

LECTURE 1

RECOGNITION AND ENFORCEMENT OF FOREIGN DECISIONS

GENERAL PRESENTATION

PROF TERESA CHENG

GBM GBS SC JP

FOUNDER MEMBER & CO-CHAIRMAN OF ASIAN ACADEMY OF INTERNATIONAL LAW





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- Overview
- Common law recognition and enforcement
- Bilateral arrangements
- Judgments Convention
- Mainland China and Hong Kong SAR Arrangements





Basic principles

- Principle of non-intervention
- Judicial sovereignty
- Principle of comity



State practice

- Generally, action involving states administrative actions, criminal proceedings, are not recognized or enforced
- Civil and commercial judgments recognized and enforced based on common law, statutes (by reason of bilateral/regional arrangements)
- International conventions – Judgment Convention





Contrast with arbitration and mediation

- New York Convention
- Singapore Convention





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Judgments Convention

COMMON LAW RECOGNITION AND ENFORCEMENT



Action at Common Law – legal bases

- Doctrine of comity? *Roach v Garvan* [1748]
- Doctrine of obligations? *Russell v Smyth* [1842]
 - duty on judgment debtor to pay judgment debt decided by a court of competent jurisdiction, English courts bound to enforce
- Duty of positive law - establishing an efficient society of nations?



Adams v Cape Industries Plc [1990] Ch 433

- Relied on obligation doctrine
- Referred to doctrine of comity
- Emphasised duty of positive law – a society of nations work better if judgment can be directly enforced in countries where the judgment debtor or his assets are located

Enforcement action under common law

- Bring an action on foreign judgment (not confined to common law jurisdiction)
- Traditionally, provided foreign judgment is:
 - Action *in personam*
 - For debt/definite sum of money (not taxes/penal/fines)
 - Final and conclusive (even if pending appeal)
- Summary judgement possible if no defence



JSC BTA Bank v Multar K Ablyazov [17 Feb 2014] #27, a
foreign judgment is enforceable in HK if:

- Final and conclusive on the merits
- Made by a court of competent jurisdiction over the parties and subject matter
- Between same parties or privies on an identical issue
- Foreign judgement is for a monetary sum
- Not impeachable according to the HK conflict of laws rules

Action in personam for money award

- Fixed or liquidated sum
- Not be in nature of taxes or penalty
- Not enforce foreign law which is penal, revenue or public law
- If injunctive relief need to start fresh proceedings in HK





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Jiang Xi An Fa Da Wine v Zhang King, [2019] HKCFI 2411
raised three matters after pronouncing the “traditional criteria”

(52)...Traditional criteria for enforcement of a foreign judgment by action under the common law are that the judgment is:

1. for a debt or definite sum of money
2. Made by a court of competent jurisdiction over the parties and the subject matter
3. Between the same parties or their privies on an identical issue
4. Final and conclusive on the merits
5. Not impeachable according to the rules on conflict of laws of Hong Kong



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(1) Action in personam on money award only?

- *(83)....the rule has its origin in an English case from Georgian times. The developments and changes in societies all over the world in the last 200 years, in particular, the increasing globalization of business and commerce, the mobility of both individuals and assets are the ease with which people and properties can relocate and be relocated, are far-reaching and most probably beyond the imagination of those living in the early 19th century.*
- *(84)....re-assessment of thee continuing applicability in HK of the 200 years old **common law prohibition on the recognition and enforcement of foreign non-monetary judgment should be due.** In this regard, I note that a foreign order for the transfer of company shares were successfully enforced*



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(2) Final and conclusive if subject to trial supervision?

(89) In short, there is no definite authority that the existence of the “trial supervision” procedure would deprive a PRC judgment of its otherwise final and conclusive character. Rather, the matter has to be proved at trial at which evidence of material PRC law would have to be adduced by the parties and assessed by the court in the actual enforcement proceedings.

(90) I am satisfied that the Prospective PRC judgment may be enforced in Hong Kong within the meaning of s21M(1)(b) of the HCO



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(3) Precondition that the interim relief in relation to the proceedings, which are capable of giving rise to a judgment which may be enforced in Hong Kong at common law in s21M of HCO

- Follow the CFA judgment of *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd (2016) HKCFAR 586.(para 48)*
- The adoption of a good arguable case to see if the above condition is met as was held in *Bank of China v Yang Fan* and *JSC BTA Bank v Nukhtar Kabulovich* is **wrong**



Final and conclusive

- Not review merits of the disputes, so foreign judgment must be final and conclusive
- Still final and conclusive even if pending appeal but action may be stayed





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China NPL Holdings PTE Ltd v Mo Haidan & Ors, June 2020, (action to enforce PRC Judgment, set aside ex parte Mareva injunction granted)
Trial supervision revisited

(15) There is no dispute in regard to the circumstances justifying the grant of Mareva relief. The circumstances are well established. P must demonstrate:

- 1. That it has a **good, arguable case** on a substantive claim over which the court has jurisdiction;*
- 2. That there are assets within the jurisdiction;*
- 3. That the balance of convenience is in favour of grant; and*
- 4. That there is a real risk of dissipation of assets or removal of assets from the jurisdiction which would render P's judgment of no effect.*





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- Having heard expert evidence on whether the PRC court judgment is final and conclusive in light of the “trial supervision” the court finds:

(42) It seems to me there is a clear distinction between judgment of a foreign court where there is an appeal pending which I accept might be regarded as final and conclusive, notwithstanding the ongoing appellate process in the overseas jurisdiction such that the original judgment has been set aside, the findings are not binding on the court hearing the retrial and there is therefore no question of the matters being “res judicata”.





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- *(43) I cannot see how it can be said that a judgment in the second situation is final and conclusive; I accept the evidence of Mr. Hu that there is no “res judicata” arising from the original proceedings in the PRC and in the circumstances it would be contrary to common sense as well as to the established principles of Hong Kong Conflict of Laws to regard it as such for enforcement purposes in Hong Kong.*
- *(44) Accordingly, I am unable to conclude that P has discharged its obligation to demonstrate a good, arguable claim based on a final and conclusive judgment of the PRC court.*





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- When is a PRC court judgment final and conclusive?
- A matter of expert evidence of PRC law to be assessed each time by a judge?





Competent jurisdiction of original court

- Applicable law is conflict of laws rules of *lex fori*
- Foreign court rules on jurisdiction not relevant



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Tang Gang v Wong Sai Chung [2023] HKCA 1338

For common law enforcement action, the applicable principles can be found in the judgment of Staughton LJ in *Jet Holdings Inc v Patel* [1990] 1 QB 335, 344E-345C :

“Where the objection to enforcement is based on jurisdiction—that is rule 43—it is to my mind plain that the **foreign court’s decision on its own jurisdiction is neither conclusive nor relevant. If the foreign court had no jurisdiction in the eyes of English law, any conclusion it may have reached as to its own jurisdiction is of no value. To put it bluntly, if not vulgarly, the foreign court cannot haul itself up by its own bootstraps. Logically, the same reasoning must apply where enforcement is resisted on the ground of fraud—rule 44. If the rule is that a foreign judgment obtained by fraud is not enforceable, it cannot matter that in the view of the foreign court there was no fraud.** But this doctrine makes a great inroad into the objective, which is generally desirable, of enforcing judgments where in the eyes of English law the foreign court had jurisdiction. The defendant may have been served in the foreign country, entered an appearance, given evidence, been disbelieved, and had judgment entered against him. If he asserts that the plaintiff’s claim and evidence were fraudulent that issue must be tried all over again in enforcement proceedings. The lesson for the plaintiff is that he should in the first place bring his action where he expects to be able to enforce a judgment.



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Personal jurisdiction (*Emanuel v Symon* [1908] 1 KB 302)
Original court has jurisdiction if judgment debtor:

- A subject of the state of origin
- In state of origin at start of action
- Made a claim as plaintiff or counter-claimant in foreign court
- As a defendant, submitted to jurisdiction by voluntarily appearing in the proceedings
- Before commencement of proceedings agreed to submit to jurisdiction of courts in the state of origin



Typical situations where foreign court has no jurisdiction:

- Not submitted to foreign court
- Immunity from jurisdiction of foreign court
- Judgments on claims of immovable property outside the state of origin
- At the time of the foreign court proceedings the property (movable or immovable) is not in the state of origin



Grounds resisting enforcement - fraud

- Judgment obtained by fraud by judgment creditor or foreign court
- Fraud was material to foreign judgment
- Examples
 - Knowingly giving false evidence
 - Procuring of knowingly false evidence
 - Bribery



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WFM Motors v Malcolm Maydwell, 1995, CA, Foreign Judgments (Reciprocal Enforcement) Ordinance (FJREO) Cap 319, s4 and s6, p.7-8, allegations of fraud

- *The setting aside of a registration of a foreign judgment is provided for by section 6 of the FJREO...Abouloff v Oppenheimer & Co (1882) 10 QBD 295It was held that notwithstanding that the defence (of fraud) had been considered and rejected in Russia it was available to the Defendant in England.*
- *Vadala v Lawes (1890) 25 QBD 310...the defence that the judgment was obtained by fraud was available even though it involved matters adjudicated upon in the foreign court.*

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WFM Motors v Malcolm Maydwell, 1995, CA, Foreign Judgments (Reciprocal Enforcement) Ordinance (FJREO) Cap 319, s4 and s6, p.7-8, allegations of fraud

*For the purposes of this appeal the principles to be applied are as follows. First, **the court is not re-trying the case.** The question is not whether the decision of the foreign court was correct. Secondly, however, where fraud is alleged it is permissible in an appropriate case **to examine the evidence to consider whether or not the evidence given at the trial was fraudulent.** Thirdly, it follows that this can be done even when the very points that are put forward have already been considered and dismissed by the foreign court. An allegation of fraud is always serious and the Defendant must particularise the fraud with precision and then establish it to the appropriate standard*

Tang Gang v Wong Sai Chung [2023] HKCA 1338

- 39. It is quite clear from the above *dicta* that where fraud is alleged, it is not a matter of discretion of the Court whether the issue should be revisited. **It must be.** With respect, the Judge had wrongly taken the view that it was a matter of discretion of the Court whether the issue of fraud raised by the Defendant should be allowed to be tried again in Hong Kong





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Li v Li HCA 1075/2003, 2004, Chinese judgement on enforcing under common law a PRC judgment, allegations of fraud

- Court relied on Dicey and Morris, the Conflict of Laws Rule 143-A, *foreign judgment relied upon as such in proceedings in England is impeachable for fraud. Such fraud may be either (1) fraud on the part of the party in whose favour the judgment is given; or (2) fraud on the part of the court pronouncing the judgment.* The court then referred to the cases cited in WMF referred to in Dicey and Morris in para 14-129, and the CA decision on *Ever Chance Development Ltd v Ching Kai Chiu trading as Wing Hung Hardware & Machinery Company and Others*
- Court concluded that if D has prima facie evidence, arguable and credible case to show that the PRC court judgment was procured by fraud, the HK court will review the evidence to decide whether the judgment was impeachable for fraud.



Grounds resisting enforcement – breach of natural justice

- Notions of natural justice of *lex fori*
 - Reasonable notice of foreign proceedings
 - Opportunity to be heard
 - Wrong in merits not relevant



Grounds resisting enforcement – contrary to public policy (conflicting decisions)

- Contrary to *lex fori*'s notions of public policy
- Fundamental concepts of morality and justice
- Narrowly construed
- Recognition is inconsistent with a judgment of enforcing jurisdiction



Grounds resisting enforcement – against third parties

- No common law rule to apply principles of agency or alter ego to enforce against third parties
- Start fresh action





Grounds resisting enforcement – ADR

- Should debtor have pursued available remedies to rectify violations of excess of jurisdictions in foreign courts (eg arbitration clause)? Estoppel?



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Security for costs - Two-way media v PCCW [2023] HKCFI 659

20....The pretinent question is whether there are any difficulties in the enforcement process.

21. The Hong Kong courts have accepted that whilst the United States has a common law system, there is no reciprocal enforcement of judgments between Hong Kong and the United States under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) and it is therefore necessary for a successful party to institute proceedings in the United States to enforce a Hong Kong judgment or order on costs. The Hong Kong court has further held that the proposition in *Nasser v United Bank of Kuwait*^[8], **that it may be incumbent upon the defendant to show some basis for concluding that enforcement would face substantial obstacle or extra burden meriting the protection of an order for security for costs where the plaintiff resides in a common law country and there is legislation enabling reciprocal enforcement of judgment by registration, clearly has no application where there is no legislative arrangement for reciprocal enforcement of judgments between Hong Kong and the United States.** This is the case in this Application. In such circumstances, the courts have accepted that there will “*naturally be some delay and additional costs if the defendant has to enforce a judgment or order on costs against the plaintiff in the USA*”.^[9]



- BILATERAL ARRANGEMENTS





STATE ACTIONS

- Bilateral treaty
- Regional treaty
- International instruments



Hong Kong statutes

- Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319)
- Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (based on choice of court provisions)
- Mainland judgments in matrimonial and family cases (Cap 639)
- Mainland Judgements in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) and Rules (Cap 645A)





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Foreign Judgments (Reciprocal Enforcement) Ordinance Cap 319 [6 May 1960]

- To make provision for the enforcement in the Hong Kong of judgments given in other parts of the Commonwealth and foreign countries which afford reciprocal treatment to judgments given in the Hong Kong
- Continued in force under the Basic Law of Hong Kong
- S4: Registration of foreign judgment
- S6: Registered judgements must, or may be set aside



Foreign Judgments (Reciprocal Enforcement) Ordinance Cap 319 [6 May 1960]

- s6(a) (registered judgement obtained under s4) **shall be set aside**
 1. not a judgment within the Ordinance
 2. Courts of country of original court had no jurisdiction
 3. Judgment debtor not received notice of proceedings
 4. Judgment obtained by fraud
 5. Contrary to public policy
 6. Rights under the judgment not vested in the person who made the application
- s6(b) **may be set aside** if matter in dispute had been subject of a final and conclusive judgment by a court having jurisdiction in the matter





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Foreign Judgments (Reciprocal Enforcement) Ordinance Cap 319 [6 May 1960]

- Foreign court **deemed to have had jurisdiction by s6(2)**, general principles as in common law regarding submission to jurisdiction for personal jurisdiction; for immovable property or action in rem if property in question was at the time of the proceedings in the country of that court
- **No jurisdiction under S6(3)** If subject matter is immovable property outside the country of the original court, or judgement debtor entitled to immunity from jurisdiction of the courts of the country of the original court
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Resorts World at Sentosa Pte.Ltd v Wong Fei Fu, June 2020, enforcement of
Singapore judgment under FJREO

- **Material non-disclosure:** failed to disclose failed attempt to serve the Singapore Proceedings on Wong in Macau (Macau court refused to recognize the Singapore proceedings which were not served duly on Wong in accordance with Macau rules)
- Application to set aside not **duly made: duly means made within the time prescribed**, long delay of 22 months not acceptable
- **S6(1)(a)(iii) conditions met:** No evidence of service, nor that Wong had actual notice and it is the actual notice of the foreign proceedings before the foreign judgment is obtained in question that matters.
- **Registered judgement set aside**





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- The Mainland and HKSAR arrangements will be discussed at the last lecture on Articles 22 and 25 of the Judgments Convention





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Judgments Convention

CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS



INTERNATIONAL EFFORTS

- 1971 HCCH Hague Convention and Protocol (not adopted)
- Brussels Convention 1972
- Lugano Convention 1988
- 1992 May HCCH Judgement Project



INTERNATIONAL EFFORTS (CONT'D)

- 1992 Judgement Project commenced but suspended in 2005
- 2005 Choice of Court Convention
- 2012 Judgement Project reinstated
- 2019 Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (“The Judgments Convention”)





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THE JUDGEMENTS CONVENTION

- Convention came into force
- 30 states ratified
- 8 states signed but not ratified





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IMPORTANCE

- Growth in cross-border trade and commerce
- Choice of dispute resolution: litigation become a viable choice
- Preclude jurisprudential exorbitance
- Preserve judicial sovereignty
- Enhance mutual legal assistance between states
- Reduce parallel proceedings and costs to parties
- Enhance certainty, predictability, affordability
- Upholding the rule of law





Overview of Judgments Convention

- Chapter I : Scope and definitions
- Chapter II: Recognition and enforcement
- Chapter III: General Clauses
- Chapter IV: Final Clauses



Overview of Judgments Convention: Scope and definition

- Civil and commercial
- Reciprocity
- Exclusion by negative list (eg intellectual property)
- State as parties are covered
- Define habitual residence (statutory seat, incorporated or formed, central administration or principal place of business)





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Overview of Judgments Convention – recognition and enforcement

- No review of merits only to extent needed to apply the Convention
- Enforcing court can postpone or refuse recognition if judgment is subject to review in State of origin, subsequent application not precluded.





Overview of Judgments Convention – recognition and enforcement

- A judgment is eligible for recognition and enforcement if one of the following requirements is met (Article 5(1)(a) to (m))
- Special provisions for personal/family or household/consumer contracts/employee (Article 5(2))



Overview of Judgments Convention – recognition and enforcement

- Article 7: Recognition or enforcement **may be refused** if grounds set out in 7(1)(a) to (f) are met
- Compare with New York Convention:
 - Is it discretionary?
 - Are the grounds exhaustive grounds?
 - Who bears the burden of proof?
 - Can an enforcing court on its own initiative invoke public policy ground?



Overview of Judgments Convention – recognition and enforcement

- **Shall not recognize or enforce** a ruling on a preliminary question
- **May refuse recognition or enforcement** if judgment is based on matters excluded from Convention
- **Severability** preserved
- **May refuse recognition or enforcement** if damages are exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered
- Judicial settlements which is enforceable in State of origin **shall be enforced in same manner as a judgment**



Overview of Judgments Convention – recognition and enforcement

- Documents to be produced and Procedures set out in Articles 12 and 13(certified copy, Apostille Convention) (Procedure according to law of the requested state)
 - Compare with Articles 3 and 4 of New York Convention 1958
- Positive obligation on states,
 - “shall act expeditiously”
 - “shall not refuse the recognition and enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State”
- Does not prevent recognition or enforcement of judgments under national law
 - If more favourable, national courts still can apply.





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Overview of Judgments Convention – general clauses

- Transition
- Declaration on reservation
- Uniform interpretation
 - Regard shall be had to its international character and to the need to promote uniformity in its application
- Non-unified legal systems
- Relationship with other international instruments: not affect pre-existing treaties or rules of REIO,





Overview of Judgments Convention – final clauses

- Declarations with respect to non-unified legal systems
- REIO





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THANK YOU

- Professor Teresa Cheng GBM GBS SC JP
- TC@TeresaChengSC.HK

