

The Convergence of Judicial Rules between Mainland China and Hong Kong has Reached a Higher Level

By Du Tao and Jingwei Qiu***

With the increasingly close personnel exchanges and deepening economic cooperation between Mainland China and Hong Kong, the number and types of legal disputes between the two regions have also increased. Against the backdrop of adhering to the “One Country, Two Systems” principle and the Basic Law of Hong Kong, the judicial and legal professions of the two regions have worked closely together and finally signed “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 (hereinafter referred to as “REJ Arrangement”) in January 2019, which will come into effect in January 2024. REJ Arrangement aims to establish an institutional arrangement for the courts of the Mainland and the Hong Kong Special Administrative Region to recognize and enforce judgments in civil and commercial cases, achieve the “circulation” of judgments in civil and commercial cases, reduce the burden of repeated litigation, and save judicial resources in the two regions.

There are 31 articles in REJ Arrangement, which comprehensively and meticulously stipulate the scope and contents of mutual recognition and enforcement of judgments in civil and commercial cases, the procedures and methods for applying for recognition and enforcement, the circumstances under which recognition and enforcement may not be recognized, and the remedies available. Articles 1, 2, and 4 are provisions that positively state the scope of recognition and enforcement of civil and commercial judgments in the two regions; Articles 3, 5, 12, and 13 are provisions that clearly recognize and enforce the scope of civil and commercial judgments of the courts of the two regions. Articles 7 to 11 and 20 to 27 are procedural provisions. The remaining provisions deal with the entry into force, interpretation, and modification of REJ Arrangement.

Compared with “the recognition and enforcement of judgments in civil and

commercial matters pursuant to choice of court agreements made between the parties concerned” (the first agreement reached between the two places on mutual recognition and enforcement of judgments in civil and commercial matters, hereinafter referred to as ‘Mainland-Hong Kong Mainland-Hong Kong Choice of Court Arrangement’), REJ Arrangement has significantly increased the types of cases to which it can be applied. Mainland-Hong Kong Choice of Court Arrangement is very limited in terms of the types of cases to be applied and only applies to civil and commercial cases where the parties have a written jurisdiction agreement, and there is a final monetary judgment. For example, in 2018, Zhongji Company filed an application with the Hangzhou Intermediate People’s Court of Zhejiang Province for recognition and enforcement of a civil judgment of a Hong Kong court^[1], because a winding-up order made by a Hong Kong court is not a civil and commercial case according to parties’ agreement, and it cannot directly apply to the mainland court for recognition in accordance with the provisions of Mainland-Hong Kong Choice of Court Arrangement. In the 2010 case in which Chengxin Real Estate Company applied to the Xiamen Intermediate Court for confirmation of an effective judgment issued by the Hong Kong High Court^[2], although the parties had signed a contract with a jurisdiction clause in writing since Mainland-Hong Kong Choice of Court Arrangement was only limited to the recognition of monetary judgments, the judgment of conveying the ownership of immovable property in the judgment could not be recognized and enforced because it was a non-monetary judgment. These two cases clearly illustrate the narrow scope of the Mainland-Hong Kong Choice of Court Arrangement. REJ Arrangement not only applies to monetary judgments but also includes non-monetary judgments. It also lists the types of cases that are not subject to REJ Arrangement for the time being. This method clarifies the types of cases to be applied, which is conducive to unifying judges’ understanding of the scope of application of REJ Arrangement in judicial practice and protecting the legitimate rights and interests of the people in the two places to the greatest extent.

REJ Arrangement removes the restriction on the level of the court of first instance. Mainland-Hong Kong Choice of Court Arrangement restricts the level of judgment rendered by the Mainland courts, which is limited to judgments rendered by courts at the level of the Mainland Intermediate Court and above, as well as some basic courts with foreign-related jurisdiction. However, REJ Arrangement does not restrict the level of courts in the Mainland where

judgments are rendered, i.e. effective judgments issued by courts at all levels in various regions of the Mainland can be applied. For Hong Kong, the REJ Arrangement extends the scope to the effective judgments of the Labour Tribunal, the Small Claims Tribunal, and the Lands Tribunal. After REJ Arrangement comes into effect, together with the matrimonial and family arrangements that have been signed before, about 90% of civil and commercial judgments in the two places will be reciprocal recognition and the scope of application of enforcement will be expanded, ^[31]so that the cases involving each other can be recognized and enforced to the greatest extent, and to ensure that creditors in the two places can obtain the greatest judicial relief.

With regard to the revision of jurisdiction, on the one hand, new jurisdictional connection points have been added to the REJ Arrangement, filling the gap in the provisions of the Mainland-Hong Kong Choice of Court Arrangement in this regard. The new jurisdictional connection point of “the applicant’s domicile” is connected with the expansion of the scope of the application of REJ Arrangement. Since REJ Arrangement also includes the confirmation of legal relationships or legal facts in the scope of application, there is no enforceable content in such judgments themselves. The applicant only needs to apply to the Mainland court for recognition of this part of the legal relationship or facts. If REJ Arrangement does not add a new jurisdictional connection point of “the applicant’s domicile”, when the respondent has neither property nor domicile in the Mainland, a jurisdictional connection point cannot be established, resulting in no Mainland court accepting the application. Therefore, the addition of “the applicant’s domicile” as a jurisdictional connection point in this arrangement is of great practical significance, which greatly enhances the feasibility of the recognition of judgments.

On the other hand, REJ Arrangement clarifies the criteria for the review of the jurisdiction of the court of first instance. Mainland-Hong Kong Choice of Court Arrangement stipulates that, according to the law of the requested party, if the requested court has exclusive jurisdiction over the case, it shall not recognize and enforce it, that is, adopt the “exclusive jurisdiction exclusion” model. For the first time, REJ Arrangement clearly stipulates the criteria for the review of the jurisdiction of the court in which the judgment is rendered. Article 11 sets out the jurisdictional criteria for different types of cases by way of enumeration. The provisions on jurisdiction in REJ Arrangement are in fact based on the HCCH

2019 Judgments Convention, and adopt the review model of “exclusive jurisdiction exclusion” plus “enumeration”. Under REJ Arrangement, if a Mainland judgment applies to the Hong Kong court for recognition and enforcement, the Hong Kong court can not only greatly reduce the workload of reviewing jurisdiction, but also reduce the number of defenses to jurisdictional issues, thereby increasing the success rate of recognition and enforcement of the judgment. Moreover, REJ Arrangement clearly unifies the criteria for determining the jurisdiction of the court of first instance, which can effectively reduce the occurrence of parallel litigation and enhance the predictability and stability of litigation. In addition, the wording of the provisions on jurisdiction in different circumstances in Article 11 of REJ Arrangement indicates that when examining whether the court of first instance has jurisdiction, it is only necessary to examine the jurisdiction of the jurisdiction of the jurisdiction in which the judgment was rendered.

In terms of content, REJ Arrangement takes a more open stance than the HCCH 2019 Judgments Convention, strengthens the judicial protection of intellectual property rights, and clearly stipulates the jurisdictional standards for intellectual property cases. With the in-depth interaction of professional services related to intellectual property rights in the mainland and Hong Kong, the two regions have gradually reached a consensus on issues such as the determination of the validity of certain intellectual property rights and the protection system, which provides the possibility of adding new protection clauses related to intellectual property rights in the REJ Arrangement. The scope of intellectual property rights protected by REJ Arrangement mainly refers to the Agreement on Trade-Related Aspects of Intellectual Property Rights, the General Provisions of the Civil Law of the People’s Republic of China, and the Regulations on the Protection of Plant Varieties. For the first time, REJ Arrangement adds provisions on punitive damages for infringement of intellectual property rights and clarifies the punitive damages part of the monetary judgments in the four types of cases recognized and enforced by the requested court. In addition, based on the particularity of trade secret infringement disputes, non-monetary liability for infringement of trade secrets is stipulated.

In terms of the finality of the recognition and enforcement of judgments, REJ Arrangement has made a major breakthrough. Hong Kong is a common law country and has a habit of following precedent when it comes to finality. In 1996,

in the case of Chiyu Banking Corporation Limited's application for recognition and enforcement of a Mainland judgment (hereinafter referred to as the Chiyu case)^[4], Judge Cheung Chak Yau of the Hong Kong Court made the following judgment on the issue of the finality of the judgment: The judgment of a foreign court must be final and irrevocable, and because of the existence of a retrial system in Chinese mainland, the original trial court has the right to change the original judgment in the retrial, because the judgment made by the original trial court can be changed, and this system makes the mainland judgment not final. As a result, the Mainland judgment was ruled by the Hong Kong court not to be recognized and enforced. The criterion of finality established by this case had a profound and long-lasting impact on the recognition and enforcement of mainland judgments by Hong Kong courts, and the Chiyu case has been repeatedly cited as a precedent by the Hong Kong side. Even later, in the 2001 *TayCuanv. NgChi* case^[5], the issue of finality was raised again, and the Hong Kong side rejected the application on the same grounds, resulting in a further strengthening of the criterion of finality of judgment. However, Mainland-Hong Kong Choice of Court Arrangement only avoids the use of the word "finality" and does not explicitly stipulate "enforceable judgments", which cannot really solve the problem. Subsequently, the Mainland Judgments (Reciprocal Enforcement) Ordinance enacted by Hong Kong under Mainland-Hong Kong Choice of Court Arrangement deviated from the original intention of Mainland-Hong Kong Choice of Court Arrangement and still adopted the expression "final and conclusive" on the issue of finality. As such, the Mainland-Hong Kong Choice of Court Arrangement has a very limited role in coordinating the finality of judgments between the two places.

Under REJ Arrangement, "the judgment is final and inconclusive" no longer needs to be "final and conclusive" for mainland civil and commercial judgments to be recognized and enforced in Hong Kong. The phrase "final judgment with enforceable effect" has been changed to "effective judgment", and the meaning of "effective judgment" has been clarified, referring to "first-instance judgments and second-instance judgments that are not allowed to be appealed in accordance with the law or have not been appealed within the statutory time limit, as well as the above-mentioned judgments made through retrial procedures". REJ Arrangement has undergone substantial changes in the legislative provisions on the issue of finality of judgments, and Hong Kong has abandoned its long-standing insistence on the criteria of "certainty" and "inconclusiveness". Moreover, the

clear elaboration of the “effective judgment” enables the subsequent judicial practice to apply the law more accurately. When hearing a case of recognition and enforcement of a Mainland judgment, the Hong Kong court only needs to conduct a formal review to determine whether the type of judgment is in accordance with REJ Arrangement.

However, the breakthrough of REJ Arrangement on the issue of finality of judgments does not represent a fundamental change in Hong Kong’s attitude towards the recognition and enforcement of extraterritorial judgments, which can only be confirmed after the transformation of Hong Kong’s local legislation and subsequent judicial practice. At least on the surface, this provision resolves the historic obstacle that has been preventing the recognition and enforcement of Mainland judgments in Hong Kong courts. From a more in-depth perspective, Hong Kong will treat mainland judgments differently from foreign judgments, so that judgments from the two places can truly be circulated.

At present, the development of the Guangdong-Hong Kong-Macao Greater Bay Area is in the ascendant, and the signing of REJ Arrangement has provided new opportunities for the future development of the two places. This is not only the endpoint of the basic and comprehensive coverage of the judicial assistance arrangements for civil and commercial matters between the two places, but also the starting point for colleagues in the legal circles of the two places to move towards a higher and farther goal^[6]. This means that Mainland China and Hong Kong will have a broader space for development and better prospects in the field of mutual recognition and enforcement of civil and commercial judgments. In the new era and new context of continuing to adhere to the principle of “one country, two systems” in the future, the legal culture and legal system of Mainland China and Hong Kong will be gradually integrated, and an integrated system of civil and commercial judicial assistance will be successfully established.

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^[1] See (2018) Zhe 01 Zhigang No. 2. On 12 November 2018, the applicant, Zhongji Company, filed an application with the Hangzhou Intermediate People's Court for recognition of the High Court's winding-up order No. 132 of 2018 in the High Court of the Hong Kong Special Administrative Region. <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=JseWE2JCpafgJrx5lyT46GkmFgQc7VGra0V1/ugltMMOZ2S3LUQMq7fWnudOoarTTYdhHuJewBempXeLhxTPMm90fL3cvEPOqfJQ2Xb051xu6I6RfcuEPyM36peDZ1lY>

^[2] See (2009) Xiamin Zhizi No. 124. In 2009, Chengxin Real Estate sued Hong Kong Guoyuan Investment Co., Ltd. in Hong Kong, demanding that it deliver the housing involved in the lawsuit and repay the money.

legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=67107&QS=%24%28HCA2231%2F2007%2C?%29&TP=JU

^[3] The Mainland and Hong Kong signed an arrangement on mutual recognition of judgments in civil and commercial matters, and continuously improved the inter-regional judicial assistance system with Chinese characteristics: An interview with the person in charge of the Research Office of the Supreme People's Court[EB/OL].?2019-01-18?.<https://www.chinacourt.org/article/detail/2017/06/id/2903940.shtml>.

^[4] Chiyu Banking Corp Ltd v. Chan Tin Kwun?1996?HKCFI 418; (1996)2 HKLRD 395; HCA 11186/1995.legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=30726&QS=%2B%7C%28HCA%2C11186%2F1995%29&TP=JU

^[5] Tan Tay Cuan v. Ng Chi Hung, HCA 5477/2000.5/2/2001.legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=21647&QS=%2B%7C%28HCA%2C5477%2F2000%29&TP=JU

^[6] The Mainland and Hong Kong signed an arrangement on mutual recognition of judgments in civil and commercial matters, and continuously improved the inter-regional judicial assistance system with Chinese characteristics: An interview

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