

EXPANDED ARRANGEMENT FOR ENFORCEMENT OF MAINLAND JUDGMENTS IN HONG KONG

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ENFORCEMENT OF MAINLAND JUDGMENTS IN HONG KONG

The long-awaited expanded arrangement for reciprocal enforcement of judgments between mainland China and Hong Kong under the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645 of the Laws of Hong Kong) (the “MJREO”) will take effect on 29 January 2024.

This means that mainland judgments in civil and commercial matters given on or after 29 January 2024 can be enforced in Hong Kong once said judgment has been registered with the Hong Kong Court of First Instance pursuant to the simple procedures promulgated in the MJREO.

The MJREO will replace the reciprocal enforcement regime under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597 of the Laws of Hong Kong) (the “Existing Ordinance”). The MJREO applies to judgments given on or after the date of its commencement (i.e. 29 January 2024). The Existing Ordinance continues to apply to judgments (given pursuant to an exclusive jurisdiction agreement in favour of the courts in mainland China or Hong Kong) dated before the commencement date of the MJREO.

KEY DIFFERENCES

The key differences between the MJREO and the Existing Ordinance are:

1. Removal of the exclusive jurisdiction requirement

To take the benefit of the reciprocal enforcement arrangement under the Existing Ordinance, the judgment creditor is required to show that the parties have agreed to submit to the exclusive jurisdiction of the courts in mainland China or Hong Kong in the underlying contract. This exclusive jurisdiction requirement is no longer required under the MJREO. Currently, the exclusive jurisdiction requirement effectively precludes asymmetric jurisdiction clauses favoured by banks and other institutions, which are permissible in common law and most civil jurisdictions (France and Russia being two notable exceptions). An asymmetric exclusive jurisdiction clause allows lenders to sue the borrower in jurisdictions of their choice (whether in Hong Kong or overseas), whereas it limits the borrower’s choice to sue in Hong Kong courts.

Instead, under the MJREO, a “jurisdictional requirement” of the original proceedings will have to be satisfied or the registration will be set aside. This requires that the original proceeding has sufficient connection with mainland China, such as the defendant’s residence or place of business being in mainland China at the time the proceedings were accepted by the mainland court, or that the proceedings related to a contract the performance of which was on the mainland.

The MJREO therefore brings Hong Kong court jurisdiction clauses more in line with the corresponding position regarding arbitration clauses, where asymmetrical provisions are permissions under the principle set out in *China Merchants Heavy Industry Co Ltd v JGC Corp* [2001] HKLRD (Yrbk) 21 and in *China Railway (Hong Kong) Holdings Ltd v Chung Kin Holdings Co Ltd* [2023] HKCFI 132, where the Hong Kong courts provided further guidance on non-exclusive arbitration clauses.

2. Expanded scope of enforceable judgments

Under the Existing Ordinance, only monetary judgments given by courts in mainland China or Hong Kong in commercial disputes are recognised and enforced. The MJREO expands the types of judgments that can be recognised and enforced to include both monetary and non-monetary judgments that are civil and commercial in nature. Further, it adopts an exclusion list approach, whereby most civil and commercial cases will be covered except for those listed in the exclusion list. The exclusions include judgments given in respect of insolvency proceedings, certain maritime matters, certain intellectual property cases, certain arbitration related matters, succession of estate matters and matrimonial cases.

3. Broader range of acceptable courts

The MJREO broadens the range of acceptable courts and tribunals. Enforceable judgments from the mainland will no longer be limited to those courts that are specifically designated. Judgments given by lower courts and other tribunals (such as the judgments given by Primary People’s Courts in the PRC (where no appeal is possible); and judgments given by the Lands Tribunal and the Small Claims Tribunal in Hong Kong) can be recognised and enforced under the MJREO.

ENFORCEMENT OF HONG KONG JUDGMENTS IN MAINLAND CHINA

In mainland China, the new arrangement will be implemented by the judicial interpretation to be promulgated by the Supreme People’s Court, which is expected to provide a more comprehensive mechanism for the recognition and enforcement of Hong Kong judgments there.

To facilitate the enforcement of Hong Kong judgments in mainland China, certified copies of said judgments and a certificate certifying their effectiveness may be obtained from the Hong Kong Courts pursuant to the MJREO.

COMMERCIAL IMPLICATION OF THE NEW RECIPROCAL ENFORCEMENT ARRANGEMENT

1. Asymmetric exclusive jurisdiction clause possible

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The removal of the exclusive jurisdiction requirement means that the choice of asymmetric exclusive jurisdiction clause in offshore financing documents involving borrowers from mainland China is possible without losing the benefit of reciprocal enforcement under the MJREO.

It was decided in a Hong Kong case that the asymmetric exclusive jurisdiction clause did not satisfy the exclusive jurisdiction requirement under the Existing Ordinance. Following the commencement of the MJREO, the choice of asymmetric exclusive jurisdiction clause in financing transactions with mainland borrowers should no longer be problematic.

2. Reduce the need to re-litigate

The narrow scope of the existing regime often means that parties will effectively have to re-litigate the disputes in either mainland China or Hong Kong to obtain comprehensive judgment again if the original judgment could not be enforced under the Existing Ordinance. The simple reciprocal enforcement mechanism under the MJREO will hugely reduce the time, legal costs and risks usually associated with the cross-border enforcement of such judgments.

3. Hong Kong as the dispute resolution hub for PRC related disputes

The expanded reciprocal enforcement arrangement under the MJREO distinguishes Hong Kong as the ideal venue of choice for dispute resolution for PRC related matters. It signifies further commercial integration between mainland China and Hong Kong.

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