



# ICLG

The International Comparative Legal Guide to:

## **Enforcement of Foreign Judgments 2018**

### **3rd Edition**

A practical cross-border insight into the enforcement of foreign judgments

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## EDITORIAL

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Welcome to the third edition of *The International Comparative Legal Guide to: Enforcement of Foreign Judgments*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations relating to the enforcement of foreign judgments.

It is divided into two main sections:

Two general chapters. These chapters are designed to provide readers with a comprehensive overview of key issues affecting the enforcement of foreign judgments, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in the enforcement of foreign judgments in 36 jurisdictions.

All chapters are written by leading lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Louise Freeman and Chiz Nwokonkor of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

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# Hong Kong

Nick Gall



Gall

Lydia Mak



## 1 Country Finder

- 1.1 Please set out the various regimes applicable to recognising and enforcing judgments in your jurisdiction and the names of the countries to which such special regimes apply.**

Applicable Law/ Statutory Regime	Relevant Jurisdiction(s)	Corresponding Section Below
Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) (the “ <b>Ordinance</b> ”)	Australia Austria Belgium Bermuda Brunei France Germany India Israel Italy Malaysia The Netherlands New Zealand Singapore Sri Lanka	Sections 2 and 3

## 2 General Regime

- 2.1 Absent any applicable special regime, what is the legal framework under which a foreign judgment would be recognised and enforced in your jurisdiction?**

Absent applicable special regimes set out in various ordinances in Hong Kong, the common law applies as the legal framework under which a foreign judgment would be recognised and enforced in Hong Kong.

- 2.2 What constitutes a ‘judgment’ capable of recognition and enforcement in your jurisdiction?**

Under the Ordinance, a ‘judgment’ means: (i) a judgment or order given or made by a court in any civil proceedings; or (ii) a judgment

or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party. However, it does not include overseas judgments given in breach of agreement for the settlement of disputes.

Under common law, there is no specific definition of a ‘judgment’ in relation to the recognition and enforcement of a foreign judgment in Hong Kong. However, the definition of ‘judgment’ in the High Court Ordinance includes decrees.

- 2.3 What requirements (in form and substance) must a foreign judgment satisfy in order to be recognised and enforceable in your jurisdiction?**

The requirements that a foreign judgment must satisfy in order to be recognised and enforced in Hong Kong depends on whether any of the relevant ordinance in Hong Kong apply.

### Recognition under the Ordinance

For a foreign judgment to be recognised under the Ordinance:

- the judgment must be from a superior court – i.e., a court with unlimited jurisdiction in civil and criminal matters;
- the recognition application must be made within six years of the date of the original 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 between the parties; and
- the judgment is for a sum of money.

### Recognition under common law

For a foreign judgment that may not be registered under the Ordinance, recognition of the foreign judgment can be effected under the common law if:

- 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.

### Enforcement of Judgments in Hong Kong

Once a registered foreign judgment or a local Hong Kong judgment has been obtained, it can be enforced in Hong Kong. For the procedure for enforcement, see question 2.5 below.

## 2.4 What (if any) connection to the jurisdiction is required for your courts to accept jurisdiction for recognition and enforcement of a foreign judgment?

As long as the foreign judgment meets the requirements for recognition under either the Ordinance or common law, then it can be recognised and enforced in Hong Kong.

## 2.5 Is there a difference between recognition and enforcement of judgments? If so, what are the legal effects of recognition and enforcement respectively?

Yes, there is a difference between the recognition and enforcement of judgments.

In the context of the Ordinance, recognition means that a foreign judgment is given the same force and effect as if the foreign judgment were a judgment of the Hong Kong courts.

In the context of the common law, the foreign judgment is recognised only to the extent that it is for the payment of a liquidated sum of money on which judgment can be given directly by the Hong Kong courts.

The practical effect of recognition is that the foreign judgment becomes enforceable in Hong Kong. It does not automatically lead to enforcement of the same foreign judgment and a judgment creditor must take additional steps for enforcement. For example, a judgment creditor holding a recognised foreign judgment may seek to enforce that judgment by applying for a garnishee order to attach funds belonging to the judgment debtor (such as funds in a bank account) and have those funds paid to the judgment creditor.

## 2.6 Briefly explain the procedure for recognising and enforcing a foreign judgment in your jurisdiction.

### Procedure for Recognition under the Ordinance

A foreign judgment can be recognised under the Ordinance by the procedure below:

1. the judgment creditor of the foreign judgment applies *ex parte* to the Court of First Instance of Hong Kong to register the foreign judgment, which should be supported by an affidavit and a draft order setting out the basis upon which the requirements under the Ordinance are met (see question 2.3 above);
2. if the application and other documents are in order, the court will register the foreign judgment;
3. the judgment creditor must serve the notice of registration on the judgment debtor;
4. the judgment creditor may attempt to set the registration aside (the grounds are set out in question 2.7 below); and
5. if the registration is not set aside within the specified time (see question 2.7 below), the judgment creditor may proceed with the enforcement of the registered foreign judgment.

### Procedure for Recognition under the common law

A foreign judgment that cannot be registered under the Ordinance can be recognised under the common law by the procedure below:

1. The judgment creditor of the foreign judgment commences civil proceedings in Hong Kong by way of writ, which can be endorsed or include a statement of claim setting out the claim of a debt arising from the foreign judgment.
2. The writ must then be served on the Defendant. If the Defendant either (a) does not state its intention to defend within 14 days, or (b) provide a defence within 28 days, the Plaintiff can apply for a default judgment.

3. If a judgment (default or otherwise) is obtained, the judgment creditor may proceed with the enforcement of the judgment in the same way as any Hong Kong judgment.

### Enforcement of Judgment

Where a foreign judgment has been successfully registered under the Ordinance or sued upon under common law, it can then be enforced in Hong Kong. The method of enforcement will vary depend on the type of enforcement desired.

For example, the judgment may be enforced by garnishee proceedings. The process is as follows:

1. The judgment creditor issues an *ex parte* summons supported by an affidavit stating certain information, including the identity of the garnishee (e.g. a bank) in Hong Kong and that the garnishee is indebted to the judgment debtor.
2. At the hearing of the garnishee order to show cause, an order *nisi* will generally be made specifying a further hearing date to allow for the garnishee to attend.
3. At the further hearing, the Court may grant a garnishee order absolute if the garnishee does not attend or does not dispute liability to the judgment debtor.

## 2.7 On what grounds can recognition/enforcement of a judgment be challenged? When can such a challenge be made?

The grounds for challenging the recognition of a judgment differ depending on the method of recognition of the foreign judgment.

### Grounds for Challenging recognition of a Foreign Judgment under the Ordinance

A judgment debtor can apply to set aside a foreign judgment registered under the Ordinance on the following grounds:

1. the requirements for registration were not met;
2. the foreign court had no jurisdiction;
3. the judgment debtor did not receive notice of the foreign proceedings;
4. the judgment was obtained by fraud;
5. the enforcement of the foreign judgment is contrary to public policy in Hong Kong; or
6. the rights under the judgment are not vested in the person by whom the application for registration was made.

### Grounds for Challenging Recognition of a Foreign Judgment under common law

Under common law, a judgment creditor seeking to recognise a foreign judgment can bring an action in Hong Kong to sue upon a foreign judgment. Accordingly, the judgment debtor need only defend the action brought in Hong Kong by the judgment creditor. The grounds on which the judgment debtor may defend the action are as follows:

1. the foreign court had no jurisdiction over the claim;
2. the foreign judgment is not final and/or conclusive over the merits of the claim; or
3. the claim is not for a fixed sum of money.

### Challenging the Enforcement of a Judgment

If the judgment debtor successfully challenges the recognition of the foreign judgment, the foreign judgment would be rendered unenforceable in Hong Kong. On the contrary, if the judgment debtor unsuccessfully challenges the recognition of the foreign judgment, the judgment debtor may appeal the decision and apply for a stay of execution of the recognised foreign judgment. If a stay of execution is not granted, the judgment debtor has no standing to challenge enforcement of the foreign judgment.

**2.8 What, if any, is the relevant legal framework applicable to recognising and enforcing foreign judgments relating to specific subject matters?**

The following subject matters are governed by a different legal framework than that of the Ordinance and the common law:

- family law and insolvency matters under the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap. 188);
- particular regimes relating to judgments in connection with the carriage of nuclear materials or oils under the Nuclear Material (Liability for Carriage) Ordinance (Cap. 479) and Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414);
- applications for assistance under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525); and
- probate and letters of administration under the Probate and Administration Ordinance (Cap. 10).

**2.9 What is your court's approach to recognition and enforcement of a foreign judgment when there is: (a) a conflicting local judgment between the parties relating to the same issue; or (b) local proceedings pending between the parties?**

The Hong Kong courts generally take a liberal approach to the recognition and enforcement of foreign judgments.

Where there is a conflicting local judgment between the parties relating to the same issue, it is unlikely that a Hong Kong Court will consider the foreign judgment as final and conclusive whether for recognition under the Ordinance or under common law.

Where there are local proceedings pending between the parties concerning unrelated issues to that of the foreign judgment, there is unlikely to be any effect on recognition of that foreign judgment in Hong Kong.

**2.10 What is your court's approach to recognition and enforcement of a foreign judgment when there is a conflicting local law or prior judgment on the same or a similar issue, but between different parties?**

Provided that a foreign judgment is final and conclusive, there is unlikely to be any effect on the recognition and enforcement of that foreign judgment in Hong Kong when there is a conflicting local law or prior judgment on the same or a similar issue, but different parties.

**2.11 What is your court's approach to recognition and enforcement of a foreign judgment that purports to apply the law of your country?**

See question 2.10 above. The Hong Kong courts will not normally look at the underlying merits of the foreign judgment as long as all of the other requirements set out in question 2.6 are met.

**2.12 Are there any differences in the rules and procedure of recognition and enforcement between the various states/regions/provinces in your country? Please explain.**

No. The laws of Hong Kong apply to Hong Kong generally.

**2.13 What is the relevant limitation period to recognise and enforce a foreign judgment?**

Under section 4(1) of the Ordinance, a judgment creditor has six years from the date of the foreign judgment to have it registered in the Court of First Instance in Hong Kong. The same limitation period applies for recognition of a foreign judgment under common law.

**3 Special Enforcement Regimes Applicable to Judgments from Certain Countries**

**3.1 With reference to each of the specific regimes set out in question 1.1, what requirements (in form and substance) must the judgment satisfy in order to be recognised and enforceable under the respective regime?**

See questions 2.3 and 2.5 above in relation to the requirements for recognition and enforcement of a foreign judgment. If a foreign judgment falls within the statutory regime and is from a country set out in question 1.1 above, it must be registered under the Ordinance and no other process can be invoked (including any common law process).

The Arbitration Ordinance (Cap. 609) (the “**Arbitration Ordinance**”) in Hong Kong provides that any award made in any country (including Hong Kong) can be enforced in Hong Kong as though it were a judgment from the Hong Kong Court of First Instance (the “**HK Court**”), provided that leave is obtained from the HK Court.

The party seeking leave to enforce must produce:

1. An authenticated original award or a duly certified copy of it.
2. The original arbitration agreement or a duly certified copy of it.
3. If the award or agreement is not in either Chinese or English, a translation of it in either language must be produced and certified by an official or sworn translator, or diplomatic or consular agent.

**3.2 With reference to each of the specific regimes set out in question 1.1, does the regime specify a difference between recognition and enforcement? If so, what is the difference between the legal effect of recognition and enforcement?**

In respect of foreign judgments, the difference between recognition and enforcement is set out above at question 2.5.

For arbitral awards, the Arbitration Ordinance makes no distinction between recognition and enforcement.

**3.3 With reference to each of the specific regimes set out in question 1.1, briefly explain the procedure for recognising and enforcing a foreign judgment.**

The procedure for recognising a foreign judgment is set out at question 2.6 above.

To enforce any arbitral award made in any country as though it were a judgment from the HK Court, leave can be obtained from the HK Court by the following process:

1. Making an *ex parte* application with a supporting affidavit. The duty of full and frank disclosure applies.

2. The affidavit should exhibit a certified copy of the Award and the Arbitration Agreement, together with a certified English translation if the Award and/or Arbitration Agreement are not in English, and briefly set out the factual background of the arbitration and confirm that the award has not been complied with.
3. While it is not a requirement to make a demand for payment before making an enforcement application, it is common practice to do so. This can be done by a written demand for payment as soon as possible. Evidence of unsatisfied demands for the sum owing under the award should be set out in the affidavit.
4. Once leave has been granted, the order must be served on the other party who will have 14 days to contest the order and set it aside. The award cannot be enforced until the expiration of this period.
5. If the order is unopposed after 14 days, the HK Court may grant leave to allow enforcement of the arbitral award as if it were a judgment of the HK Court. The party seeking to enforce the arbitral award can then proceed to enforcement in the usual way (see questions 2.5 above and 4.1 below).

**3.4 With reference to each of the specific regimes set out in question 1.1, on what grounds can recognition/enforcement of a judgment be challenged under the special regime? When can such a challenge be made?**

The grounds on which recognition and enforcement of a foreign judgment can be challenged are set out at question 2.7 above.

In relation to arbitral awards, the HK Court can refuse to grant leave to enforce an arbitral award under the Arbitration Ordinance if:

1. A party to the arbitration agreement was under some incapacity.
2. The arbitration agreement was not valid, either under the law, parties subjected it or under the law of the country where it was made.
3. The dispute related to matters not contemplated within the terms of arbitration or are beyond the scope of terms of arbitration.
4. The arbitral procedure was contrary to what parties agreed or the law where arbitration took place.
5. The award is not yet binding on parties or has been set aside or suspended by a competent authority.

(The above points being the “**Grounds of Refusal**”.)

It should be noted that the Arbitration Ordinance draws a subtle distinction between those awards made in a territory that is party to the New York Convention (a “**Convention Award**”) and those that are not (a “**Non-Convention Award**”).

For Convention Awards, the enforcement can only be refused on one of the Grounds of Refusal set out above. The HK Court does not have residual discretion to refuse.

For Non-Convention Awards, the HK Court may refuse to grant leave on any one of the Grounds of Refusal and is not bound to enforce the Non-Convention Award.

In short, the HK Court retains residual discretion for any reason to refuse leave to enforce a Non-Convention Award, whereas no such discretion is retained for Convention Awards.

## 4 Enforcement

**4.1 Once a foreign judgment is recognised and enforced, what are the general methods of enforcement available to a judgment creditor?**

Once the foreign judgment or arbitral award becomes a Hong Kong judgment, the normal enforcement routes become available to the Judgment Creditor.

This can be done in several ways: by issuing a writ of execution which directs the bailiff to seize and sell the Judgment Debtor’s goods to satisfy the judgment debt, by presentation of a petition to wind up a judgment debtor company or to declare bankrupt an individual Judgment Debtor; by Examination of the judgment debtor (if company, then one of its officers) before a master by oral cross-examination; by garnishee proceedings; or by charging order.

## 5 Other Matters

**5.1 Have there been any noteworthy recent (in the last 12 months) legal developments in your jurisdiction relevant to the recognition and enforcement of foreign judgments? Please provide a brief description.**

In 2016, a Special Commission was established by the Hague Conference on Private International Law in 2016 to prepare a draft Convention on the Recognition and Enforcement of Foreign Judgments, in order to enhance access to justice and facilitate cross-border trade and investment by reducing costs and risks associated with cross-border dealings. The Special Commission convened in February 2017 and November 2017 to discuss the draft Convention but it is yet to be finalised.

**5.2 Are there any particular tips you would give, or critical issues that you would flag, to clients seeking to recognise and enforce a foreign judgment in your jurisdiction?**

- In straightforward cases, an application under common law takes around six to 12 months. Under the Ordinance, the process takes around two to four months, if uncontested.
- Affidavits in support of recognition under the Ordinance should include any prior challenges to jurisdiction and dismissal of the same. Similarly, if a party has submitted to the jurisdiction of a foreign court or arbitral tribunal without challenge, this should also be noted in the affidavit to strengthen the application.
- If matters become contested, a judgment creditor may be well advised to take out an additional application for security for costs or an order that interim payment be made in court to safeguard the judgment creditor’s interests pending contested litigation in Hong Kong.
- Enforcement proceedings in arbitral awards are held in chambers (not open to the public). A judgment creditor may seek further anonymity and/or confidentiality by seeking orders that the arbitral award be kept sealed and confidential.



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Lydia speaks English, Cantonese and Mandarin.

# GALL

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