

**HONG KONG BAR ASSOCIATION’S COMMENTS ON**  
**THE DRAFT MAINLAND JUDGMENTS IN CIVIL AND COMMERCIAL**  
**MATTERS (RECIPROCAL ENFORCEMENT) BILL and RULES**

**A. INTRODUCTION**

1. 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 (“**Arrangement**”) was signed on 18 January 2019 with the aim of establishing a more comprehensive mechanism for reciprocal recognition and enforcement of judgments in civil and commercial matters between the Hong Kong SAR and the Mainland, thereby reducing the need to litigate the same disputes in both jurisdictions and further enhancing Hong Kong’s competitiveness as a regional centre for legal services.
2. Public consultation was launched by the Department of Justice seeking views on the drafts of the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill (“**Draft Bill**”) and the Rules (“**Draft Rules**”), which seek to implement the Arrangement in Hong Kong by introducing a legislative mechanism for registration of certain judgments given by the courts of the Mainland in civil and commercial matters. A similar mechanism has been provided in the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap. 639) (“**Matrimonial RRE Ordinance**”).
3. Briefly, under the Draft Bill and Draft Rules:
  - 3.1 A person may apply to the Court of First Instance (“**CFI**”) to have a Mainland judgment in a civil or commercial matter registered with the CFI on an *ex parte* basis;

- 3.2 The CFI may set aside the registration if the applicant has proved to the satisfaction of the court that any of the exhaustive grounds of refusal exists;
- 3.3 Both monetary (excluding punitive or exemplary damages) and non-monetary relief judgments may be registrable with the exception that (a) Mainland judgments awarding relief other than monetary relief in respect of a tortious dispute over an infringement of “specified intellectual property rights” or an act of unfair competition under the relevant Mainland law are excluded from registration and (b) Mainland judgments awarding punitive or exemplary damages in either of the two types of cases as referred to in (a) may be registrable; and
- 3.4 A registered Mainland judgment may be enforced in the same way as if it were a judgment originally given by the CFI.
4. The Hong Kong Bar Association (“**HKBA**”) had provided the Preliminary Response of the Hong Kong Bar Association dated 26 November 2018 on the “Consultation Paper on the Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters”. The HKBA now provides further views on the Draft Bill and Draft Rules in these Observations, focusing on the following areas:
- 4.1 The 2-year time limit for applying to register a Mainland Judgment;
- 4.2 The scope of Mainland judgments eligible for registration in Hong Kong;
- 4.3 The time limit for applying to set aside the registration of a Mainland judgment;
- 4.4 The exclusion of punitive or exemplary damages awarded under a

Mainland judgment in the recognition and enforcement regime; and

- 4.5 The consistency on the applicability of certain provisions in the Draft Bill and Draft Rules to a court as well as a tribunal in Hong Kong.

**B. THE 2-YEAR TIME LIMIT**

5. Clause 10 of the Draft Bill provides:

*“Subject to section 11, a judgment creditor under a Mainland Judgment in a civil or commercial matter may apply to the Court for a registration order to register the Judgment, or any part of the Judgment, if —*

*...*

*(b) the following conditions are satisfied—*

- (i) the Judgment or part requires the payment of a sum of money, or the performance of an act, by a party to the original proceedings for the Judgment;*
- (ii) a default in complying with the requirement occurred within 2 years before the date of the application; and*
- (iii) the default has not been made good as at the date of the application.” (emphasis supplied)*

6. Similarly, Clause 11(4) of the Draft Bill provides that:

*“(4) For the purposes of this section, a sum of money or an act is a qualifying sum or act if—*

- (a) a default in complying with the requirement to pay the sum of money, or to perform the act, occurred within 2 years before the date of the registration application concerned; and
- (b) *the default has not been made good as at the date of the application.*” (emphasis supplied)

7. Clauses 10 and 11 of the Draft Bill therefore appears to introduce an absolute time limit of 2 years within which an application for recognition and enforcement shall be made, and the Hong Kong courts apparently have no discretion to extend such time limit.

8. In contrast, Article 10 of the Arrangement simply provides that:

*“The time limits, procedures and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place”.*

9. Given that: (a) no time limit has been stipulated for the enforcement of a Mainland judgment under the Arrangement and (b) under section 4(4) of the Limitation Ordinance (Cap 347), limitation period for the enforcement of a judgment under Hong Kong law is in general 12 years, questions will arise as to why it is necessary for the Draft bill to propose a short and absolute time limit of 2 years for the recognition and enforcement of a Mainland judgment.

10. We note that in the Information Sheet<sup>1</sup> published by the Department of Justice in relation to the Matrimonial RRE Ordinance, it has been explained that:<sup>2</sup>

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<sup>1</sup> Accessible at [https://www.doj.gov.hk/en/mainland\\_and\\_macao/pdf/RRECCJ\\_Ordinance\\_info\\_sheet\\_en.pdf](https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_Ordinance_info_sheet_en.pdf).

<sup>2</sup> See footnote 4 thereof.

*“The two-year time limit seeks to reflect the fact that the enforcement of a Mainland judgment in the Mainland is generally subject to a two-year time limit under Mainland law and the Mainland side would likely impose the same time limit in relation to an application made under the Arrangement for the enforcement in the Mainland of Hong Kong judgments.”*

11. This appears to be consistent with the Mainland Law of Civil Procedure (《中华人民共和国民事诉讼法》), where Article 239 thereof provides that the time limit for an application to enforce a Mainland judgment (申请执行) is two years. However, this does not seem to be an absolute time limit as Article 239 itself provides that the computation of time limits (including its suspension and termination) is subject to the general law (申请执行时效的中止、中断, 适用法律有关诉讼时效中止、中断的规定。).
12. In view of our understanding of the effect of Article 239 as described above, if the proposed absolute time limit of 2 years under the Draft Bill is intended to be absolute, it may not be sufficiently flexible to cater for different scenarios under the general law of the Mainland which may have the effect of suspending, terminating or altering the 2-year limit. In other words, there is a risk that the 2-year absolute time limit that is currently proposed in the Draft Bill may not entirely mirror the position under the relevant Mainland law.
13. We note that the Matrimonial RRE Ordinance provides that the Hong Kong courts have discretion to give permission for a registration application to be made after the expiry of the 2-year period. Section 8 of the Matrimonial RRE Ordinance provides that:

*“(1) A party to a Mainland Judgment given in a matrimonial or family case may make a registration application in relation to a care-related*

*order in the Judgment only if —*

*(a) ...*

*(b) Where there has been non-compliance with the order as at the application date—*

*(i) the party makes the registration application within 2 years after the date on which non-compliance first occurred; or*

*(ii) the District Court, on the application of the party, has given permission for the registration application to be made after the expiry of the 2-year period mentioned in subparagraph (i).*” (emphasis supplied)

14. The HKBA takes the view that the Draft Bill should provide the Hong Kong courts with a similar “discretion” provision (which is at present not contained in the Draft Bill) to extend the 2-year time limit in appropriate cases. This would minimise the scope of any potential arguments in future litigation on whether the provision allows for any discretion to be exercised by the court or on the constitutionality of such provision (assuming that it provides for an absolute time limit). Alternatively, the Draft Bill may provide that the limitation period is 2 years or the time period which may be subject to any relevant Mainland law on the enforceability of the Mainland judgment, whichever is later.

## **C. SCOPE OF MAINLAND JUDGMENTS ELIGIBLE FOR REGISTRATION**

15. Clause 8(1) of the Draft Bill states that:

*“(1) For the purposes of this Ordinance, a Mainland Judgment is effective in the Mainland—*

*(a) if it is enforceable in the Mainland; and*

*(b) if—*

*(i) it is a Mainland Judgment given by the Supreme People’s Court;*

*(ii) it is a Mainland Judgment of the second instance given by a High People’s Court or an Intermediate People’s Court; or*

*(iii) it is a Mainland Judgment of the first instance given by a High People’s Court, an Intermediate People’s Court or a Primary People’s Court, and—*

*(A) no appeal is allowed from the Judgment according to the law of the Mainland; or*

*(B) the time limit for appeal in respect of the Judgment has expired according to the law of the Mainland and no appeal has been filed.”*

16. The HKBA envisages there may be situations where a party appeals only part of a *“Mainland Judgment of the first instance given by a High People’s Court, an Intermediate People’s Court or a Primary People’s Court”* and the counter-party seeks to enforce and register one or more ruling(s) or relief(s) in the first instance decision unaffected by the appeal. Since such a first instance decision has been appealed from and would not qualify as a judgment for which *“the*

*time limit for appeal in respect of the Judgment has expired according to the law of the Mainland and no appeal has been filed*”, it is likely that such a judgment under the present drafting of clause 8(1) of the Draft Bill would not be an effective Mainland Judgment eligible for registration in Hong Kong, and the party seeking to enforce the relief(s) granted in the first instance judgment may find himself unable to register in Hong Kong even the undisputed part of the Mainland Judgment (*albeit* pending appeal) possibly for a very long time.

17. If as a matter of Mainland law, a first instance judgment is unenforceable in its entirety pending an appeal against it even though the appeal is only confined to certain aspects of the judgment, the HKBA readily sees why the judgment should not be registrable in Hong Kong, and it would seem that section 8(1)(a) of the Draft Bill should preclude registration.
18. On the other hand, if Mainland law does not preclude enforcement of relief(s) ordered in a first instance judgment unaffected by a pending appeal, there appears to be no reason why such a first instance judgment in respect of the relief(s) that is/are not subject to any appeal should not be registrable in Hong Kong, subject to the fulfilment of other relevant conditions. In this connection, the HKBA notes that the Draft Bill envisages registration of part of a Mainland judgment: for instance see clauses 6(1), 7(2), 14(1), 16(1), 17(1), 20(1), 21, 22, 24(1), 25(1), 28-30.
19. The HKBA considers there should be synchrony between the Mainland law and the Hong Kong registration system on whether a Mainland first instance judgment is enforceable (and hence registrable in Hong Kong) in respect of any relief or order unaffected by a pending appeal. Accordingly, it would be helpful if the issue could be clarified so as to enhance certainty in the operations of the proposed legislative regime:

19.1 In case of the scenario envisaged in §17 above, it seems that a “for the



avoidance of doubt” provision may be inserted to the effect that section 8(1)(a) of the Draft Bill excludes registration of a first instance judgment in its entirety pending the appeal notwithstanding the part of the judgment sought to be registered is not the subject of the appeal.

- 19.2 In case of the scenario envisaged in §18 above, a provision may be inserted to explain an extant appeal would not preclude registration of a judgment in respect of the relief/order unchallenged in the appeal, subject to fulfilment of other relevant conditions.

#### **D. TIME LIMIT FOR SETTING ASIDE REGISTRATION**

20. Clause 20 of the Draft Bill provides:

*“(1) The Court must, when making a registration order for a Mainland Judgment in a civil or commercial matter, or any part of such a Judgment, to be registered, specify the period within which an application for setting aside the registration may be made.*

*(2) The Court may extend the period (either as originally specified or as subsequently extended) within which an application mentioned in subsection (1) may be made.”*

21. Clause 20 does not specify a time period for setting aside applications to be made, but leaves the discretion to the registering court to set a time limit. While this might give the court some flexibility to determine the time limit on a case-by-case basis, this would place an unnecessary burden on the court to assess the time limit every time when a registration order is made. The lack of any specific time limit would also lead to uncertainty or even abuse particularly from the perspective of the party against whom a setting aside application would be made. In this context, it is unclear in particular as to whether the

time limit imposed by the court may start to run even **before** a registration order is served by the applicant on the other parties giving notice of *inter alia*, the registration of the Mainland judgment and the right to apply to set aside the registration order.

22. In this connection, it is noted that the Draft Bill and/or the Draft Rules do not specify any time limit within which the notice of registration must be served by the applicant. Rule 16 of the Draft Rules, so far as material, only provides:

*“(1) If a registration order for the registration of a Mainland Judgment in a civil or commercial matter, or any part of such a Judgment, is made on a registration application, the applicant must serve a notice of registration (**the notice**) of the Judgment or part on all other parties to the original proceedings for the Judgment—*

*(a) by delivering it to those parties personally;*

*(b) by sending it to those parties at their usual or last known address;*  
*or*

*(c) in any other way directed by the Court.*

*(2) Service of the notice out of jurisdiction is permissible without leave, and Order 11, rules 5, 5A, 6, 8 and 8A of the Rules of the High Court (Cap. 4 sub. leg. A) apply in relation to the notice as if the notice were a writ.*

*(3) The notice must set out—*

...

*(c) the right of a person against whom the Judgment or part may be enforced to apply under section 21 of the Ordinance to have the registration set aside; and*

*(d) the period within which a setting aside application may be made.*

*(4) The notice must contain a notification to the effect that the period mentioned in subrule (3)(d) may be extended under section 20(2) of the Ordinance.*

*(5) The notice must also contain a notification to the effect that an action to enforce the Judgment or part may be taken only after the expiry of the period within which a setting aside application may be made or after such an application has been finally disposed of.”*

23. Similarly, rule 19(1) of the Draft Rules, so far as material, also only provides that:

*“(1) A person wishing to issue execution on a registered judgment must produce to the Registrar of the High Court—*

*(a) an affidavit of service of the notice of registration of the judgment under rule 16; ...”*

24. While Rule 19 requires an applicant who wishes to execute a registered judgment to satisfy the court that notice of registration of the judgment has been duly served, the lack of a time limit for serving such notice, together with the possibility that the time limit for the setting aside application will start to run even before a registration order is served, could nonetheless be subject to procedural and tactical abuse. For example, if an applicant chooses to serve the notice of registration on the other parties to the Mainland judgment only near

the end of, or even after, the time period specified by the Court for the setting aside application, the other parties wishing to oppose the registration will be put to unnecessary expense and pressure to apply to the court on an urgent basis for setting aside the registration order or for an extension of the period to do so, failing which the applicant would have an advantage of getting a head start in enforcing the judgment against them in Hong Kong.

25. In order to preclude or minimise such abuse, the HKBA takes the view that Clause 20 of the Draft Bill should, additionally, specify that the time for the other parties to the Mainland judgment to apply to set aside the registration shall not, save in exceptional circumstances, be less than 14 days after service of the notice of registration by the applicant. This is similar to the approach which was taken by the Court of First Instance in *黃書建 v 代威* [2019] HKCFI 1386, where Lok J noted (at §11) a registration order made by the Master to the effect that the respondent was at liberty to apply to set aside the registration of a Mainland judgment under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) within 14 days after service of the notice of registration.

#### **E. MAINLAND JUDGMENTS PROVIDING FOR PUNITIVE OR EXEMPLARY DAMAGES**

26. Article 16 of the Arrangement provides:

*“Where the judgment provides for punitive or exemplary damages, the punitive or exemplary part of the damages would not be recognised and enforced except as provided under Article 17.”*

27. Article 17 of the Arrangement then provides:

*“For tortious claims for infringement of intellectual property rights and*

*civil disputes over acts of unfair competition under Article 6 of the Anti-Unfair Competition Law of the People's Republic of China heard by a people's court of the Mainland, or disputes over passing off heard by a court of the HKSAR, reciprocal recognition and enforcement of the judgments of the courts of the Mainland and of the HKSAR is confined to rulings on monetary damages, including punitive or exemplary damages, for acts of infringement which were committed in the requesting place.*

*Reciprocal recognition and enforcement of a judgment concerning disputes over the infringement of trade secrets shall include both monetary (including punitive or exemplary damages) and non-monetary rulings.*” (emphasis supplied)

28. The HKBA notes that Clause 16(1)(b)(i), (2) and (3) of the Draft Bill seems to give effect to Article 17 of the Arrangement in that the registration of a Mainland judgment concerning infringement of trade secrets for monetary and non-monetary relief is not precluded.
29. However, Clause 18(3)(c) of the Draft Bill does not mention that punitive or exemplary damages would not be excluded from registration if awarded in respect of a judgment concerning disputes over the infringement of trade secrets. It merely provides:

*“(3) To avoid doubt, the Judgment or part must not be registered for any of the following sums—*

*(a) a tax or other charge of a like nature;*

*(b) a fine or other penalty, other than a fine or charge described in subsection (2)(c);*

(c) punitive or exemplary damages, other than those awarded in proceedings brought in respect of—

(i) a tortious dispute over an infringement of a specified intellectual property right committed in the Mainland; or

(ii) a civil dispute over an act of unfair competition under Article 6 of the Mainland Anti-Unfair Competition Law committed in the Mainland.” (emphasis supplied)

30. The HKBA considers that disputes over the infringement of trade secrets should also be covered in Clause 18(3)(c) of the Draft Bill for the avoidance of doubt, and to preclude any potential debate on the apparent inconsistency between clauses 16 and 18(3)(c) of the Draft Bill.

**F. APPLICABILITY OF CERTAIN PROVISIONS TO A COURT AS WELL AS A TRIBUNAL IN HONG KONG**

31. Under the Draft Bill, the word “Court” is defined as only the Court of First Instance (clause 2), which is specifically given the powers to, *inter alia*, make a registration order to register a qualifying Mainland judgment in Hong Kong (e.g. clauses 10, 13, 17, 26) and to set aside the registration (e.g. clauses 20-25).
32. Meanwhile, Clause 9 of the Draft Bill provides that a Hong Kong Judgment, for the purpose of the facilitation of their recognition and enforcement in the Mainland, means essentially a judgment given by all levels of courts and tribunals which have jurisdiction on civil matters. Notably, however, while the expression “*court or tribunal*” has been repeatedly used in Part 3 of the Draft Bill and Part 4 of the Draft Rules, there are some provisions in the Draft Bill (e.g. Clauses 22, 28, 30 and 31 under Part 2) and the Draft Rules (e.g. Rule 6)

which refer and apply only to “*a court in Hong Kong*” without also making it clear that a “*court*” includes a tribunal.

33. There is no apparent justification why a tribunal (in particular, those specified in Clause 9(b) of the Draft Bill, whose judgments may be eligible as effective Hong Kong judgments for recognition and enforcement in the Mainland) should not be covered in the above-mentioned provisions. For the sake of clarity and consistency, insofar as such provisions are intended to apply to both the courts and tribunals as specified under Clause 9 of the Draft Bill, the HKBA takes the view that this should be made sufficiently clear in the Draft Bill and the Draft Rules.
34. By way of examples, section 46 of the Evidence Ordinance (Cap. 8) states that “*court (法院、法庭) includes any tribunal*”. Moreover, section 50(4)(a) of the High Court Ordinance (Cap. 4) also provides that “*court (法庭) includes any tribunal ...*”.

## **G. SUMMARY**

35. The HKBA’s views and proposals are summarised as follows:
  - 35.1 Clause 10 of the Draft Bill should be amended to either provide the Hong Kong courts with discretion to extend the 2-year time limit for registration of Mainland Judgments in Hong Kong, or alternatively, to provide that the limitation period is 2 years or the time period which may be subject to any relevant Mainland law on the enforceability of the Mainland judgment, whichever is later.
  - 35.2 Clause 20 of the Draft Bill should be amended to state that the time for applying to set aside the registration shall not, save in exceptional circumstances, be less than 14 days after service of the notice of

registration by the applicant.

35.3 Clause 18(3)(c) of the Draft Bill should be amended to make clear (for the avoidance of doubt) that a Mainland judgment providing for punitive or exemplary damages in a dispute over the infringement of trade secret would not be excluded from registration.

35.4 The expression “*a court in Hong Kong*” in e.g. Clauses 22, 28, 30 and 31 of the Draft Bill and Rule 6 of the Draft Rules should be clarified to the effect that a “*court*” in that context includes any of the courts and/or tribunals specified in Clause 9(b) of the Draft Bill.

**HONG KONG BAR ASSOCIATION**

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