach of mandatory provisions does not affect the validity of the contract (Article 16), and when a change in circumstances can be said to have arisen (Article 32).

## **2. Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships" (II) Will Take Effect on 1 January 2024.**

The [Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships" \(II\)](#) will take effect on 1 January 2024. It consists of 13 articles that provide a framework for China's system of determining questions of foreign law. The major provisions are as follows: (1) In response to the absence of a specific list of ascertainment methods, Article 2 explicitly enumerates seven methods for determining questions of foreign law, such as information provided by the parties, services from legal ascertainment institutions, or opinions from foreign and domestic legal experts. Additionally, an open-ended provision is included, providing for determinations made by "other appropriate methods", thereby allowing flexibility for various approaches to be adopted as appropriate. (2) Second, in response to the absence of provisions on the burden of ascertainment costs, Article 11 specifies for the first time that, in the absence of an agreement between the parties, the court will exercise its discretionary power to determine any applicable costs which are incurred in ascertaining the relevant foreign legal position.

## **3. The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) and the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Rules Will Take Effect on 29 January 2024.**

On 10 November 2023, the Hong Kong SAR Government [announced](#) that the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) and Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Rules will commence operation on 29 January 2024. These provisions aim to realise the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the

Courts of Mainland China and of the Hong Kong Special Administrative Region signed by the Supreme People's Court of China and the Department of Justice of the Hong Kong SAR on 18 January 2019. In contrast to the current regime (namely, the Arrangement of the Supreme People's Court between Mainland China and the HKSAR on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction (No. 9 [2008] of the Supreme People's Court)), the new regime makes two critical changes: (1) the new regime no longer retains the requirement under the current regime for the parties to include an exclusive jurisdiction clause in writing in the underlying contract giving rise to the dispute; it is only necessary to comply with the statutory jurisdiction requirements for the new regime to apply; (2) the new regime expands the types of enforceable judgments. The current regime covers only monetary judgments in civil and commercial matters relating to contracts. The new regime will cover both monetary and non-monetary judgments and will include different types of judgments, such as judgments, decrees, settlements, and orders for payment.

#### **4. Approval Granted for the Business Office Registration of a Foreign Arbitration Institution for the First Time in Shanghai, China.**

On 1 December 2023, the Regulations on Promoting the Construction of International Commercial Arbitration Centres in Shanghai became effective. Article 16 permits well-known foreign arbitration and dispute resolution institutions to establish business offices in Shanghai. On the same day, the Shanghai Municipal Bureau of Justice granted approval for the registration of the Korean Commercial Arbitration Board Shanghai Centre ("Korean Arbitration Shanghai Centre"). The KCAB thus became the first foreign arbitration institution to have a business office approved in Shanghai. Previously, foreign arbitration institutions could only exist in China through representative offices. Institutions such as the SIAC, ICC, and KCAB had established representative offices in accordance with the [Notice of the State Council on the Plan for Further Deepening the Reform and Opening Up of the China \(Shanghai\) Pilot Free Trade Zone \(State Council \[2015\] No. 21\)](#). However, China's policies further liberalised in 2019, and the State Council's [Overall Plan for the China \(Shanghai\) Pilot Free Trade Zone Lingang Special Area](#) allowed well-known foreign arbitration and dispute resolution institutions to establish business offices in the Lingang Special Area to conduct international arbitration. Thus, approval was granted for the Korean Arbitration Shanghai Centre.

#### **5. Japanese Bankruptcy Proceedings Have Been Recognised by Chinese Court for the First Time.**

On 26 September 2023, the Third Intermediate People's Court of Shanghai Municipality issued a ruling recognising for the first time a Japanese civil rehabilitation proceeding involving a Japanese company. This procedure is similar to the bankruptcy reorganisation process under Chinese Law, where the debtor self-manages the company assets under the supervision of an administrator. The court also acknowledged the identity of the supervisory commissioner and allowed the supervisory commissioner, under certain conditions, to supervise the Japanese company's self-management of assets and business affairs within the territory of China. This case represents the inaugural instance of a Japanese bankruptcy proceeding being acknowledged by a Chinese court. The primary legal basis for Chinese courts to recognise foreign bankruptcy proceedings is Article 5 of the Chinese

Enterprise Bankruptcy Law. According to this provision, the conditions for recognising foreign proceedings include the finality of the judgment and the existence of reciprocity between the two countries. Reciprocity in this context refers to legal reciprocity, *i.e.* whether the laws of the relevant country provide for the acknowledgment of Chinese bankruptcy proceedings within that country. In the absence of evidence indicating the reciprocating country's refusal to recognise Chinese bankruptcy proceedings, it can be concluded that there is a reciprocal relationship between the two parties for the purposes of Article 5. The court in this case applied the principle of comity, confirming the existence of reciprocity between China and Japan in the recognition of cross-border bankruptcy cases.

#### **6. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents Came Into Effect in China on 7 November 2023**

The Convention Abolishing the Requirement of Legalisation for Foreign Public Documents ("Convention") took effect in China on 7 November 2023. China and other countries that have signed the Convention will no longer require consular authentication for public documents. Instead, they will use an Apostille to verify the authenticity of seals, signatures, and other such elements. This change will simplify the international circulation of official documents, reducing the burden on persons involved in foreign-related cases. The Beijing International Commercial Court has also released a document titled 'Litigation Guidance on the Understanding and Application of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents', which aims to provide a pragmatic guide to the Convention for both Chinese and foreign parties involved in legal proceedings.

#### **7. The Supreme People's Court of the PRC Published the Fourth Group of Typical Cases Related to the "Belt and Road" Initiative**

On 27 September 2023, China's Supreme People's Court ("SPC") released the Fourth Group of Typical Cases related to the "Belt and Road" Initiative. The 12 cases published this time cover various types of international commercial disputes, including international sale of goods, independent guarantees, letters of credit, and equity transfer. These cases address important issues in international commercial law, such as confirming that avoiding a contract under the CISG is equivalent to terminating a contract under Chinese law (Case No.1), and affirming the principle of payment upon the beneficiary's demand in the context of independent guarantees (Case No.4). The release of these typical cases is a significant initiative by the SPC to strengthen and improve the dispute resolution mechanisms for international commercial disputes related to the "Belt and Road" Initiative. It aims to contribute to the uniformity of judgments across various levels of Chinese courts on legal issues related to foreign commercial matters. Since 2015, the SPC has released a total of 40 typical cases related to the "Belt and Road" Initiative.

#### **8. The National Development and Reform Commission of PRC and the Hong Kong Monetary Authority Signed a Memorandum of Understanding on Supporting Cross-border Financing by Chinese Enterprises and Promoting the Development of the Hong Kong Bond Market.**

On 18 October 2023, the National Development and Reform Commission and the Hong Kong Monetary Authority signed a [Memorandum of Understanding \(MOU\) on Supporting Cross-](#)

[Border Financing by Chinese Enterprises and Promoting the Development of the Hong Kong Bond Market](#). According to the MOU, the key areas of collaboration between the two parties in this instance include:

First, supporting Chinese enterprises in issuing bonds in Hong Kong in line with the relevant regulations. This includes providing policy facilitation for eligible Chinese enterprises, with the aim of expanding financing channels for Chinese enterprises.

Second, jointly organising and participating in promotional activities to enhance the understanding of market participants regarding the policy regulations related to overseas debt for Chinese enterprises. This seeks to encourage market participants to utilize Hong Kong as a platform for cross-border financing.

Third, promoting diversified development of the Hong Kong bond market. This entails, *inter alia*, enriching the scope of related RMB business, encouraging issuers to issue innovative bonds, and expanding the variety of products.

## **9. The Shanghai International Economic and Trade Arbitration Commission Releases New Version of Arbitration Rules**

On 7 November 2023, the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center, “SHIAC”) officially introduced its [updated arbitration rules](#), which enter into effect on 1 January 2024. The new arbitration rules of the SHIAC are a combination of multiple instruments comprising the SHIAC Arbitration Rules (2024), the SHIAC Special Arbitration Rules for Aviation, the SHIAC Special Arbitration Rules for Data, and two instruments of SHIAC Guidance for online arbitration and ad hoc arbitration respectively. Building upon the 2015 version of the arbitration rules, the SHIAC Arbitration Rules (2024) reflect the experience accumulated by SHIAC in managing arbitration cases over the past decade. The number of articles in the Arbitration Rules has increased from 66 to 92, with one of the most noteworthy additions relating to ad hoc arbitration. According to Article 2 of the SHIAC Arbitration Rules (2024), the SHIAC may, according to the agreement of the parties and the Guidance concerning ad hoc arbitration, act as the appointing authority for arbitrators in ad hoc arbitration cases under the Arbitration Rules of the United Nations Commission on International Trade Law or other arbitration rules, and/or provide administrative services and other relevant functions in such cases. This marks the latest instance of a Chinese arbitral institution issuing rules related to ad hoc arbitration, following the release and implementation of the [China Maritime Law Association Temporary Arbitration Rules](#) and the [China Maritime Arbitration Commission Temporary Arbitration Service Rules](#) on 18 March 2022.

## **10. Ten Key Judicial Recommendations Released by the Hangzhou Internet Court**

On 7 November 2023, the Hangzhou Internet Court unveiled ten key judicial recommendations, including specific measures on strengthening the protection of personal information and a requirement to prominently label products utilising facial replacement technology. Hangzhou, the capital city of Zhejiang Province – one of China’s most economically developed regions – is home to prominent internet companies such as Alibaba. Therefore, the judicial recommendations from the Hangzhou Internet Court hold significant importance in China’s legal practice, particularly in



the realm of internet-related matters. It is noted that the entities receiving these recommendations promptly provided feedback and implemented corrective actions, contributing to the formation of best practices within their respective industries. These recommendations play a crucial role in China's ongoing efforts to optimise the online consumer environment and enhance the protection of consumer rights.



## **The Supreme Court Confirms Maritime Injunctions as a Proper Weapon Against the Grant of Anti-suit Injunctions**

“China Life P&C Insurance Co., Ltd Hunan Branch v. Verba Marine Co., Ltd” Guangzhou Maritime Court [2020] Yue 72 Min Chu No. 675

*Li Lei*

The Supreme People's Court of the People's Republic of China (“The Supreme Court”) has recently published a list containing the “Ten Leading Maritime Cases in 2022”. The sixth of these cases concerns the interplay between maritime injunctions on the one hand, and anti-suit injunctions on the other. In that case, China Life P&C Insurance Co., Ltd Hunan Branch v Verba Marine Co., Ltd, the Guangzhou Maritime Court granted an application for a maritime injunction ordering the Defendant to withdraw an anti-suit injunction it had applied for before the High Court of England and Wales. By listing this case as one of the leading maritime cases of 2022, the Supreme Court is effectively affirming the judgement of the Guangzhou Maritime Court, and confirming maritime injunctions as a proper and appropriate weapon against anti-suit injunctions.

### **Facts**


A shipment of soybeans carried by the MV “Cape Kasos” from the United States of America to China was damaged. China Life P&C Insurance Co., Ltd Hunan Branch as the insurer (the “Insurer”) had paid the assured (which was also the consignee in the bill of lading) as per insurance contract, and the Insurer had then subrogated the assured’s rights to claim against the Defendant, Verba Marine Co., Ltd (the Owner of the vessel (the “Owner”)), on basis of the relevant bills of lading before the Guangzhou Maritime Court. The Defendant Owner challenged the jurisdiction of the Guangzhou Maritime Court, but this challenge was dismissed by the Guangzhou Maritime Court at the first instance and the Guangdong High Court on appeal. The High Court of England and Wales later granted the Owner’s application for an anti-suit injunction (on the basis of there being a binding arbitration clause in the bills of lading), and ordered the Insurer to suspend or abandon all the proceedings it had brought before the Guangzhou Maritime Court. However, the Insurer then applied to the Guangzhou Maritime Court for a maritime injunction ordering the Owner to withdraw the anti-suit injunction in England and Wales.

### **Issue**

The central issue in this case was whether the Court should grant a maritime injunction ordering the Defendant to withdraw the English anti-suit injunction?

### **Decision**

The Guangzhou Maritime Court held observed that the Owner’s jurisdictional challenge had been dismissed both at first instance and on appeal. However, the Owner had failed to obey the final and



binding order from the Guangdong High Court to continue the suit before the Guangzhou Maritime Court. By applying for an anti-suit injunction before the High Court of England and Wales, the

Owner had infringed the legitimate rights and interests of the Insurer. The Guangzhou Maritime Court thus found that the Insurer's application for a maritime injunction was consistent with the relevant provisions of the Law on Special Procedures for Maritime Litigation. In addition, the Guangzhou Maritime Court noted that under English law, a party can apply to the English courts to withdraw an anti-suit injunction. The Guangzhou Maritime Court therefore granted the Insurer's application for a maritime injunction and ordered the Owner to procure the withdrawal of the anti-suit injunction granted by the High Court of England and Wales within 30 days.

### **Commentary**

Before this case, there was a further reported case decided by the Wuhan Maritime Court in 2017 between Huatai P&C Insurance Co., Ltd Shenzhen Branch ("Huatai") and Clipper Chartering SA ("Clipper"). That case concerned a similar factual matrix, save that the owner, Clipper, had not sought to challenge the jurisdiction of the Wuhan Maritime Court, but had instead directly applied to the Hong Kong High Court for an anti-suit injunction on the basis that there was a binding arbitration clause contained in the bills of lading. The Hong Kong High Court issued an anti-suit injunction in favour of Clipper and ordered the insurer, Huatai, to withdraw the legal proceedings commenced before the Wuhan Maritime Court. However, the Wuhan Maritime Court granted Huatai's application for a maritime injunction ordering Clipper to withdraw the anti-suit injunction before the Hong Kong High Court. In reaching this conclusion, the Wuhan Maritime Court considered that Clipper had made no challenge to the court's jurisdiction, which was deemed to be acceptance of the jurisdiction of the Wuhan Maritime Court. That case raised some debate among academics and practitioners.

However, by affirming this recent decision of the Guangzhou Maritime Court as a leading case, The Supreme Court has indicated its support for the approach adopted by the Guangzhou Maritime Court and, by extension, the Wuhan Maritime Court.

As we have noted, the English or Hong Kong Courts are prepared to grant anti-suit injunctions to uphold the parties' bargains if a binding arbitration clause exists, and the injunction defendant has breached the arbitration clause by commencing litigation. From a Chinese law perspective, the Chinese Courts will not have jurisdiction if there is a binding arbitration clause between parties. However, the essential jurisprudential difference between the Chinese Courts and the English (or Hong Kong) Courts is that the Chinese Courts, in most circumstances, do not recognize the binding force of an arbitration clause contained in or incorporated into bills of lading. In these circumstances, we consider that the ongoing battle between the anti-suit injunction and the maritime injunction will continue. It would accordingly be advisable for a party involved in similar cases in future to think twice before applying for an anti-suit injunction from foreign courts.

## A Practical Perspective on the Recognition and Enforcement of London Arbitral Awards in China

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**Abstract:** The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is one of the most important and comprehensive international treaties on the recognition and enforcement of foreign arbitral awards. It has greatly facilitated the cross-border enforcement of foreign arbitral awards. However, divergence in the interpretation of and standards applicable under the Convention by the contracting parties has also led to some uncertainty in the cross-border enforcement of foreign awards, particularly in cases where a party is in default. In this article, the authors will share some practical insights on the recognition and enforcement of London arbitral awards in China based on their rich experience as practitioners handling such cases.

### 1. Case Brief

On 2 August 2021, Shipowner Company A (a foreign company) and Charterer Company B (a domestic company) concluded a voyage charterparty which stipulated that "any disputes shall be resolved by arbitration in London under English law." On 16 March 2019, the vessel in question arrived at the discharge port, albeit having been delayed allegedly because of various defaults by Company B. Company A commenced an arbitration against Company B to claim for demurrage.

The London arbitration in this case proceeded as an ad hoc arbitration handled by London lawyers on behalf of Company A. The lawyers sent notices of the commencement and constitution of the arbitration to Company B by email and by post, but Company B did not participate. The arbitral tribunal rendered a default award, ordering Company B to pay demurrage and to bear the costs of the arbitration and the English lawyers' fees.

Unlike with the arbitration proceedings, Company B engaged with the attempt by Company A to have the arbitral award recognized and enforced in the Chinese Courts. In particular, Company B claimed that it had not received any email or mail notification about the arbitration, and had been completely unaware of it. Company B also contended that the arbitral award had violated various provisions of the New York Convention. Company B had evidence to prove that its original business personnel had resigned and its premises had moved before the commencement of the arbitration, which reasonably established that it had not received the mail notification. As this case concerned a default award in an ad hoc arbitration, the Chinese Court adopted an extremely cautious standard to determine the success or failure of the email delivery in question, requiring Company A to at least prove that Company B had received the email or that the email had been sent successfully. Because of the high standard of proof imposed, and the difficulty and expense of procuring electronic records after the fact in the absence of contemporaneous electronic records, this led to a deadlock in the case. Ultimately, the case was settled, with Company A receiving a settlement sum representing most of the demurrage claimed.

## **2. Procedure for Recognition and Enforcement of an Arbitral Award in the Chinese Jurisdiction**

The key consideration in the recognition and enforcement of foreign arbitral awards in domestic courts turns on whether the arbitral award meets the requirements of the New York Convention. In practice, the focus is on whether the foreign arbitral award meets the formal requirements set out in Article 4 of the Convention, as well as the further requirements set out in Article 5. The five bases for refusing recognition and enforcement in the first paragraph of Article 5 will only be relied on by the court if the respondent specifically raises an objection.<sup>i</sup> Conversely, the two grounds for refusal in the second paragraph of Article 5 will be actively policed by domestic courts.<sup>ii</sup>

In cases concerning recognition and enforcement, the key issue between the parties is usually whether the foreign arbitral award meets the requirements of Article 5(1). The most common disputes turn on whether the respondent had received adequate notice of the arbitral proceedings; and whether the composition of the arbitral tribunal and the arbitral proceedings are themselves in accordance with the arbitration agreement or the law of the curial seat.

In the present case, the arbitration agreement stipulated that "any dispute shall be resolved by arbitration in London in accordance with English law". According to section 2 of the Arbitration Act 1996 of the United Kingdom<sup>iii</sup>, although the parties did not agree on the specific rules applicable to the arbitration, the procedure to be applied, including as relates to the appointment of arbitrators, or the requirements as to notification and service, the arbitration procedure and the composition of the arbitral tribunal would nonetheless be governed by the Arbitration Act 1996, based on the agreed seat of the arbitration. Therefore, at the stage of applying for recognition and enforcement in the Chinese jurisdiction, as long as the applicant can provide evidence to prove that the entire arbitration procedure complies with the provisions of the UK Arbitration Act 1996, the court will consider that the resultant award meets the requirements of the New York Convention and further grant recognition and enforcement of the said award.

## **3. Reasons for Deadlock**


One of the reasons deadlock might arise is because domestic (Chinese) courts tend to be more cautious in relation to recognizing and enforcing arbitral awards, especially where the award is granted in default. In this case, given the applicant's defence denying the receipt of any arbitration notice, the court was also further concerned that Company A may not have strictly complied with the applicable notification procedures, thereby effectively preventing Company B from participating in the arbitration and presenting its case. To ameliorate such concerns, the court in the case under consideration required Company A to provide further evidence to prove that it had properly notified Company B.

Pursuant to Section 76 of the UK Arbitration Act 1996, the applicant may use any effective means to serve notices on the respondent. Therefore, it was acceptable to serve notices by email only.

Similarly, in a Chinese case ([2006]民四他字第 34 号), the PRC Supreme People's Court held that

"the applicant in the case served the respondent by email via a third party under the provisions of the Arbitration Act 1996. This method of service is not prohibited in China. If the applicant can prove





that the respondent has received the notice, the service shall be deemed to be effective.” This means that China does not prohibit the use of email for service. However, the Supreme People’s Court has also set a higher standard for determining whether email service is successful: the applicant must provide evidence that the respondent has confirmed receipt of the email, or provide other evidence that can prove that the respondent has received the email. In the hearing of this case, the court held that the email correspondence provided by Company A’s London lawyers was not sufficient to prove that the applicant had properly notified the respondent. The applicant needed to provide further evidence to prove that the other party had successfully received the email, or at least that the email has been sent successfully.

A second reason for why deadlock might arise is that there are significant differences in judicial practice between different jurisdictions. London lawyers are, perhaps unsurprisingly, experienced at handling English-seated arbitration cases governed by English law, but may not be familiar with the requirements for the subsequent recognition and enforcement of any resultant award in other countries or regions. According to our communication with several sets of practitioners based in London, having to specifically prove that an email was *actually* delivered to the other party's email address is not commonly required. Therefore, they may not have specific contingency plans to avoid such risks and meet the requisite evidentiary threshold. In the case under discussion, this evidentiary gap caused great obstacles to the recognition and enforcement of the award in China, and is a salutary reminder as to the importance of familiarity with local approaches to enforcement and recognition.

#### **4. Concluding Comments**

First, although email can be used to serve notices in London-seated arbitration, it is advisable to send a hard copy by mail and preserve all relevant records should recognition and enforcement in China be a potential consideration. Ideally, one might wish to specify the agreed notice delivery methods, addresses, and email addresses in the arbitration agreement. In the event of refusal of receipt by mail where recognition and enforcement in China may become an issue, it may be prudent to instruct Chinese lawyers to consider further offline delivery. The service record can be preserved by any of the following methods: procuring a signed delivery receipt, recording or filming the delivery process, or posting the arbitration notice at the business premises. Ensuring that preservation of the service record is maintained will provide certainty as to the delivery, and is likely to make it easier to convince the court that proper notice has been given.

Second, before the arbitration begins, it is important to communicate with lawyers in the country or region where the foreign arbitration award will be recognized and enforced. This will help to mitigate any unforeseen consequences which might arise from differences in judicial practice between different jurisdictions. It might also be advisable to instruct Chinese lawyers in circumstances where recognition and enforcement in China are potential developments to handle both the arbitration proceedings and the subsequent recognition and enforcement proceedings, both in order to reduce legal costs and to increase the certainty of the award being recognized and enforced.

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i Article 5 of the 1958 New York Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

ii Article 5 of the 1958 New York Convention

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
  - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

iii “Arbitration Act 1996

2 Scope of application of provisions.

- (1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.

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# Reciprocal Enforcement of Civil and Commercial Judgement between Mainland China and Hong Kong

*Alan Li, Celine Cen*

## I. Introduction

On 18 January 2019, the Supreme People's Court of the People's Republic of China ("SPC") and the Hong Kong Government 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"). The 2019 Arrangement seeks to improve the system, framework, and policy for mutual assistance in the civil and commercial matters involving Mainland China and Hong Kong.

The Hong Kong Government, on 10 November 2023, announced that the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645) ("Ordinance") and the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Rules (Cap. 645A) ("Rules") will come into operation on 29 January 2024. The Ordinance sets out the operation of the relevant mechanisms, while the Rules cover matters including practice and procedure relating to applications under the Ordinance.

The Ordinance seeks to implement the 2019 Arrangement in Hong Kong. In Mainland China, the 2019 Arrangement will be implemented by way of judicial interpretation to be promulgated by the SPC.<sup>1</sup>


Upon its commencement, the 2019 Arrangement will supersede the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned ("2006 Arrangement"). The 2006 Arrangement was signed in 2006 and took effect in 2008. As the 2019 Arrangement only applies to judgements made on or after the commencement date of the Ordinance, *i.e.* 29 January 2024, the 2006 Arrangement and the existing Hong Kong regime under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) will continue to apply to judgements rendered before 29 January 2024 under a contract with an exclusive jurisdiction agreement in favour of a Mainland Chinese or Hong Kong court.

## II. Highlights and Changes

Here are some salient aspects of the 2019 Arrangement, with divergence from the 2006 Arrangement highlighted.

### A. Jurisdiction requirement

The requirement for a written jurisdiction agreement that a Mainland court or a Hong Kong court has exclusive jurisdiction over the dispute(s)<sup>2</sup> to which the rendered judgment relates is removed in the 2019 Arrangement. Under the 2019 Arrangement, the jurisdictional requirement



is comparatively less strict, and will be satisfied if the dispute giving rise to the judgment has an adequate connection with the requesting place. Examples of such connection between the dispute and requesting place include: (a) the place of residence of the defendant being within the requesting place; (b) the defendant maintaining a representative office, branch, office, place of business or such other establishment without separate legal personality in the requesting place, and the action arose out of the activities of that establishment; (c) the action being brought on a contractual dispute where the place of performance of the contract is in the requesting place; and (d) the action being brought on a tortious dispute where the infringing act was committed in the requesting place.<sup>3</sup>

## **B. Types of matter**

The 2006 Arrangement applies mainly to judgements arising out of contractual disputes, excluding contracts of employment or contracts to which a natural person is involved as a party for purposes of personal consumption, family affairs or other non-commercial purposes. The 2019 Arrangement, however, covers a wide range of civil and commercial matters, with a list of express exclusions in cases on succession, administration or distribution of estate, certain defined matrimonial and family matters, certain defined cases concerning intellectual property rights, cases involving certain maritime disputes, bankruptcy (insolvency) cases, cases on the confirmation of the validity of an arbitration agreement or the setting aside of an arbitral award, cases on the recognition and enforcement of judgments or arbitral awards of other countries or regions, and cases involving disputes of a personal nature, etc.<sup>4</sup>

Unlike the 2006 Arrangement, which only allows for the enforcement of “decision[s] of payment”<sup>5</sup> (monetary relief), the 2019 Arrangement covers judgements entailing both monetary and non-monetary rulings.<sup>6</sup> In practical terms, this means that specific performance, for example, may soon be enforceable cross-border.


As a further noteworthy point, the 2019 Arrangement also applies to judgments concerning civil damages awarded in criminal cases.<sup>7</sup>

## **C. Scope and categories of enforceable judgments and level of courts**

Under the 2019 Arrangement, a ruling concerning preservation measures from a Mainland court and an anti-suit injunction or an order for interim relief from a Hong Kong court are specifically excluded from the definition of “judgement[s]” which are to be reciprocally recognised and enforced.

The levels of courts of both Mainland China and Hong Kong which are empowered to issue qualifying judgements have expanded in the 2019 Arrangement. Under the 2006 Arrangement, the Mainland courts include the SPC, the High People’s Courts, the Intermediate People’s Courts and certain designated Basic People’s Courts as annexed to the 2006 Arrangement. The 2019 Arrangement, by contrast, provides for the same, except without the need for Basic People’s Courts to be designated. As for the Hong Kong courts, the 2019 Arrangement further includes the Labour Tribunal, the Lands Tribunal, the Small Claims Tribunal and the Competition Tribunal, on top of the Court of Final Appeal, the Court of Appeal, the Court of First Instance of the High Court, and the District Court.<sup>8</sup>





In addition, the 2019 Arrangement merely requires the judgements to be “legally effective” as opposed to “final decisions with executive force” (in the 2006 Arrangement). The new terminology is likely to be more appropriate, as judgements subject to review might not be rigidly “final”.

#### **D. Grounds for refusal**

The grounds for refusing recognition and enforcement are largely similar in the two Arrangements. Should one of the following, *inter alia*, be made out upon a review of the evidence adduced by the respondent, the court of the requested place shall refuse recognition and enforcement: (a) the judgment does not satisfy the jurisdictional requirements of the respective Arrangement; (b) procedural unfairness on the part of the respondent during the original trial; (c) the judgement having been obtained by fraud; (d) the court of the requested place having rendered judgement or an arbitral award having been made in the on the same dispute, or the requested place having recognised and enforced a judgement or an award of another jurisdiction on the same dispute; and (e) the court of the requested place considering that the recognition and enforcement of the judgement from the other jurisdiction would manifestly violate the basic principles and social and public interests or public policy of the requested place.<sup>9</sup> These grounds are also bases to set aside the registration of a judgment before a Hong Kong court under the Ordinance.<sup>10</sup>

### **III. Procedures provided by the Ordinance**

The Ordinance provides the mechanisms to facilitate the reciprocal recognition and enforcement of Mainland Chinese and Hong Kong judgments:

#### **A. Registration of Mainland judgments in civil or commercial matters in Hong Kong to facilitate the enforcement of Mainland judgements in Hong Kong**

- Effect of registration: A registration would render the registered Mainland judgment enforceable in Hong Kong as if it were a judgment originally given by the Court of First Instance of the High Court on the day of registration. The judgment or part is to be recognised in a Hong Kong court as conclusive in any proceedings in respect of the same cause of action between the same parties and may be relied on by way of defence or counterclaim in any such proceedings.<sup>11</sup>
- The time limit for registration: within two years from a default by the other party in complying with required actions set out in the judgment.<sup>12</sup>
- The application procedures for registration:
  - (a) The applicant makes an application to the Court of First Instance of the High Court, supported by a sealed copy of the Mainland judgement, a certificate of effectiveness of the judgement and an affidavit, among other things.
  - (b) If the court is satisfied that the requirements for registration are met, it may make a registration order for the Mainland judgment, or for a part of it to be registered. The applicant then serves a notice of registration on all potential respondents.

- (c) Within 14 days after the notice of registration is served (unless some other time limit is specified by the court), a respondent may apply to the court to set aside the registration.
- (d) After the time limit for a setting aside application has expired or after any setting aside application, if made, has been finally dismissed, the Mainland judgment may be registered.<sup>13</sup>

#### **B. Application for judgment copy and certificate for enforcement of Hong Kong judgments in civil or commercial matters in the Mainland**

- The application procedures for the said certified copy and certificate include:
  - (a) Generally, the application should be made on affidavit to the registrar of the Hong Kong court which gave the judgment.<sup>14</sup>
  - (b) If such an application is made to a specified Hong Kong court in accordance with the Ordinance, that court must issue to the applicant a certified copy of the judgement and a certificate.<sup>15</sup>
  - (c) The applicant then makes an application to the Mainland courts for recognition and enforcement of the Hong Kong judgment in the Mainland in accordance with Mainland law.

#### **IV. Conclusion**

The 2019 Arrangement “establishes a more comprehensive mechanism for reciprocal recognition and enforcement of judgments in a wide range of civil and commercial matters between Hong Kong and the Mainland”. It includes a broad range of disputes, including those arising out of intellectual property rights. It covers both monetary and non-monetary relief. It enhances certainty and predictability of the civil and commercial judgement enforceability, reduces re-litigation risk and, increases time and cost efficiency. It also strengthens Hong Kong’s competitiveness as an international dispute resolution hub and a regional intellectual property trading centre.<sup>16</sup>

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<sup>1</sup> <https://www.info.gov.hk/gia/general/202311/10/P2023110900551p.htm>

<sup>2</sup> Articles 1 and 3, 2006 Arrangement.

<sup>3</sup> Article 11, 2019 Arrangement.

<sup>4</sup> Article 3, 2019 Arrangement.

<sup>5</sup> Article 1, 2006 Arrangement.

<sup>6</sup> Article 16, 2019 Arrangement.

<sup>7</sup> Article 1, 2019 Arrangement.

<sup>8</sup> Article 4, 2019 Arrangement; Article 2, 2006 Arrangement.

<sup>9</sup> Article 9, 2006 Arrangement; Article 12, 2019 Arrangement.

<sup>10</sup> Section 22(1), Ordinance.

<sup>11</sup> Sections 26-28, Ordinance.

<sup>12</sup> Section 10, Ordinance.

<sup>13</sup> Sections 10, 13, 20-21, Ordinance.

<sup>14</sup> Section 33, Ordinance.

<sup>15</sup> Section 34, Ordinance.

<sup>16</sup> <https://www.info.gov.hk/gia/general/202311/10/P2023110900551p.htm>

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