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Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

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First published 2012
Eleventh edition
ISBN 978-1-83862-655-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Enforcement of Foreign Judgments 2022

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Lexology Getting The Deal Through is delighted to publish the eleventh edition of *Enforcement of Foreign Judgments*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Cyprus and Germany.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Oliver Browne, Tom Watret and Georgie Blears of Latham & Watkins LLP for their assistance with this volume.



London
September 2021

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This article was first published in September 2021
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Hong Kong

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LEGISLATION

Treaties

1 | Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties, and what, if any, amendments or reservations has your country made to such treaties?

Regarding reciprocal recognition and enforcement of foreign judgments, Hong Kong is a party to three arrangements (collectively, the Arrangements) signed with the Supreme People's Court of the People's Republic of China, namely:

- 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 dated 14 July 2006;
- the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region dated 20 June 2017; and
- 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 dated 18 January 2019.

On 14 May 2021, Hong Kong and the Supreme People's Court of the People's Republic of China also signed The Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Record of Meeting) recording their consensus in this area.

Under the Hong Kong Basic Law, the Central People's Government is responsible for foreign affairs relating to Hong Kong (article 13), and the application to Hong Kong of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of Hong Kong, and after seeking the views of the Hong Kong government (article 153).

Other than the Arrangements and the Record of Meeting with mainland China, Hong Kong is a party to no bilateral or multilateral treaty for the reciprocal recognition and enforcement of foreign judgments.

As the Arrangements are specific to Hong Kong, no amendments or reservations need to be made.

Intra-state variations

2 | Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Hong Kong consists of only one jurisdiction. The enforcement of foreign judgments is uniform across Hong Kong and enforced in the same ways depending on the relief sought.

Sources of law

3 | What are the sources of law regarding the enforcement of foreign judgments?

Foreign judgments can be enforced in Hong Kong either:

- through the statutory registration scheme under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO) and the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO); or
- under common law.

The FJREO applies to judgments from 15 jurisdictions; namely, Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka.

The MJREO applies to judgments from the mainland, as defined under section 2, to mean any part of China other than Hong Kong, Macau or Taiwan.

In the absence of applicable regimes in various ordinances, the common law regime applies in recognising and enforcing foreign judgments in Hong Kong.

Hague Convention requirements

4 | To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Hong Kong is not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and therefore its provisions are not binding.

BRINGING A CLAIM FOR ENFORCEMENT

Limitation periods

- 5 | What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Under section 4(1) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO), a judgment creditor has six years from the date of the foreign judgment or, where there have been proceedings by way of appeal against the judgment, from the date of the last judgment given in the appeal proceedings, to have the judgment registered in the Court of First Instance (CFI) in Hong Kong.

Under section 7(1) of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO), a judgment creditor has two years from the last day of the period specified for the performance of the judgment if it is so specified, or from the date the judgment takes effect in any other case, to have the judgment registered in the CFI.

Under common law, a judgment creditor has six years from the date of the foreign judgment to commence fresh proceedings by writ in Hong Kong to recover the judgment sum as a debt.

There is no provision in the FJREO or the MJREO requiring the CFI to consider the statute of limitations of the foreign jurisdiction. Under common law, the usual six-year limitation period in Hong Kong applies.

Types of enforceable order

- 6 | Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Under section 3(2) of the FJREO, a foreign judgment is only registrable if it is for a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or another penalty. Further, concerning section 2, only foreign judgments made in civil and criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party are registrable.

Under section 5(2) of the MJREO, a mainland judgment is only registrable if it is for a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or another penalty. Further, concerning section 2, only mainland judgments for payment in civil or commercial matters are registrable.

Under common law, a foreign judgment is enforceable only if it concerns a fixed sum of money.

Given the above, foreign judgments for interim and permanent injunctions and specific performance, etc, are not enforceable in Hong Kong under the FJREO or the MJREO. However, for proceedings that have been or are to be commenced in a place outside Hong Kong and are capable of giving rise to a judgment that may be enforced in Hong Kong under any ordinance or at common law, a party can apply under section 21M of the High Court Ordinance (Cap 4) to seek interim relief in support of such foreign proceedings, which includes Mareva injunctions, Anton Piller orders, interlocutory injunctions and orders for preservation, inspection or delivery up.

Competent courts

- 7 | Must cases seeking enforcement of foreign judgments be brought in a particular court?

A party seeking enforcement of a foreign judgment must apply to the CFI for registration, whether under section 4(1) of the FJREO or section 5(1) of the MJREO.

Where a foreign judgment is not registrable under the FJREO or the MJREO, a party seeking enforcement must commence fresh

proceedings in the Hong Kong courts to claim the judgment sum as a debt for the foreign judgment to be recognised.

Separation of recognition and enforcement

- 8 | To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

There is a difference between recognition and enforcement of a foreign judgment. The concept of recognition can also differ slightly depending on whether it is considered under the FJREO, the MJREO or common law.

Under section 4(2) of the FJREO and section 14 of the MJREO, registration of a foreign judgment is to give the foreign judgment the same force and effect as if it were a judgment of the Hong Kong courts. A foreign judgment is to be registered in the CFI before it can be enforced.

Under common law, the foreign judgment is recognised only to the extent that it is proof of a valid debt that can be sued, and judgment will be given directly by the Hong Kong courts.

While registration or recognition of a foreign judgment means that the judgment becomes enforceable in Hong Kong, it does not automatically lead to enforcement. The judgment creditor must take additional steps. For example, a judgment creditor holding a registered or recognised foreign judgment could enforce it by applying for a garnishee order compelling a bank to pay what it holds on behalf of the judgment debtor to the judgment creditor. Other common means of enforcement include charging orders and writs of fieri facias.

OPPOSITION

Defences

- 9 | Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

The grounds for challenging a foreign judgment differ depending on whether it is registrable or recognised under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO), the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO) or common law.

Under section 6(1)(a) of the FJREO, the registration of a foreign judgment must be set aside if the court is satisfied that:

- the judgment does not fall under the provision of the FJREO or was registered in contravention of any provision in the FJREO (eg, the foreign judgment is not final and conclusive);
- the foreign court had no jurisdiction to give the judgment;
- the judgment debtor did not receive notice of the foreign proceedings in sufficient time to defend the proceedings;
- the judgment was obtained by fraud;
- enforcement of the judgment is contrary to Hong Kong public policy; or
- the rights under the judgment are not vested in the person making the application for registration.

Also, under section 6(1)(b) of the FJREO, the registration of a foreign judgment may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had, before the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

Under section 18 of the MJREO, the registration of a mainland judgment must be set aside if the court is satisfied that:

- the judgment does not fall under the provision of the MJREO or was registered in contravention of any provision in the MJREO;

- the relevant choice of mainland court agreement is invalid under the law of the mainland unless the original court has determined that the agreement is valid;
- the judgment has been wholly satisfied;
- the Hong Kong courts have exclusive jurisdiction over the case according to Hong Kong law;
- the judgment debtor did not appear in the original court to defend the proceedings, either not being summoned or being summoned but with insufficient time to defend the proceedings under the law of the mainland;
- the judgment was obtained by fraud;
- a judgment on the same cause of action between the parties to the judgment has been given by a Hong Kong court or an arbitral award on the same cause of action between the parties has been made by an arbitration body in Hong Kong;
- a judgment on the same cause of action between the parties to the judgment has been given by a court in a place outside Hong Kong or an arbitral award on the same cause of action between the parties has been made by an arbitration body in a place outside Hong Kong, and the judgment or award has already been recognised in or enforced by Hong Kong courts;
- the judgment is contrary to Hong Kong public policy; or
- the judgment has been reversed or otherwise set aside according to an appeal or a retrial under the law of the mainland.

Under common law, several defences can be raised, such as:

- the foreign court has no jurisdiction over the claim;
- the foreign judgment is not final and conclusive upon the merits of the claim, or is not for a fixed sum of money;
- the foreign judgment is contrary to substantial justice;
- the foreign judgment was procured by fraud;
- the foreign judgment is contrary to Hong Kong public policy; or
- the foreign judgment is inconsistent with a previous decision by the Hong Kong court or a foreign judgment recognisable in Hong Kong.

Injunctive relief

10 | May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

As long as the foreign judgment falls under either the FJREO or the MJREO, a defendant may apply to set aside the registration of the judgment to prevent enforcement. There is no need to obtain injunctive relief in general. Also, as execution on the judgment will not be issued until after the expiry of the period within which an application may be made to set aside the registration, there is no need to apply for a stay of the enforcement proceedings in general.

Under Order 71, Rule 9 of the Rules of the High Court (Cap 4A) (RHC), an application can be made to set aside the registration of a foreign judgment under the FJREO to prevent enforcement.

Under Order 71A, Rule 8 of the RHC, an application can be made to set aside the registration of a mainland judgment under the MJREO to prevent enforcement.

Under common law, as a foreign judgment will only be recognised by commencing fresh proceedings based on the judgment, the general practice to prevent enforcement is for the judgment debtor to defend the action brought in Hong Kong in recognition of the foreign judgment.

REQUIREMENTS FOR RECOGNITION

Basic requirements for recognition

11 | What are the basic mandatory requirements for recognition of a foreign judgment?

The requirements for recognition of a foreign judgment in Hong Kong will depend on whether the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO), the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO) or common law applies.

For a foreign judgment to be registered under the FJREO, the following requirements must be satisfied:

- the judgment must be given in the superior court of a designated country (ie, Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, the Netherlands, New Zealand, Singapore or Sri Lanka), which has unlimited jurisdiction in civil and criminal matters;
- the recognition application must be made within six years of the date of the original judgment or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment;
- the judgment must not have been wholly satisfied;
- if the judgment has been satisfied in part as at the date of registration, the judgment shall be registered only in respect of the balance remaining payable at that date;
- the judgment must be enforceable by execution in the country of the original court;
- the judgment is final and conclusive; and
- the judgment is an order for a sum of money (other than taxes, penalties or fines).

For a mainland judgment to be registered under the MJREO, the following requirements must be satisfied:

- the judgment must be from the Supreme People's Court, any Higher or Intermediate People's Court or certain recognised Primary People's Courts;
- the judgment concerns a commercial contract and was given after 1 August 2008;
- the parties to the commercial contract had a written agreement made after 1 August 2008 specifying that the courts in mainland China have exclusive jurisdiction over the dispute;
- the judgment is enforceable in mainland China;
- the judgment is final and conclusive; and
- the judgment is an order for a definite sum of money (other than taxes, penalties or fines).

Should the foreign judgment fall outside of the FJREO and the MJREO, it may be recognised under common law if the following requirements are satisfied:

- the judgment is final and conclusive (upon the merits of the claim in the foreign jurisdiction); and
- the judgment is for a fixed sum of money.

Other factors

12 | May other non-mandatory factors for recognition of a foreign judgment be considered and, if so, what factors?

Under the FJREO and the MJREO, there is a reciprocity requirement for foreign judgments to be registered in Hong Kong. Under common law, foreign judgments from a jurisdiction that does not recognise Hong Kong judgments may still be recognised in Hong Kong.

The Court of First Instance has the discretion to decide whether to allow the foreign judgment to be registered. Cases will be assessed and

decided on an individual basis. Factors to be taken into consideration may include public policy, fraud, inconsistency with previous Hong Kong judgments, etc.

Procedural equivalence

13 | Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction and, if so, how is that requirement evaluated?

There is no specific requirement for the foreign judgment to be decided with similar procedures to Hong Kong for it to be registered or recognised.

JURISDICTION OF THE FOREIGN COURT

Personal jurisdiction

14 | Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant and, if so, how is that requirement met?

Under section 6(2)(a) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO), the foreign court is deemed to have had jurisdiction in an action in personam if:

- the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings;
- the judgment debtor was the plaintiff in, or counterclaimed in, the proceedings in the original court;
- the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court;
- the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
- the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

There is no specific provision under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO) for Hong Kong courts to examine whether the foreign court had personal jurisdiction over the defendant.

In common law, a judgment creditor must prove that the foreign judgment is in personam. Concerning *Emanuel v Symon* [1908] 1 KB 302, in actions in personam there are five cases in which the courts will enforce a foreign judgment:

- where the defendant is a subject of the foreign country in which the judgment has been obtained;
- where the defendant was resident in the foreign country when the action began;
- where the defendant in the character of the plaintiff has selected the forum in which he or she is afterwards sued;
- where the defendant has voluntarily appeared; and
- where the defendant has contracted to submit him or herself to the forum in which the judgment was obtained.

Subject-matter jurisdiction

15 | Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy and, if so, how is that requirement met?

Under section 6(2)(b) of the FJREO, in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property, the foreign court is deemed to have jurisdiction if the property in question was at the time of the proceedings in the original court situated in the country of that court. Under section 6(2)(c) of the FJREO, in the case of a judgment given in an action other than any such action as is mentioned under section 6(2)(a) and (b), the foreign court is deemed to have jurisdiction if the jurisdiction of the original court is recognised by the law of the registering court.

Under the MJREO or common law, it is not a specific requirement for Hong Kong courts to examine whether the foreign court had subject-matter jurisdiction over the controversy.

Service

16 | Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The defendant must have been served with notice in sufficient time of the original action in the foreign jurisdiction, otherwise, the registration of the foreign judgment in Hong Kong must be set aside.

Under section 6(1)(a)(iii) of the FJREO, if the Hong Kong court is satisfied that the judgment debtor, being the defendant in the foreign proceedings (notwithstanding that process may have been duly served on him or her following the law of the foreign jurisdiction), did not receive notice of such proceedings in sufficient time to enable him or her to defend the proceedings and did not appear, the registration of the foreign judgment must be set aside. 'Notice' means actual notice of the foreign proceedings. Further, the defendant must have been served in sufficient time. The question of whether a judgment debtor has received notice of foreign proceedings in sufficient time is answered by reference to the detailed facts of each case.

A similar provision can be found in section 18(1)(f)(ii) of the MJREO.

Fairness of foreign jurisdiction

17 | Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

There is no requirement under the FJREO, the MJREO or common law for the Hong Kong court to consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment.

EXAMINATION OF THE FOREIGN JUDGMENT

Vitiating by fraud

18 | Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

According to section 6(1)(a)(iv) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO), the registration of a foreign judgment must be set aside if the Hong Kong court is satisfied that the judgment was obtained by fraud. A similar provision can be found in section 18(1)(g) of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO). Therefore, where there is an application

to set aside the registration of a foreign judgment alleging that it was obtained by fraud, the Hong Kong court will examine whether such an allegation is true.

Under common law, the fact that a foreign judgment is procured by fraud can be a defence in the proceedings for recognition of the foreign judgment.

Public policy

19 Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

According to section 6(1)(a)(v) of the FJREO, the registration of a foreign judgment must be set aside if the Hong Kong court is satisfied that the enforcement of the judgment is contrary to public policy in Hong Kong. A similar provision can be found in section 18(1)(j) of the MJREO. The Hong Kong court may consider a range of public policy issues in its decision to grant recognition and enforcement of a foreign judgment.

Under common law, the fact that a foreign judgment is contrary to Hong Kong public policy can be a defence in the proceedings for recognition of the foreign judgment.

Under the FJREO, the MJREO and common law, it is not a specific requirement for Hong Kong courts to examine the foreign judgment for consistency with the substantive laws in Hong Kong.

Conflicting decisions

20 What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

According to section 6(1)(b) of the FJREO, the registration of a foreign judgment may be set aside if the Hong Kong court is satisfied that the matter in dispute in the proceedings in the original court had, before the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

According to section 18 of the MJREO, the registration of a mainland judgment must be set aside if the Hong Kong court is satisfied that the judgment on the same cause of action between the parties to the judgment has been given by a Hong Kong court or a court in a place outside Hong Kong, and the judgment has been recognised in or enforced by the Hong Kong court.

Under common law, if the judgment of a foreign court is inconsistent with a previous decision of a competent Hong Kong court concerning proceedings between the same parties, it would normally not be enforced.

Enforcement against third parties

21 Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

The FJREO and the MJREO do not expressly provide for enforcement against entities not named in the foreign judgment. Both section 2 of the FJREO and section 2 of the MJREO define 'judgment debtor' as a person against whom the judgment was given, which includes any person against whom the judgment is enforceable under the law of the original court.

There is also no common law rule under which the Hong Kong court will apply the principles of agency or alter ego to enforce a foreign judgment against a third party. Therefore, if a judgment creditor wishes to enforce a judgment against a third party, he or she will have to bring fresh proceedings against such party.

Having said that, a judgment creditor can enforce the judgment against the judgment debtor through a third party; for example, the banks. Garnishee proceedings are a simple method of enforcement where the judgment debtor is him or herself the creditor of a third party. The most common example is garnisheeing a judgment debtor's bank account. Through garnishee proceedings, the obligation of the third party to pay money to the judgment debtor is transformed into an obligation of the third party to pay the money directly to the judgment creditor.

Alternative dispute resolution

22 What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The FJREO does not apply to judgments that under the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46) cannot be recognised or enforced in Hong Kong, which include foreign judgments given in breach of an agreement for settlement of disputes. Therefore, if the Hong Kong court is satisfied that the foreign judgment had an enforceable agreement to use alternative dispute resolution, then it will not be registrable under the FJREO.

For registration under the MJREO, the mainland judgment must contain a choice of mainland court agreement (ie, an agreement by the parties that any dispute will be determined by the mainland courts). Therefore, if the parties have agreed to use alternative dispute resolution, the judgment will not be registrable under the MJREO.

Under common law and in general, if the parties had an enforceable agreement to use alternative dispute resolution, then the defendant should have relied on the agreement to challenge the original proceedings in the foreign court before the judgment was given.

Favourably treated jurisdictions

23 Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

The FJREO applies only to judgments given in the superior courts of a designated country (ie, Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka). Similarly, the MJREO is only applicable to mainland judgments. This is because the above-mentioned countries also give reciprocal treatment to judgments given in Hong Kong. However, once a foreign judgment is registered, the judgment will have the same force and effect and can be enforced as if it were a Hong Kong judgment.

Under common law, no judgments from any foreign jurisdictions are given greater deference than judgments from others concerning recognition and enforcement.

Alteration of awards

24 Will a court ever recognise only part of a judgment, or alter or limit the damage award?

According to section 4(5) of the FJREO and section 9 of the MJREO, where a foreign judgment contains both matters that can be registered and matters that cannot be registered, the Hong Kong court may register the judgment in respect of only the parts that can be registered. Other than that, there is no provision under the FJREO or the MJREO that provides that the Hong Kong court may alter or limit the damage award.

AWARDS AND SECURITY FOR APPEALS

Currency, interest, costs

- 25 | In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

According to section 4(3) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO) and section 11 of the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO), where the foreign judgment is expressed in a foreign currency, it must be converted to Hong Kong dollars as at the date of registration of that judgment.

According to section 4(6) of the FJREO and section 12 of the MJREO, an application for registration of a foreign judgment made under the FJREO or the MJREO must specify the amount of the interest, if any, that under the law of the foreign court has become due under the judgment up to the time of registration.

Security

- 26 | Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

According to section 7 of the FJREO, an application can be made to set aside the registration of the foreign judgment if the applicant satisfies the Hong Kong court that an appeal is pending or that he or she is entitled and intends to appeal against the judgment. Under Order 71, Rule 4 of the RHC, the Hong Kong court may order the judgment creditor to give security for the costs of the application for registration and of any proceedings that may be brought to set aside the registration.

According to section 19 of the MJREO, if the Hong Kong court is satisfied that an appeal against the judgment is pending or that the case on which the judgment was based is ordered to be retried by a competent designated court, the Hong Kong court may either set aside the registration or adjourn the application until after the expiry of such period as appears to the Hong Kong court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal or retrial disposed of by a competent designated court. Under Order 71A, Rule 4 of the RHC, the Hong Kong court may order the judgment creditor to give security for the costs of the application for registration of a mainland judgment and of any proceedings that may be brought to set aside the registration.

ENFORCEMENT AND PITFALLS

Enforcement process

- 27 | Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once the foreign judgment is registered under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO) or the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO), or once it is recognised under common law, it will be treated as if it were a judgment given by the Hong Kong courts. Under common law, once a foreign judgment is recognised by the court, it is prima facie enforceable.

There are various ways in which the foreign judgment can then be enforced in Hong Kong, which include:

- a charging order over a landed property or securities;

- an examination order against the judgment debtor, who will be cross-examined on oath about the whereabouts of his or her assets;
- a writ of execution for delivery of the goods, etc;
- garnishee proceedings, which require a third party who owes money to the judgment debtor to pay the judgment creditor;
- winding-up or bankruptcy proceedings, which wind up the judgment debtor if it is a company or bankrupt a judgment debtor if he or she is an individual;
- a stop order, which prohibits the transfer of the relevant funds or the registration of a transfer of the relevant securities; and
- a stop notice, which requires a notice to the judgment creditor of any proposed transfer of the relevant securities.

Pitfalls

- 28 | What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

A judgment creditor who seeks to apply for the registration of a foreign judgment in Hong Kong under the FJREO or the MJREO has to comply with the requirements set out in Order 71, Rule 3 or Order 71A, Rule 3 of the Rules of the High Court respectively to provide evidence in support of the application.

UPDATE AND TRENDS

Hot topics

- 29 | Are there any emerging trends or hot topics in foreign judgment enforcement in your jurisdiction?

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 New Arrangement) was signed between the Supreme Court of China and the Hong Kong government on 18 January 2019. The New Arrangement is the third arrangement providing for recognition and enforcement of judgments of a civil and commercial nature between China and Hong Kong.

The New Arrangement differs from the previous Choice of Court Arrangement (which is 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, signed on 14 July 2006), in that the former covers both monetary and non-monetary relief and includes all types of costs orders. The New Arrangement also provides greater clarity and certainty for the recognition and enforcement of judgments between the mainland and Hong Kong.

The New Arrangement is not effective yet and will take effect on a date to be announced after both the mainland and Hong Kong have undergone all the procedures necessary for implementation. Once it becomes effective, the New Arrangement will supersede the Choice of Court Arrangement. As the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO) was enacted as local legislation to give effect to the Choice of Court Arrangement, it is foreseeable that new legislation will be enacted to supersede the MJREO to give effect to the New Arrangement.

Further, to enforce the Arrangement on Reciprocal and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong SAR, which was entered into in 2017, the Legislative Council in Hong Kong passed the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill on 5 May 2021.

The ordinance will become effective after the issuance of the relevant court rules to complement the operation. Under the ordinance, a party to a judgment made by the mainland courts in a matrimonial or family case may apply to the Hong Kong courts for the recognition and enforcement of the same, provided that such mainland judgment contains at least one of a care-related order (such as an order relating to the custody and guardianship of a child), a maintenance-related order (eg, an order relating to the maintenance of a child, spousal maintenance or division of property) or a status-related order (eg, an order granting a divorce or for marriage annulment).

To apply for recognition and enforcement of the order in Hong Kong, a party should first obtain a certificate issued by the mainland court giving the judgment, which certifies the judgment to be a legally effective judgment in a matrimonial and family case. The party should then file the application with the District Court in Hong Kong together with other specified documents (including the certificate from the mainland court) with the requisite fees.

A party may also apply to the District Court in Hong Kong for recognition and enforcement of a Mainland divorce certificate.

The ordinance and the relevant rules are expected to enhance legal cooperation in mainland judgment enforcement in Hong Kong.

Concerning other foreign judgments, in the recent case of *Jiang Xi An Fa Da Wine Co Ltd v Zhan King* [2019] HKCFI 2411, the Court of First Instance of the Hong Kong High Court, by way of obiter dicta, expressed reservations about the common law restriction of recognising foreign non-monetary judgments. The court noted the global trend of recognising both monetary and non-monetary foreign judgments, and that these global developments suggest a need for re-assessment of the applicability of the common law restriction in Hong Kong. These remarks are obiter and are not binding and this remains to be seen about the developments in the current common law regime in Hong Kong.

Coronavirus

30 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 29 January 2020, the Hong Kong judiciary introduced a General Adjourned Period (GAP), during which all hearings of courts and tribunals originally scheduled to be held were adjourned. The GAP ended on 3 May 2020 but was reintroduced on 19 July 2020 for two days (namely, 20 and 21 July 2020) due to a spike in confirmed covid-19 cases in Hong Kong. The covid-19 pandemic has encouraged Hong Kong courts to make use of technology in court proceedings to minimise disruptions to court services during the GAP. One such example is *Cyberworks Audio Video Technology Limited v Mei Ah (HK) Company Limited & Ors* [2020] HKCFI 347, in which the High Court unprecedentedly allowed a hearing to be conducted via telephone conference after the trial was postponed due to the covid-19 outbreak. In the words of Coleman J in the *Reasons for Ruling in Cyberworks*, published on 28 February 2020, the covid-19 pandemic has allowed the court to reconsider how future court cases can be managed more effectively, especially because at least a decade has passed since the Civil Justice Reform was implemented.

Following the *Reasons for Ruling in Cyberworks*, a statement was made by the Chief Justice of the Court of Final Appeal, Mr Geoffrey Ma Tao-li, on 25 March 2020, in which he expressed that the judiciary had been urgently considering other further ways to increase court services during the pandemic, such as hearing submissions by telephone or videoconferencing.

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There have been three phases so far, namely:

- Phase I, from 3 April 2020: the court used videoconferencing facilities for remote hearings for suitable civil cases in the High Court;
- Phase II, from 15 June 2020: more courts allowed remote hearings by the use of a telephone; and
- Phase III, from 2 January 2021: wider use of videoconferencing facilities and telephone for remote hearings is allowed in civil cases in the following courts:
 - the Court of Appeal of the High Court;
 - the Court of First Instance of the High Court (Judges and Masters);
 - the Competition Tribunal;
 - the District Court (Judges and Masters), including the Family Court;
 - the Labour Tribunal; and
 - the Small Claims Tribunal.

The judiciary has published different guidance notes to help court users to adopt these changes, including:

- the Guidance Note for Remote Hearings for Civil Business in the High Court (Phase I: Video Conferencing Facilities);
- the Guidance Note for Remote Hearings for Civil Business in the Civil Courts (Phase II: Expanded Video-Conferencing Facilities and Telephone);
- the Guidance Note for Remote Hearings for Civil Business in the Civil Courts (Phase III: Wider Video-Conferencing Facilities and Telephone); and
- the Technical Specifications of the Judiciary’s Video Conferencing Facilities for Remote Hearings for Civil Business.

As a result of these developments, there have been cases where the court has determined that a hearing of a summons is suitable for remote hearing using a telephone and has given directions on how the hearing by way of telephone shall be conducted. For example, in some cases, the court has directed that all applicable court rules or practices will continue to apply to the remote hearing, except that there is no need to stand at the beginning or end of hearings or when addressing the court. The court may also direct the parties to arrange with the court clerk to set up the necessary facilities to conduct the remote hearing and allow sufficient time for any necessary testing to take place.

On 21 July 2020, the judiciary announced that all hearings of courts and tribunals originally scheduled from 22 July 2020 onwards would generally proceed as scheduled unless otherwise directed by the court, but added that for civil proceedings at the Family Court, District Court and High Court, the courts may direct parties in suitable cases to use alternative modes of disposal, such as paper disposal and remote hearings by telephone or videoconferencing.

Separately, the Hong Kong government has announced an Employment Support Scheme to provide time-limited funding to employers. Under the scheme, the government will provide wage subsidies to eligible employers to assist them in retaining employees and avoiding redundancy. The subsidy is 50 per cent of the monthly wages of the employee paid and capped at HK\$9,000 per employee per month. The duration of the subsidy will be for a maximum of six months.

Clients are advised to stay informed and watch out for government announcements and updates.

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