



Hong Kong General Chamber of Commerce
香港總商會 1861

香港總商會
香港金鐘道統一中心廿二樓
Hong Kong General Chamber of Commerce
22/F United Centre,
95 Queensway, Hong Kong
Tel (852) 2529 9229
Fax (852) 2527 9843
Email chamber@chamber.org.hk
www.chamber.org.hk

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Mr Paul Tsang
Law Officer (Ag.)
International Law Division
Department of Justice
7th Floor, Main Wing
Central Government Offices
18 Lower Albert Road
Hong Kong

By post and fax: 3918 4791

Dear Mr Tsang

**Re: Consultation Paper on the 2016 Preliminary Draft Convention on the
Recognition and Enforcement of Foreign Judgments**

We are pleased to submit, for the Department of Justice's consideration, the Chamber's response to a consultation exercise on the captioned.

Fundamentally, we believe that public discussion should focus on the potential merits and demerits of Convention adoption rather than the current approach where views on the Convention's provisions are being sought. We are also of the view that the Government should take stock of existing measures for enforcing foreign judgments as part of this evaluative process before consideration is given to the implementation of the Convention.

We hope you will find our comments to be helpful.

Sincerely



Shirley Yuen
CEO

Encl.

**HONG KONG GENERAL CHAMBER OF COMMERCE (“HKGCC”)
RESPONSE TO THE DEPARTMENT OF JUSTICE’S CONSULTATION PAPER (“CP”)
ON THE 2016 PRELIMINARY DRAFT CONVENTION ON THE
RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS**

1. **Introduction**

1.1. The approach that the Government is proposing to take in this matter, as described in the CP, is relatively unusual. For any proposed changes to the existing regime in Hong Kong, for example by way of new legislation, the first consideration would normally be whether the changes were in principle necessary or appropriate for Hong Kong at all, in comparison to the *status quo*. Assuming the answer is yes, the second consideration would then be the details of the proposed changes, and whether any amendments to the proposed changes are appropriate. In the case of this CP, however, the Government is proposing to approach the matter the other way around. In the CP, it is inviting comments on the details (i.e. drafting) of the draft Convention- not the principle of whether it is appropriate for Hong Kong to implement the Convention at all. According to the CP, this issue would only be considered if and when the draft Convention is adopted by the Hague Conference at a diplomatic conference.¹ It is unclear as to when any such conference would take place, but given that the Government is envisaging that the draft Convention may be finalised in 2017, it is possible that such a diplomatic conference would not be held until the end of 2017 or even in 2018. Only at that stage, assuming the draft Convention is adopted by the Hague Conference, would the Government (according to the CP) consider whether it should be implemented in Hong Kong.

1.2. There may be reasons why the Government is approaching the matter in this way. For example, given that the draft Convention remains subject to further discussion and refinement, and there is the potential for textual alterations to the Draft Convention over the next 12 months, it may feel that it is only meaningful to assess the issue of whether the Convention is appropriate for Hong Kong once it has actually been finalised. However, by following this approach, it is crucial that the Government accepts the following points:

- Any comments which HKGCC (or any third party) makes on the content of the draft Convention in response to this CP are necessarily of a preliminary and non-exhaustive nature, subject to change in the light of how the draft evolves, and (most importantly) **without prejudice to its views on the issue of whether it is necessary or appropriate for the Convention, in its final form, to be implemented in Hong Kong at all**. HKGCC expects to express a view on this issue in response to the further public consultation which the Government should conduct on this issue (see below), if and when the draft Convention is adopted by the Hague Conference.
- In assessing whether the Convention (if adopted by the Hague Conference) is appropriate for Hong Kong, the Government should only decide in favour if at least the following two conditions are fulfilled: (a) a further public consultation is

¹ Paras 3 and 8.

conducted, giving all interested parties a proper opportunity to express their views; and (b) a full regulatory impact assessment (“RIA”) is conducted, which shows convincingly and overwhelmingly that the benefits of implementing the Convention in Hong Kong clearly exceed the costs. An important consideration which should be examined in the RIA, for example, which is not addressed in the draft Convention, is the identity of the countries which may become parties to it. This is not necessarily something over which any signatory state (let alone Hong Kong as a non-signatory State) would have any control. However, it does affect the benefits and risks arising from the draft Convention, should not be disregarded as immaterial, and is a relevant factor in deciding whether Hong Kong should accede to the Convention at all. Another consideration is whether the methods which **already exist** in Hong Kong for the enforcement of foreign judgments are sufficient. The RIA would need to show that these methods were in some way deficient, that implementing the Convention would remove these deficiencies, and that any costs and risks resulting from such implementation are clearly exceeded by the benefits.

1.3. In section 2 below we summarise the current methods of enforcing foreign judgments in Hong Kong. In section 3, we give some preliminary views on the content of the draft Convention, subject to the caveats above and in particular that they are without prejudice to our view on whether the implementation of the Convention is appropriate for Hong Kong.

2. **Overview of the current position in Hong Kong**

2.1 At present, there are two means by which a foreign judgment can be registered and enforced in Hong Kong. Which regime applies depends on the arrangements in place between the State within which the judgment in question was obtained and Hong Kong.

2.2 Generally under the common law regime, the party seeking enforcement of a foreign judgment in Hong Kong must prove that the foreign judgment is:-

- (A) Final and conclusive (i.e. it cannot be altered by the court that pronounced it, notwithstanding there may be the possibility of an appeal to a higher court²);
- (B) Between the same parties (or their privies) as those before the Hong Kong Court;
- (C) For a definite monetary sum; and
- (D) Rendered by a court which has competent jurisdiction in Hong Kong terms³.

2.3 Under Hong Kong’s statutory regime, the Foreign Judgments (Reciprocal The position Enforcement) Ordinance (“**FJREO**”) (Cap. 319), is similar, which requires:-

- (A) The judgment must be both final and conclusive⁴ (a judgment is deemed to be final and conclusive notwithstanding that an appeal is pending against it or that it may still be subject to an appeal⁵);

² Dicey, Morris & Collins on the Conflict of Laws (15th Ed) para. 14-026, applied in *Suzanne Ruth Henderson v Scott Henderson* [2016] HKEC 857.

³ Johnston, Graeme. *The Conflict of Laws in Hong Kong* (2nd Ed) para. 9.015.

⁴ Section 3(2)(a) of FJREO.

- (B) There must be payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty⁶; and
 - (C) The judgment must have been given after the coming into operation of the order directing that the provisions of the FJREO shall extend to that foreign country.
- 2.4 The defendant, to resist enforcement, must plead and prove that the foreign judgment should be denied enforcement on the following grounds⁷:
- (A) Lack of jurisdiction (i.e. it cannot be shown under Hong Kong law that a foreign court had competent jurisdiction to give that foreign judgment)⁸;
 - (B) The foreign judgment was procured by fraud⁹;
 - (C) The foreign judgment was obtained by a procedure which offends Hong Kong notions of substantial justice¹⁰;
 - (D) The foreign judgment resolves issues of a public as opposed to private law nature (the rule against enforcement of foreign penal, revenue or public laws disallows enforcement or recognition of foreign judgments in Hong Kong if to do so would amount to indirect enforcement of such laws)¹¹; or
 - (E) The foreign judgment is contrary to Hong Kong public policy¹².

The RIA that should accompany any Government proposal to implement the Convention in Hong Kong should explain why the existing mechanisms described above are deficient (if they are), why the implementation of the Convention would remove these deficiencies, and how the costs and risks arising from such implementation would be exceeded by the benefits.

3. **Overview and critical assessment of the proposed changes**

- 3.1. Without prejudice to our view on whether the implementation of the Convention is appropriate for Hong Kong, on which we reserve judgment until a later date (see above) we can see a number of problems with the current drafting. We explain these problems below.
- 3.2. The scope of the present draft is unhelpfully broad, and would benefit from further refinement. If enacted into Hong Kong law in its current form, the terms of the Draft Convention would represent a significant and arguably unwelcome departure from the existing common law and statutory regimes presently in place in Hong Kong.

⁵ Section 3(3) of FJREO.

⁶ Section 3(2)(b) of FJREO.

⁷ The defences available under the statutory regime are materially similar.

⁸ Johnston, Graeme. *The Conflict of Laws in Hong Kong* (2nd Ed) para. 9.054.

⁹ *Ibid*, para. 9.031.

¹⁰ *Ibid*, para. 9.026.

¹¹ *Supra* note 11, para 9.079.

¹² *Supra* note 11, para. 9.090.

- 3.3. At present the Draft Convention offers no meaningful definition of the phrase “*civil or commercial matters*”. This phrase is central to the scope of the Draft Convention. In our view, the scope of the Draft Convention should be confined to judgments for a definite sum of money, consistent with the common law and statutory provisions in Hong Kong. To do otherwise would in our view, create unacceptable uncertainty. We also consider that it would be prudent to exclude litigation commenced by State agencies from the scope of the Draft Convention.
- 3.4. We also note that the Draft Convention, as presently drafted, allows for judgments which provide for other forms of relief, such as injunctions and specific performance, to be enforced in Hong Kong. This could give rise to difficulties. Such judgments may touch upon fundamental rights and freedoms and are usually governed by specific principles and rules that may vary from jurisdiction to jurisdiction. Allowing enforcement of foreign judgments granting relief other than a sum of money may result in an increase in unmeritorious applications from foreign jurisdictions which seek relief which is incompatible with the laws of Hong Kong. Resisting such claims would invariably be expensive and time consuming for defendants in Hong Kong. For these reasons, we recommend that the scope of the Draft Convention be confined to the enforcement of money judgments only.
- 3.5. Consistent with the reasoning set out above, we consider that it should be made clear that judgments concerning competition law issues should be excluded from the scope of the Draft Convention. Judgments on anti-trust or competition matters are usually made with reference to the particular competitive landscape in the relevant market and may grant relief other than a sum of money. As matters stand, such judgments would be potentially enforceable under the Draft Convention.
- 3.6. In our view, it may result in unfairness if the enforcement of judgments on anti-trust or competition matters is to be allowed without any mechanism to review the suitability of the relief granted in light of the market environment in the requested State. We would therefore recommend that the Draft Convention exclude anti-trust or competition matters from the scope of the draft Convention.
- 3.7. Article 2(4) of the Draft Convention provides that a judgment is not excluded from the scope of the Draft Convention simply because a foreign state was a party to the proceedings. In Hong Kong, foreign states enjoy absolute immunity: *Democratic Republic of The Congo & Others v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 395. As such, a commercial contract with a foreign State cannot be enforced in Hong Kong against the foreign State unless the foreign State waives immunity.
- 3.8. We note this for completeness only, as we consider that Articles 2(4) when read together with Article 5 which states that existing immunities of States will not be affected by the Draft Convention, should mean that the current position in Hong Kong in relation to State immunity to be maintained.

November 2016