How to Navigate the Reciprocal Enforcement Between Hong Kong and Mainland China

Commercial and Contracts

Government

Litigation and Dispute Resolution

Artwork provided by the authors.

Cheat Sheet

- **Ease of enforcement.** 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* (the Arrangement) entered into in 2024 between Hong Kong SAR and Mainland China makes it significantly easier for judgments to be enforced in the respective jurisdictions.
- **Application.** The Arrangement only applies to proceedings concerning civil and commercial matters, matters not considered excluded judgments, and judgments given from specified Hong Kong SAR and Mainland Chinese courts, which must fulfill the jurisdictional requirement, and are not set aside.
- **Easing of the jurisdictional requirement.** The old 2008 Arrangement required parties to contract that either Hong Kong SAR or Mainland China had exclusive jurisdiction over the dispute. This requirement was replaced in the Arrangement by a relaxed jurisdictional requirement requiring the dispute or parties to have some connection with Hong Kong SAR or Mainland China.
- **Ancillary impacts.** The Arrangement has ancillary impacts on asymmetric jurisdiction clauses and security for costs. In-house counsel should also take note of possibilities for more convenient service procedures and be wary of the approaches on statutory interpretation expected from courts of both jurisdictions regarding the Arrangement.

The question of whether a judgment in one jurisdiction can be enforced in another jurisdiction has raised difficult questions for centuries. One of the ways which jurisdictions attempt to make it easier is by entering into arrangements for reciprocal enforcement with each other, for the arrangement would clearly take precedence over other enforcement options and the complexity of how judgments are to be enforced is minimalized.

Before the current Arrangement, there was 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* (the 2008 Arrangement), which came into force in 2008. The 2008 Arrangement was intended to address the difficulties of enforcing judgments in the respective jurisdictions as the lack of common rules in enforcing overseas judgments under common law (Hong Kong SAR) and civil law (Mainland China) created doubts as to whether judgments could be enforced across the border. Given the high volume of activities between Hong Kong SAR and Mainland China, this was a suboptimal position to be in, which the 2008 Arrangement sought to resolve.

As time went by, flaws began to show. The 2008 Arrangement's scope of application was limited, and utilization remained low. Reforms were needed with interactions between Hong Kong SAR and Mainland China increasing. The 2008 Arrangement was no longer sufficient to fully address the needs of both jurisdictions, and an updated regime with wider applicability was needed, leading to the introduction of the Arrangement in 2024.

As optimistic as it appears on its face, the Arrangement is embedded with inherent complexities. Nonetheless, this article attempts to unpack these complexities in a short and succinct manner, and hopefully leaves something for all in-house counsel to take away.

When can reciprocal enforcement assist parties in Hong Kong SAR and Mainland China?

The scope of the Arrangement was intended to be wide for "*civil and commercial matters*" and judgments given by the relevant Hong Kong SAR and Mainland courts.

Civil and commercial matters

The concept of "*civil and commercial matters*" is an elusive concept due to the different approaches under the laws of Hong Kong SAR and Mainland China. The proceedings are required to be considered a "*civil and commercial matter*" in both Hong Kong SAR and Mainland China, meaning that achieving a consistent definition in both jurisdictions is necessary.

One example of ensuring consistency is how Mainland China categorizes proceedings into three categories of civil, criminal, and administrative proceedings, while Hong Kong SAR categorizes proceedings into two categories of civil and criminal, with administrative matters falling under the category of civil proceedings. To achieve consistency between the jurisdictions, administrative proceedings were excluded from the Arrangement.

The definition of "*civil and commercial matter*" remains unclear. Hansard documents suggest that a

cause of action in a civil case in Mainland China would generally be determined by the nature of the civil legal relationship disputed by the parties, provided primarily in Mainland China's Civil Code and Civil Procedure Law. Case law rulings will develop on its interpretation.

Excluded judgments

Both jurisdictions list the type of matters or judgments which are excluded from application of the Arrangement. The coverage reflects the consensus of both jurisdictions for the Arrangement not to cover areas which substantive laws differ substantially between both jurisdictions. These matters include:

- Bankruptcy and insolvency,
- Matrimonial and family, and
- Confirmation of the validity of an arbitration agreement or setting aside of an arbitral award.

Effective judgments

The application of the Arrangement is also limited to judgments given by specified courts in Hong Kong SAR and Mainland China. The courts whose judgments would be applicable to the Arrangement has been significantly increased in comparison to the 2008 Arrangement.

In Hong Kong, the Arrangement now covers Hong Kong judgments from the following courts:

- Court of Final Appeal
- Court of Appeal
- Court of First Instance
- Competition Tribunal
- District Court
- Lands Tribunal
- Labour Tribunal
- Small Claims Tribunal

In Mainland China, the Arrangement now covers Mainland Judgments from the following courts:

- Supreme People's Court
- Mainland Judgment of the second instance given by a High People's Court or an Intermediate People's Court
- Mainland Judgment of the first instance given by a High People's Court, an Intermediate People's Court, or Primary People's Court and no appeal is allowed or the time limit for appeal has expired
- Judgments given according to the trial supervision procedure of the Mainland

Jurisdictional requirement

While not expressly set out as a prerequisite requirement, courts are required to set aside registration of a judgment from the other jurisdiction if the jurisdictional requirement is not met. This requirement replaces the previous onerous requirement in the 2008 Arrangement that required parties to agree to an exclusive jurisdiction clause, a requirement which severely limited the applicability of the 2008 Arrangement.

The jurisdictional requirement generally involves ensuring that the proceedings have some connection with the jurisdiction in which the judgment is sought to be enforced. These may include considering the residence of parties, the connection of the parties or the dispute to the jurisdiction wherein the judgment is sought to be enforced, or considering whether parties have contracted that a jurisdiction would have jurisdiction over the proceedings.

What in-house counsel need to know

There is no doubt that the Arrangement will play a key role in enforcing judgments in the respective jurisdictions in the future. It is imperative for in-house counsel to understand the implications that the Arrangement brings and how it will change the way enforcement of judgments is executed for contracts with a connection to these two jurisdictions.

Ease of enforcing cross-border judgments

The amendments in the Arrangement have substantially expanded the scope of application of the reciprocal enforcement regime to a wider range of judgments and courts, and they have replaced the onerous exclusive jurisdiction requirement with a relaxed jurisdictional requirement.

The Arrangement makes it easier for contracts to fall within its scope without having to expressly contract for it. For many disputes, proceedings will inadvertently fall within the scope of the Arrangement, and if parties wish to avoid the application of the Arrangement, they need to manage this at the contractual negotiation stage. We discuss further below how in-house counsel may be able to contract out of the Arrangement.

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Security for costs

Under the Arrangement, the registration applicant may be required to put up security for costs for the registration application when commencing enforcement proceedings. The party seeking to challenge the enforcement order may also be required to put up security for costs, as well as security for judgment. This can be an additional hurdle for seeking or challenging enforcement.

Interpretation of the Arrangement

Looking ahead, it is likely that a pro-enforcement approach will be taken by courts in both jurisdictions. Courts in both jurisdictions will likely look for consistent interpretations of their respective local promulgations of the Arrangement; and where there are differences, courts will look to interpret with an eye to encouraging enforcement between both jurisdictions.

In line with the legislative intent of the Arrangement to operate with as few disruptions as possible, courts are likely to interpret proceedings such that they will fall under the Arrangement in the right circumstances, except when they are excluded under the Arrangement.

Drafting considerations

While the Arrangement makes it easier for parties to enforce judgments in the other jurisdiction, it may not always be the case that parties wish for the Arrangement to apply to their dispute. For example, a debtor with substantial assets in one jurisdiction may wish to prevent creditors from bringing such assets within their reach by enforcing a judgment in the debtor’s jurisdiction.

It is important for in-house counsel to be aware of the potential implications of the regime at the contractual negotiation stage, to ensure that their contracts align with their companies’ interests.

Asymmetric jurisdiction clauses

Asymmetric jurisdiction clauses are common in commercial contracts but did not fall within the scope of the 2008 Arrangement as they did not amount to an exclusive jurisdiction clause. The position changed under the Arrangement as the jurisdictional requirements were relaxed and applicability of the Arrangement is no longer based strictly on contractual drafting.

Parties with asymmetric jurisdiction clauses in their contracts should no longer expect that such clauses will prevent the reciprocal enforcement arrangement from applying to disputes regarding contracts with such clauses.

While the Arrangement only applies to judgments given on or after 29 January 2024, it does not preclude contracts entered into before this date from being the subject matter of a judgment given on or after 29 January 2024. In-house counsel are recommended to consider this for arising disputes contract renewals.

Contracting out

While Hansard materials have not provided the possibility of contracting out expressly — and the Arrangement lacks judicial interpretation on this aspect — the jurisdictional requirement suggests that parties wishing for their contracts to not fall within the scope of the Arrangement may consider contracting out by adding an exclusive jurisdiction clause in their contracts or expressly agreeing for the Arrangement not to apply. By having this, the Arrangement may be inapplicable when it comes to enforcement (however is untested at the time of publication of this article).

Service of claims

In Hong Kong SAR, a claimant intending to serve a claim on a potential defendant in Mainland China typically has to go through the hassle of making a service out of jurisdiction, which requires the leave of the court.

With the introduction of the Arrangement, parties may pre-empt this difficulty by adding a clause in their contracts specifying the address for service of a Mainland Chinese party within Hong Kong SAR to negate the need to apply for service out of jurisdiction, as service within jurisdiction would be significantly faster and convenient as court leave is not required. After a Hong Kong judgment is obtained, the claimant can proceed to register their judgment in Mainland China.

Understand the Arrangement’s impact

The Arrangement is put forward as a mechanism to provide convenience to parties in Hong Kong SAR and Mainland China. While the Arrangement has made it easier to enforce judgments, in-house counsel should understand the impact that the Arrangement has on in-house drafting considerations and what they can do to protect the interests of their companies.

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