Mainland Judgments (Reciprocal Enforcement) Bill

The Administration's Response to Issues Raised at the Bills Committee Meetings held on 22 June, 29 June and 16 July 2007

Meeting Held on 22 June 2007

I. *Long Title of the Bill*

At the meeting, the Administration was asked to consider if reference to the *REJ Arrangement*[1] should be made in the Long Title of the Bill. The Long Title states the primary purpose of the Bill which is to "make provisions for the enforcement in Hong Kong of judgments in civil or commercial matters that are given in the Mainland which afford reciprocal treatment to judgments given in Hong Kong …". The present wording by itself is sufficient to convey the Bill's purpose.

2. Under our legal system, agreements and arrangements between the Government and other Governments do not take legal effect directly. The *REJ Arrangement* requires the enactment of our own legislation for implementation. In order to avoid any confusion as to the status of the *REJ Arrangement*, we do not consider it necessary to refer to the *REJ Arrangement* in the Long Title. It should also be noted that the Long Titles of the Arbitration Ordinance (Cap. 341) and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) respectively do not refer to the arbitration arrangement with the Mainland and REJ agreements with foreign countries.

II. *Use of the word "or" in "civil or commercial matters"*

3. The Administration has been asked to review whether it is appropriate to use the conjunctive word "or" as in "civil or commercial matters" in the long title and in the interpretation clause (Clause 2(1)) of the Bill. The subject matter has been previously discussed in the paper entitled Administration's Response to Issues Raised at the Bills Committee Meeting held on 30 April 2007 (LC Paper No. CB(2)2091/06-07(01)). Reference is

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[1] The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the HKSAR pursuant to Choice of Court Agreement between Parties Concerned signed on 14 July 2006.

drawn to paragraphs 4 to 8 of the Paper which discussed the term "民商事" (civil-commercial matters) in the Mainland law context.

4. Noting the discussions in the said Paper, the term "民商事" (civil-commercial matters) remains an imprecise term where civil matters and commercial matters are not mutually exclusive. The adoption of the formula "civil or commercial" matters follows the usual drafting practice in Hong Kong[2] and the usage is consistent with the *REJ Arrangement*.

5. The scope of the Bill is more particularly defined in Clause 2(1) which sets out the contracts covered by the Bill. The expression "civil or commercial" will not, therefore, in any way have any impact on the scope of the Bill.

<u>Meeting Held on 29 June 2007</u>

I. *Clause 2(1)*: *Definition of "Recognised Basic People's Court"*

6. The Administration agrees that for clarity sake, a reference to Clause 25 may be made in the definition of "recognised Basic People's Court" in Clause 2(1).

7. The Administration has also considered the possible effect that may be caused by any addition to or deletion from the list of "recognised Basic People's Court" published under Clause 25 of the Bill. We agreed that parties' autonomy should be respected and therefore any amendment to the list of "recognised Basic People's Court" should not affect the enforceability or otherwise of a judgment under the Arrangement where the choice of court agreements was concluded prior to any amendment to the list. Therefore, Committee Stage Amendments will be introduced in due course to provide for the necessary transitional provisions.

II. *Clause 2(1)*: *Definition of "Mainland"*

8. The definition of "Mainland" provided in Clause 2(1) of the Bill has been commonly adopted in other Ordinances and subsidiary legislation such as the *Arbitration Ordinance* (Cap. 341), the *Merchant Shipping (Limitation of Shipowners Liability) Ordinance* (Cap. 434) and the *Trade Descriptions (Place of Origin)(Watches) Order* (Cap. 362D).

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[2] See section 74 of the Evidence Ordinance (Cap 8), Orders 11 and 69 of the Rules of the High Court (Cap 4A).

9. Research into Mainland law has indicated that the term "內地 (Mainland)" also appears in various regulations which concern the establishment and administration of business entities set up by foreign entities, for instance, the *Regulations of the People's Republic of China on Administration of Foreign-funded Banks*《中華人民共和國外資銀行管理條例》, the *Measures on Administration of Representative Offices of Foreign Insurance Institutions*《外國保險機構駐華代表機構管理辦法》etc. These regulations, among other things, govern the conduct of relevant activities undertaken in the Mainland (內地) by entities from Hong Kong, Macao and Taiwan.

10. This seems to be consistent with the Administration's understanding that the term "Mainland" should be taken to mean any part of China other than the HKSAR, the Macao SAR and Taiwan. The present definition of "Mainland" in Clause 2(1) is considered appropriate.

III. *The effect of Clause 2(2)*

11. In the Administration's response (LC Paper No. CB(2) 2091/06-07(01)), the purpose of inserting Clause 2(2) has been explained (paragraphs 22 to 26 refer). Clause 2(2) of the Bill is similar to section 10C of the *Interpretation and General Clauses Ordinance* (Cap. 1) which was added to Cap. 1 by the *Interpretation and General Clauses (Amendment) Ordinance 1987* (Ord. No. 18 of 1987). Section 10C of Cap. 1 provides for an expression of the common law found in the English text of an Ordinance to be construed in accordance with the common law meaning of that expression.

12. In *AG v Shimizu Corp (formerly known as Shimizu Construction Co Ltd) (No. 2)* [1997] 1 HKC 453, in the context of deciding whether an arbitrator has jurisdiction to award compound interest under section 22A of the *Arbitration Ordinance*, the Court of Appeal commented that, by virtue of section 10C, the court was entitled to consider the common law meaning of "interest".

13. As stated in the said Paper, since the Bill seeks to implement the *REJ Arrangement*, it is inevitable that some Mainland legal terminology are being referred to in the Bill, examples of which are quoted in paragraph 25 of LC Paper No. CB(2) 2091/06-07(01). With this in mind, Clause 2(2) was inserted with a view to helping the court and parties to appreciate that the interpretation of such terminology is a matter of the Mainland law. It would serve the same purpose as section 10C of Cap. 1 in the *Shimizu* case.

14. The inclusion of Clause 2(2) will not affect the general practice in civil proceedings in Hong Kong. When it is necessary for the court, in proceedings under the Bill, to ascertain the meaning of an expression of the Mainland law, parties may adduce expert evidence in that regard. While the deletion of Clause 2(2) may not affect the requirement to adduce expert evidence on matters relating to the interpretation of the Mainland law, this clause serves the purpose of providing a reminder which might facilitate the construction of expressions under the Mainland law. On the other hand, its deletion will not affect the operation of the Bill.

IV. *Clause 3 of the Bill*

15. The Administration has been asked to address the scope of the Bill, in particular, where the judgments were given by Mainland courts which have not been chosen by the parties but were seised with the case either of their own accord or by application from either or both of the parties. In Annex III to the Administration's Paper No. CB(2)1641/06-07(01), the Administration has set out the relevant provisions of the Civil Procedure Law of the PRC and the Opinions of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the PRC.

16. The said Law and Opinions have specifically provided for the determination of jurisdiction by the People's Court, including the rules on transfer of cases within the People's Courts in the Mainland. The Administration therefore considers that if the judgment in question was given by a People's Court which has properly exercised its jurisdiction following the transfer of the case from the court chosen in a choice of Mainland court agreement in accordance with the Mainland law, then it should be recognized and enforced according to the provisions of the Bill. On the other hand, if a party or parties chose to submit the dispute to a court other than the court chosen under a choice of Mainland court agreement, the judgment should not be regarded as a judgment for the purpose of Clause 5 and could not therefore seek enforcement by invoking provisions of the Bill.

17. In the hypothetical case where parties to a contract each instituting legal proceedings in a designated court and obtaining a Mainland judgment which is in conflict with the one obtained by the other party, the question of whether any of the above Mainland judgments can be registered under the Bill will have to be considered by reference to the requirements set out in Clause 5(2). In such a case, it is unlikely that any of the conflicting judgments would be regarded as enforceable in the Mainland. The mere fact that such a

Mainland judgment has a certificate of finality and enforceability mentioned in Clause 6(2) is of itself not sufficient. Under clause 6(2), the certificate is not conclusive in proving the finality and enforceability of the relevant Mainland judgment: it is subject to any proof to the contrary.

Meeting Held on 16 July 2007

I. *Clause 5(2)(b): the expression "pursuant to"*

18. In the light of the above discussion and in order to address Members' concern on the expression "pursuant to", e.g. Clause 5(2)(b) ("the judgment is given pursuant to a choice of Mainland court agreement"), the Administration proposes to revise the Bill to delete the references to the expression "pursuant to" when it is used in relation to a judgment. Amendments will be made so that the relevant judgments should be "given by a chosen court (which is a designated court)" or "a designated court to which the case was transferred according to the law of the Mainland". Further, where such judgments were subject to appeal or a retrial, the Bill should also cover the resulting judgments made on appeal or in a retrial in these cases insofar as they were delivered by a designated court.

II. *Clause 6(1)(d)*: *The "unless" clause*

19. Clause 6(1) stipulates certain circumstances whereby a Mainland judgment is to be regarded as "final and conclusive". In particular, Clause 6(1)(d) provides that if "it is a judgment given in a retrial by a people's court of a level higher than the original court **unless the original court is the Supreme People's Court**" (emphasis added). The latter expression "unless …" was included to signify that the Supreme People's Court is the highest court in the Mainland and hence any retrial could not be conducted by a people's court of a higher level.

20. The Administration however agrees with Members that the above position is sufficiently clear under the Mainland law and the "unless" clause would not be required. The "unless" clause will therefore be removed from Clause 6(1)(d) by way of a Committee Stage Amendment.

III. *Paragraph 3 of Schedule 2*

21. In the Composite Response to the Views of Deputations and Submissions on the Bill submitted by the Administration (LC Paper No.

CB(2)2091/06-07(02)), the reason for the inclusion of paragraph 3 of Schedule 2 was explained. The Administration originally proposed to amend the *Foreign Judgments (Restrictions on Recognition and Enforcement) Ordinance* (Cap. 46) so that Mainland judgments or any part thereof that satisfy the requirement of Clause 5(2)(a) to (e) of the Bill would be excluded from the purview of Cap. 46.

22. In the light of the Bar Association's comment in its paper of 3 May 2007, the Administration reviewed the need for such an amendment. It is noted that Cap. 46 seeks to address a different problem and is not inconsistent with the Bill. Cap. 46 addresses the problem of foreign judgments which were given in violation of a choice of court agreement between the parties.

23. Section 3 of Cap. 46 provides that a judgment given by a court of an overseas country (defined to mean any place outside Hong Kong) contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country shall not be recognised or enforced. The intention is to protect party autonomy as expressed in choice of court agreements[3].

24. The Administration therefore came to the view that Cap. 46 should continue to apply to foreign judgments which were given in violation of a choice of forum agreement. On this understanding, the Administration considers that paragraph 3 of Schedule 2 should be removed from the Bill.

IV. *Grounds to set aside registration under Clause 18*

25. The issues concerning the grounds for setting aside registration of judgments under the Bill are dealt with separately in Annex A.

Proposed Order 71A Rule 3

26. Upon the gazettal of the Bill, the Office of the Privacy Commissioner wrote to the Administration suggesting that the requirement under the proposed Order 71A, rule 3(2)(a) for a judgment creditor to exhibit a certified copy of identity card upon an application for registration of a Mainland judgment might entail a risk of exposing the personal data of the

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[3] For example, a judgment given by a court of Singapore will not be enforced in Hong Kong under section 3 of Cap 46 if it is not the court chosen by the parties in a choice of court agreement. Similarly, a judgment given by a court in the Mainland will not be recognised or enforced if the parties have chosen the courts of another country in a choice of court agreement.

judgment creditor. A copy of the Privacy Commissioner's letter of 23 March 2007 is attached as Annex B.

27. The proposed Order 71A rule 3 is intended to implement Article 10(4) of the Arrangement. On receipt of the comments of the Privacy Commissioner, the Administration duly consulted the various parties concerned including the Judiciary. The Administration notes that there is no similar requirement for the provision of identification documents in support of an application for enforcement of a local judgment or a foreign judgment under our current law.

28. Further, following the procedure for applying for registering a foreign judgment under Cap 319, an application for registering a Mainland judgment under the Bill will need to be supported by an affidavit. Such an affidavit will have to be sworn before qualified personnel who would take steps to satisfy themselves of the identity of the deponent. Further, there is a criminal sanction against wilful use of false affidavit.

29. In view of the discussion in paragraphs 26 – 28 above, the Administration considers it appropriate to seek the views of the Bills Committee on the retention of Order 71A rule 3 or otherwise.

Legal Policy Division
Department of Justice
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Annex A

Clause 18 of the Mainland Judgments (Reciprocal Enforcement) Bill

At the meeting of 16 July 2007, the Administration was asked to compare the grounds provided under Clause 18 for setting aside a registered judgment with those grounds for refusing to enforce a foreign judgment, whether under the common law or other statute law. In particular, the Administration has been asked to review whether "natural justice" is covered under the existing provisions of Clause 18.

Grounds for impeaching a foreign judgment

2. At common law, a foreign judgment is impeachable in the following circumstances –

(a) if the courts of the foreign country did not have jurisdiction to give that judgment in the view of the law of the place of enforcement[4];

(b) if the judgment was obtained by fraud[5];

(c) if its enforcement or recognition would be contrary to public policy[6];

(d) if the proceedings in which the judgment was obtained were opposed to natural justice[7].

3. Most of the above grounds are similarly provided under section 6(1) of the *Foreign Judgments (Reciprocal Enforcement) Ordinance* (Cap. 319) as grounds to set aside the registration of a foreign judgment under the Ordinance. Reference may be made to sections 6(1)(a)(ii), (iv) and (v). However, there is no express provision under Cap. 319 which enables the court to set aside a registered judgment on the ground of natural justice.

Natural Justice

4. The *REJ Arrangement*, similar to Cap. 319, does not specify "natural justice" as a ground for refusing to enforce a judgment covered

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4 *Dicey, Morris & Collins on the Conflict of Laws*, Sweet & Maxwell, 2006, 14R-118 at p 619

5 *ibid*, 14R-127 at p 622

6 *ibid*, 14R-141 at p 629

7 *ibid*, 14R-151 at p 633

thereunder. This notwithstanding, the Administration considers that the grounds for setting aside registered judgments under Clause 18 of the Bill are sufficient to embrace the concept of "natural justice".

5. At common law, the concept of natural justice is generally concerned with procedural safeguards in upholding the fundamental principles of justice and fairness. The notion of natural justice traditionally consists of two fundamental rules: (a) no one may be a judge in his or her own cause; and (b) one's defence must always be fairly heard[8].

6. A breach of natural justice may be invoked as a defence in an action for the enforcement of a foreign judgment. It is provided under section 6(1)(a)(iii) of Cap. 319 that a foreign judgment that was obtained in proceedings at which the defendant was not given sufficient notice to enable him to defend the proceedings shall be set aside. It is worth noting that there were few reported cases in which the defence of a breach of natural justice was successfully raised[9].

7. Furthermore, it has been suggested that proceedings are not contrary to natural justice merely because the court admitted evidence which is inadmissible in domestic courts, or did not admit evidence which is admissible in domestic courts, for the admissibility of evidence is a matter of procedure and so governed by the law of the forum in which the case was tried[10].

8. Reference may also be made to the grounds for refusing to recognise or enforce a judgment of a Contracting State in the Hague Convention on Choice of Court Agreements ("*Hague Convention*"). Article 9 of the *Hague Convention* stipulates the grounds of refusal which include, *inter alia* –

(a) insufficient notice was given to the defendant to enable him to arrange for his defence (Article 9(c)(i));

(b) the judgment was obtained by fraud in connection with a matter of procedure (Article 9(d)); and

(c) enforcement would be manifestly incompatible with the public policy of the requested State (Article 9(e)).

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8 Wade & Forsyth (2000), p 441, 445 and 469

9 David McClean, *Morris on the Conflicts of Laws* (6th ed, 2005), p 165

10 *ibid*

These grounds are comparable to those found in paragraph 1(4) and (5), and paragraph 2 of Article 9 of the *REJ Arrangement*, which are respectively reflected in Clause 18(1)(f), (g) and (j) of the Bill.

9. In the *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* ("the *Explanatory Report*")[11], it is suggested that the above three grounds for refusal of recognition or enforcement, namely failure to properly notify the defendant, fraud and public policy, have considerable overlap amongst one another[12]. It is further suggested that these grounds "*all relate, wholly or partly to procedural fairness*" which is "*also known as […] natural justice*" in some countries[13]. Noting the comments contained in the *Explanatory Report*, it may be fairly argued that, in the context of enforcement of foreign judgments, the principle of natural justice may be subsumed under the aforementioned grounds.

10. It also appears that the ground of "fraud" in Article 9(d) of the *Hague Convention* is restricted to procedural fraud. Procedural fraud includes the notification exception in Article 9(c) of the *Hague Convention*[14], which involves a typical procedural defect that might constitute a breach of natural justice. Certain commentary on the principle of conflict of laws suggested that where the judges were bribed by a third party (not the plaintiff) to have the judgment given against the defendant, the defence of fraud would tend to merge with the defence that the proceedings were opposed to natural justice[15]. In the *Explanatory Report*, it is stated that fraud as to substance falls under the public policy exception in Article 9(e) of the *Hague Convention*[16].

Relevant Cases

11. In *Adams v Cape Industries Plc*[17], the English Court of Appeal held that the defence of breach of procedural natural justice had to be considered by reference to the question of whether the procedural defect concerned would constitute "*a breach of an English court's views of substantial justice*".

12. In *Minmetals Germany GmbH v Ferco Steel Ltd*[18] in which *Adams* was referred to, the English Court of Appeal held that enforcement (of

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11 By T Hartley & M Dogauchi (2007)
12 See para 190 of the *Explanatory Report* at p 55
13 *ibid*
14 *ibid*
15 *Dicey, Morris & Collins on the Conflict of Laws*, Sweet & Maxwell, 2006, 14-133 at p 626
16 See footnote 228 of the *Explanatory Report*, at p 56
17 [1990] Ch 433 (CA) at 564
18 [1999] 1 All ER (Comm) 315 at 316B-C and 331F-G

an arbitral award) that would lead to substantial injustice would be contrary to English public policy. The court also remarked that enforcement of foreign judgments and foreign arbitration awards should be treated similarly as far as consideration of public policy is concerned[19].

13. In Australia[20] and Canada[21], the defence of breach of natural justice also refers to breach of the procedural requirements of due notice and a fair opportunity to be heard, whilst acknowledging the concept of substantial injustice in *Adams*. These two procedural defects were also acknowledged as a common definition of the natural justice defence in England and the United States[22].

14. In *Hebei Import & Export Corp v Polytek Engineering Co Ltd*, the Hong Kong Court of Appeal (CA) was satisfied that a serious breach of natural justice would be considered to be contrary to public policy in the context of enforcement of an arbitral award[23]. Although the Court of Final Appeal (CFA) subsequently overturned the judgment of CA[24], the above observation of CA was not disturbed by the CFA. The CFA held that the expression "contrary to public policy of that country" in Article V(2)(b) of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* meant "*contrary to the fundamental conceptions of morality and justice*". The CFA was of the view that the opportunity of a party to present his case and a determination by an impartial and independent tribunal which was not influenced, or seen to be influenced, by private communications were basic to the notions of justice and morality in Hong Kong[25].

15. It has also been commented that the notion of substantive justice should fall within the legitimate scope of the notion of public policy in Section 6(1)(a)(v) of Cap 319[26].

16. Reading the interpretations in various common law jurisdictions and the comments contained in the *Explanatory Report* on the *Hague Convention* together, it may be fair and reasonable to conclude that the

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19 *ibid* at 330D-F

20 Nygh, P. & Davies, M., *Conflict of Laws in Australia* (7th Ed), Butterworths, 2002, section 9.39-9.42, at pp 194-195

21 Castel, J., *Canadian Conflict of Laws* (5th Ed), Butterworths 2002, section 14.8.b, at p 14-26

22 Reed, A., *Anglo-American Perspectives on Private International Law*, The Edwin Mellen Press 2003, p 542

23 [1998] 1 HKLRD 284, at pp 289G-H and 299 B-C

24 See [1999] 1 HKLRD 665

25 *ibid*, at p 691-692

26 Johnston, G., *The Conflict of Laws in Hong Kong*, Sweet & Maxwell Asia 2005, section 9.020 and footnote 99, p 563.

defence of natural justice is encompassed by the public policy defence. The notion of natural justice also has a considerable overlap with the elements of fraud. This being the case, the Administration considers that the natural justice defence is adequately covered under Clause 18 of the Bill.

Evidential requirements for the defence of fraud

17. The Administration was asked to consider if different evidential requirements between the common law and statute law would apply when the defence of fraud was alleged as a ground to refuse the enforcement of a foreign judgment.

18. In the LC Paper No. CB(2)2458/06-07(01), the Administration has discussed the issue of "fraud" as a defence against the enforcement of foreign judgments. In paragraph 4 of the Paper, it is pointed out that new evidence is not required when invoking the defence of fraud.

19. In *Owens Bank Ltd v Bracco*[27], the common law rule set out in *Abouloff v Oppenheimer & Co.*[28] and *Vadala v Lawes*[29] was reaffirmed. A foreign judgment can be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been alleged in the foreign proceedings. The House of Lords held in *Owens Bank* that the relevant provision of the English legislation[30] which denies the registration of a foreign judgment obtained by fraud was to be construed as having adopted the approach of the common law courts to the finality of a foreign judgment.

20. It was held in *Owens Bank* that there was no requirement as that in an action to set aside a local English judgment on the ground of fraud, that the fraud should be established by fresh evidence that had not been available to the defendant at trial and could not with reasonable diligence have been discovered by him before judgment had been delivered. It was further held that the common law rule to refuse enforcement on the ground of fraud was embodied in the statute and could not be altered save by legislation[31].

21. Having reviewed the relevant cases, the Administration considers that there is no difference in terms of the evidential requirements when alleging the defence of fraud, whether under common law or the statutory

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27 [1992] 2 AC 443
28 (1882) 10 QBD 295
29 (1890) 25 QBD 310
30 Section 9(2)(d) of the *Administration of Justice Act* of 1920.
31 [1992] 2 AC 443 at 489F-H

regime pertaining to the enforcement of a foreign judgment.

Proof of Contravention of Public Policy

22. Another issue raised by Members was whether the defence of public policy against enforcement of a foreign judgment can be raised at the court's initiative.

23. On this issue, it may be useful to refer to *Hebei Import & Export Corp v Polytek Engineering Co Ltd*[32] discussed in paragraph 14 wherein the judgment debtor resisted the enforcement of an arbitral award made under the *CIETAC Arbitration Rules* and the *Arbitration Law of the PRC*. He contested that the chief arbitrator had private communications with staff of a party in the absence of another and this would amount to procedural irregularities and therefore, enforcement of the award would be contrary to public policy. In deciding whether enforcement of the arbitral award should be refused under the public policy ground of section 44(3) of the *Arbitration Ordinance* (Cap. 341), Mason NPJ commented that the "*principal difference between section 44(2) of Cap. 341*[33] *and section 44(3) is that under section 44(3), the court could take the point of its own motion*" and "*if the respondent sought to raise a specific ground under section 44(2) for procedural irregularities under the guise of public policy, then it was only right that the judgment debtor bear the onus of establishing that ground*"[34].

24. Noting the CFA judgment of *Hebei Import & Export Corp*, the defence of public policy could be raised either by the judgment debtor who seeks to set aside the registered award or by the court on its own volition under the relevant provisions of the Arbitration Ordinance (Cap. 341).

25. In relation to the enforcement of foreign judgments, section 6(1)(a) of Cap. 319 stipulates, *inter alia*, that the registration of the judgment shall be set aside if "the registering court is satisfied" that the enforcement of the judgment shall be contrary to public policy in Hong Kong. The Administration considers that the formula adopted in section 6(1)(a) of Cap. 319 should not in any way prevent the court from raising the issue of public policy on its own motion.

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32 [1999] 1 HKLRD 665

33 Section 44(2) of the *Arbitration Ordinance* contains six grounds for refusal of enforcement of a Convention award, including the ground of due notice stated in section 44(2)(c).

34 [1999] 1 HKLRD 665 at 691B-D, citing AJ van den Berg, *The New York Convention of 1958* (Kluwer, 1981) in support

26. Having regard to the above discussions, the Administration considers it appropriate to follow the drafting of section 6(1)(a) of Cap. 319. This would leave the court with the discretion to invoke the public policy ground on its own volition.

Legal Policy Division
Department of Justice
September 2007

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Annex B

香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

Our Ref : PCPD(O)115/156 pt.13

23 March 2007

Secretary for Justice
Department of Justice
Law Drafting Division
8th floor, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Sirs,

Re: Mainland Judgments (Reciprocal Enforcement) Bill

I refer to the Mainland Judgments (Reciprocal Enforcement) Bill ("**the Bill**") you have proposed and write to let you have my views thereon.

Having carefully considered the Bill, I am concerned that the new procedure for application for registration of a Mainland judgment may impact upon the judgment creditor's personal data privacy currently protected by the Personal Data (Privacy) Ordinance, Cap. 486.

According to s.5 of the Bill, a judgment creditor under a Mainland judgment may apply to the Hong Kong Court of First Instance for registration of the Mainland judgment. The procedure for making this application is set out in the consequential amendments to the Rules of the High Court, Cap.4 whereby you have proposed a new Order 71A.

I note that the proposed Order 71A is similar to the existing Order 71 of the Rules which regulates the application for registration of foreign judgments under the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap.319 ("**FJREO**"). However, the proposed Order 71A contains an additional requirement under its r.3(2)(a) and r.3(2)(b) requiring the judgment creditor to exhibit his Hong Kong identity card or, if he is not a holder of an identity card, his identification document to the supporting affidavit ("**Such Requirement**").

If a judgment creditor is directed by the Court to serve a summons on the

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judgment debtor pursuant to Order 71A, r.2(1), the judgment creditor's affidavit, including a copy of the judgment creditor's identity card or identification document (as the case may be), will be handled by the relevant authorities and agents responsible for such service and will be received by the judgment debtor. As a result, the judgment creditor will be exposed to risk of his personal data contained in his identity card or identification document being abused.

The purpose of Such Requirement is not apparent from the Bill and it does not appear to me that the Court would find Such Requirement useful because:-

(1) if it is the judgment creditor who makes the supporting affidavit, the witnessing solicitor would have verified the identity of the judgment creditor and the Court would not need to inspect a copy of the judgment creditor's identity card or identification document; and

(2) if the deponent is not the judgment creditor, inspection of a copy of the judgment creditor's identity card or identification document would not assist the Court in verifying that the deponent has the authority to make the affidavit on behalf of the judgment creditor.

Furthermore, it is difficult to reconcile why Such Requirement applies only to applications for registration of Mainland judgments, but not applications relating to foreign judgments under s.4 of FJREO and Order 71.

In view of the above, I should be grateful if you could address my concern by letting me know the justification for Such Requirement and why Such Requirement only applies to application for registration of Mainland judgments.

If you have any queries, please contact the undersigned at Tel : 3423 6601.

Yours faithfully,

(Wilson LEE)
Legal Counsel
for Privacy Commissioner for Personal Data