

Reciprocal enforcement of civil and commercial judgements between Hong Kong and Mainland China



Executive Summary

On 26 October 2022, the Hong Kong Legislative Council passed the long-awaited *The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance* (the **MJREO**). MJREO implements the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by Courts of the Mainland and of the Hong Kong Special Administrative Region* signed on 18 January 2019 (the **2019 Arrangement**), which, once in effect, will remove the requirement for an exclusive jurisdiction agreement before the parties may take the benefit of the Hong Kong and Mainland court's reciprocal recognition of Hong Kong and Mainland court judgements.

Removal of the requirement for the exclusive jurisdiction agreement is a much welcomed move and allowing contract parties (in particular, lenders in international financing transactions) to elect asymmetric exclusive jurisdiction clause in offshore financing transactions involving borrowers with a strong Mainland China nexus.

The expanded scope in types of matters as well as categories of relief under the 2019 Arrangement will further solidify Hong Kong's position as the leading dispute resolution centre for disputes involving PRC assets or otherwise have a Mainland China nexus.

Introduction

On 26 October 2022, the Hong Kong Legislative Council passed the MJREO, which implements the 2019 Arrangement.

The MJREO will enable Mainland court judgments to be enforced in Hong Kong by a simple registration procedure if the requirements under the MJREO are fulfilled.

When will MJREO take effect?

Following the passing of the MJREO, the PRC and Hong Kong authorities are putting in place an implementation mechanism to give effect to the 2019

Arrangement. The Hong Kong Government has indicated that the MJREO will take effect in about six to seven months' time.

MJREO will therefore only apply to judgements made on or after the commencement date of MJREO (i.e. the existing regime under *The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597 of the Laws of Hong Kong)* (the **2006 Arrangement**) will continue to apply to Mainland China judgments given under a contract with exclusive jurisdiction agreement in favour of the Mainland courts made before the commencement of the MJREO).

Key Changes

1. Removal of the exclusive jurisdiction requirement

One of the most significant changes to the 2006 Arrangement is the replacement of the exclusive jurisdiction requirement under to the 2006 Arrangement with a jurisdictional test, which requires the parties to a contractual dispute to show that there is a connection with Mainland China.

The jurisdictional requirement will be satisfied if, at the time when the proceedings were accepted by the Mainland court, one of the conditions specified in the MJREO is satisfied, including:

- (a) the defendant's place of residence was in Mainland China;
- (b) the defendant's representative office, branch, office, place of business or other establishment was in Mainland China;
- (c) the place of performance of the disputed contract was in Mainland China; or
- (d) the parties agreed in writing to submit to the jurisdiction (whether exclusive or non-exclusive) of the Mainland courts, and if the places of residence of all the parties were in Hong Kong, together with evidence that there was a connection between the dispute and Mainland China (such as the place of performance was in Mainland China, the contract was signed in Mainland China or the subject matter was situated in Mainland China).

This marks a departure from the 2006 Arrangement where only Mainland China judgments for monetary claims under a contract with exclusive jurisdiction agreement in favour of the Mainland courts may be enforced in Hong Kong.

2. Expanded Scope of Applicable Matters

Unlike the 2006 Arrangement (which specifies the types of Mainland China judgements covering civil and commercial matters which are within the scope of the current regime), the 2019 Arrangement adopts an exclusion list, whereby most civil and commercial cases will be covered by the MJREO.

3. Expanded Categories of Remedies

Unlike the 2006 Arrangement (which only covers monetary relief), the MJREO expands the categories of remedies to both monetary and non-monetary relief.

Please refer to the table in the Schedule for other key amendments to the 2006 Arrangement.

What does it mean to you in practice

1. Return of asymmetric exclusive jurisdiction clause in financing transactions with Mainland China nexus

Asymmetric exclusive jurisdiction clauses are commonly adopted in international financing transactions. An asymmetric exclusive jurisdiction clause allows lenders to pursue claims against the borrower before courts of competent jurisdiction (whether in Hong Kong or overseas), whilst limiting the borrower's submission to the exclusive jurisdiction of Hong Kong court. An asymmetric exclusive jurisdiction clause gives the lenders the flexibility to pursue claims against the borrower in a jurisdiction where the assets of the borrower are situated, which could potentially improve the lenders' prospect of recovery of the debt.

Adoption of an asymmetric exclusive jurisdiction clause has proved to be problematic in *Industrial and Commercial Bank of China (Asia) Limited v Wisdom Top International Limited* [2020] HKCFI 322, whereby the Hong Kong court dismissed the lender's application for a certified copy of the

facility agreement and the certificate required for PRC court's recognition of the Hong Kong judgement on the basis that the asymmetric exclusive jurisdiction clause of the facility agreement does not satisfy the exclusive jurisdiction requirement under the 2006 Arrangement.

Following the commencement of the MJREO, we expect the return of choice of asymmetric exclusive jurisdiction clause in financing transactions with Mainland China nexus.

2. Hong Kong as the choice of venue of dispute resolution in relation to PRC related disputes

The expanded scope in types of matters as well as categories of relief under the 2019 Arrangement will further distinguish Hong Kong as the venue of choice for dispute resolution relating to matters with a Mainland China connection. This would be a relevant factor to be taken into account in drafting dispute resolution provisions in commercial contracts.

3. Less re-litigation

Currently, if a party could not benefit from the existing reciprocal enforcement arrangement between Hong Kong and Mainland China for the enforcement of the Mainland judgment in Hong Kong, such party would have to start new proceedings in Hong Kong to effectively re-litigate the claim in Hong Kong. As the MJREO will broaden the reciprocal enforcement arrangement between Hong Kong and Mainland China, the need for new litigation will be reduced. This will result in a huge cost saving and further enhance Hong Kong as a choice of dispute resolution venue where there are Mainland elements in the transaction.

Please feel free to contact your usual Norton Rose Fulbright contacts if you have any queries on this legal briefing.

Schedule

Key Differences between the 2006 Arrangement and the 2019 Arrangement/ MJREO

	2006 Arrangement	2019 Arrangement/ MJREO
Applicable judgments	Judgments for monetary claim given in relation to contracts with exclusive jurisdiction agreement made before the commencement of the MJREO	Judgments given on or after the commencement of the MJREO where jurisdictional test is satisfied which basically required a connection with the Mainland China such as place of residence, business or performance of disputed contract
Requirement for exclusive jurisdiction agreement in favour of Mainland courts	Yes	No
Applicable matter	Contractual disputes other than those arising from: <ul style="list-style-type: none"> • an employment contract • a contract to which a natural person acts for personal consumption, family or other non-commercial purposes 	Not limited to contractual disputes, but certain matters are expressly excluded including: <ul style="list-style-type: none"> • insolvency and bankruptcy matters (which are dealt with under a separate arrangement framework); • certain defined matrimonial and family matters (which are dealt with under a separate arrangement framework); • succession and administration or distribution of estate matters; • certain defined intellectual property cases; • certain listed maritime matters.
Applicable courts	<ul style="list-style-type: none"> • the Supreme People's Court • a Higher People's Court • an Intermediate People's Court • a recognised Primary People's Court (as listed in the Gazette from time to time). 	<ul style="list-style-type: none"> • the Supreme People's Court • a Higher People's Court (2nd instance) • an Intermediate People's Court (2nd instance) • a Higher People's Court, an Intermediate People's Court or a Primary People's Court (1st instance and no appeal is allowed or time for appeal has expired).

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