

LECTURE 8

ARTS. 22 AND 25 OF THE HCCH JUDGMENTS CONVENTION

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Outline

- I. Overview – HKSAR constitutional Structure
- II. Basic Law Article 95: mutual legal assistance arrangement between Mainland and HKSAR
- III. Reciprocal recognition and enforcement of arbitral award
- IV. HCCH Judgments Convention Articles 22 and 25
- V. Reciprocal recognition and enforcement of Judgments
 - (1) Choice of Court Arrangement
 - (2) Matrimonial
 - (3) Civil and Commercial





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Judgments Convention

I. Overview – HKSAR Constitutional Structure





One Country, Two Systems

- Innovative constitutional structure
- Contributes to development of contemporary international law
- Conceptualised to achieve peaceful reunification



Formulation

- 1979 (Deng Xiao Ping) raised possibility of Hong Kong maintaining a capitalist system
- 1981 (Ye Jianying) nine principles to achieve peaceful reunification
- 1982 (Deng Xiaoping) “*The Nine-point Proposalin essence can be generalized as “one country, two systems”*”. Two different systems are allowed to co-exist...





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“Within the People’s Republic of China, the Mainland with its one billion people will maintain the socialist system, while Hong Kong and Taiwan continue under the capitalist system”

Deng Xiao Ping
1984 June



Historical Context – Opposition to Unequal Treaties

- China has always opposed the unequal treaties
- 1860: (1856 2nd Opium War) Convention of Peking
- 1898: Convention for extension of Hong Kong Territory
99 years to 30th June 1997

Historical Context – Opposition to Unequal Treaties

- 1840: (Opium War) Treaty of Nanking
- **Since 1911**
 - 1942-1943, then Nationalist Government of China demands rejected by the UK
- **Since 1949**
 - Consistently maintained that Hong Kong has been part of Chinese territory and
 - Does not recognise the 3 unequal treaties imposed by the imperialists



Historical Context – PRC Position in UN

- 1971: Restoration of PRC's representation in the UN
- 15 June 1972: UN Special Committee on Decolonization adopted a resolution recommending deletion of Hong Kong and Macao from the list of colonies of the UN which was approved by 27th General Assembly (UN General Assembly Resolution 2908)





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“To China, Hong Kong was not a British Colony, but under British occupation in consequence of British aggression.....This Resolution of the UN General Assembly is, in a sense, recognition of China’s position on the status of Hong Kong and the nature of the three treaties”

ICJ Judge Shi Jiuyong



Negotiation

- March 1979, Governor MacLehose of Hong Kong explored possibility of extending the “lease” of the New Territories
 - Refused by Deng
- 1982, British Prime Minister Thatcher met with Deng
 - Deng expressed intention to recover Hong Kong in 1997





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Deng said in 1982 meeting:

There are three major issues involved. One is sovereignty...on the question of sovereignty China has no room for manoeuvre. To be frank, the question is not open to discussion. The time is ripe for making it unequivocally clear that China will recover Hong Kong in 1997. That is to say, China will recover not only the New Territories but also Hong Kong Island and Kowloon. It must be on that understanding that China and the United Kingdom hold talks on the ways and means of settling the Hong Kong question.



Legislating the 'One country, Two Systems' Policy

- China is a unitary state
- 4th Dec 1982, National People's Congress passes an amendment to the Constitution and introduced Article 31:

The state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be prescribed by laws enacted by the National People's Congress.

- 12th July 1983, Central People's Government proposed 12 principles to resolve the issue of Hong Kong (later part of Sino-British Joint Declaration)

The Sino-British Joint Declaration (19 December 1984)

- Crucial parts are in form of unilateral declarations
- Article 1: China declaration to recover Hong Kong and to resume exercise of sovereignty over Hong Kong
- Article 2: UK declaration to **restore** Hong Kong to PRC with effect from 1 July 1997
- Article 3: China declaration of basic policies (Annex I) regarding Hong Kong (the 12 Principles made in 1983)
- Articles 4,5,6: arrangements for transitional period before 1 July 1997 (now completed and spent)



The Joint Declaration

- Sino-British Joint Liaison Group set up and ceased operation on 1 January 2000
- Hong Kong's affairs entirely a matter of internal affairs of China.
- UK has no “right” of supervision over Hong Kong.

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The Joint Declaration “*is an unprecedented treatment of invalidity of unequal treaties imposed by big powers in history. This practice can be counted as China’s contribution in the process of progressive development of contemporary international law*”

ICJ Judge Shi Jiuyong



Legislating 'One country, Two systems': The Basic Law of Hong Kong SAR

- Basic Law Drafting Committee (formed in June 1985)
- 4th April 1990: The Basic Law passed by NPC
- NPC Decision to establish HKSAR on 1 July 1997
- Constitutional order of Hong Kong SAR governed by Constitution and the Basic Law



The Basic Law of Hong Kong SAR

Preamble:

Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking into account of its history and realities.....under the principle of “one country, two systems” the socialist system and policies will not be practised in Hong Kong.

The Basic Law of Hong Kong SAR

- HKSAR is an inalienable part of the PRC (BL/1)
- Local administrative region of the PRC which shall enjoy a high degree of autonomy and come directly under the Central People's Government (BL/12)
- NPC authorises HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication (BL/2)
- CPG shall be responsible for foreign affairs and defence (BL/13,14)

The Basic Law of Hong Kong SAR

Sources and duties of executive, legislative and judicial organs; the Chief Executive and an executive-led system

- CE is head of Government and head of HKSAR (BL/43,60)
- HKSAR Government responsible for formulating and implementing policies and introducing bills and drawing up budgets (BL/62)
- Legislative Council enact laws and scrutinise budgets (BL/73)
- Courts shall exercise judicial power independently, free from any interference (BL/85)

The Basic Law of Hong Kong SAR

The Common law legal system

- Common law, rules of equity etc continue to apply (BL/8)
- Vast majority of pre-1997 statutory laws continue to apply (decision of NPC on 23 Feb 1997, made pursuant to BL/8 and 160)
- Still some adaptations (decolonisation) of pre-1997 statutes to be made
- Can refer to precedents from other common law jurisdictions (BL/84)
- Prosecutorial independence preserved (BL/63)





The Basic Law of Hong Kong SAR

The Judicial System

- Section 4 of Chapter IV
- Power of final adjudication vested in the Court of Final Appeal (CFA) (BL/82)
- May appoint eminent judges from other common law jurisdictions to sit on CFA (BL/82)
- Mandates independent exercise of judicial powers (BL/85)
- Appoint judges based on judicial and professional qualities (BL/92)





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Judgments Convention

II. Basic Law Article 95: mutual legal assistance arrangement between Mainland and HKSAR





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- Basic Law Article 95:

“The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other.”



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Mutual legal assistance arrangements with Mainland China (BL/95)

9 signed

- *Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts*, entered into force on 30 March 1999
- *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*, entered into force on 1 February 2000
- *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 Pursuant to Choice of Court Agreements between Parties Concerned*, entered into force on 1 August 2008

Mutual legal assistance arrangements with Mainland China (BL/95)

9 signed

- *Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region*, entered into force on 1 March 2017
- *Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region*, entered into force on 15 February 2022
- *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*, entered into force on 29 January 2024

Mutual legal assistance arrangements with Mainland China (BL/95)

9 signed

- *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region*, entered into force on 1 October 2019
- *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (Articles 1 and 4 entered into force on 27 November 2020; Articles 2 and 3 entered into force on 19 May 2021)
- *The Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region*, entered into force on 14 May 2021



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III. Reciprocal recognition and enforcement of arbitral award





HK Arbitration Legislation Development

- 1963
- 1990
- 2010





Pre-1997 (award)

- HK is party to the NYC under UK
- Mainland award enforced under NY Convention



Post-1997 (award)

- NY Convention no longer applies
- Basic Law Article 95
- *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*, entered into force on 1 February 2000

Post-1997 (continued)(award)

*Supplemental Arrangement Concerning Mutual Enforcement of
Arbitral Awards between the Mainland and the Hong Kong Special
Administrative Region*

(Articles 1 and 4 entered into force on 27 November 2020; Articles 2
and 3 entered into force on 19 May 2021)

- Seat
- Pre-enforcement preservation
- Parallel Enforcement Permitted

Post-1997 (Interim measure)

- HK Position
 - Hong Kong Arbitration Ordinance (Cap. 609) Part 6/ Section 35: grant interim measures in aid of local and foreign arbitrations
- *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (entered into force on 1 October 2019)



Post-1997 (Interim measure)

Mainland Judicial interpretations

➤ 最高人民法院法释[2019]14号

《关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排》 Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region



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III. HCCH Judgments Convention

Articles 22 and 25





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Judgments Convention

HCCH Convention	Year	Mainland/HK Arrangement	Year
<u>Service Convention</u>	1965	<u>Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts</u>	1999
<u>Evidence Convention</u>	1970	<u>Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region</u>	1999
<u>Choice of Court Convention</u>	2005	<u>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 Pursuant to Choice of Court Agreements between Parties Concerned</u>	2008
<u>Judgments Convention</u>	2019	<u>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</u>	2019



Article 22 of HCCH Judgments Convention

Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –
 - (a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
 - (b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
 - (c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;
 - (d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

Article 22 of HCCH Judgments Convention

Non-unified legal systems

2. Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units. appropriate, to the court or courts in the relevant territorial unit;

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to Regional Economic Integration Organisations.



Explanatory Notes of HCCH Judgments Convention

Filters. *“The application of filters in Articles 5 and 6 may involve recourse to the interpretive rules provided in Article 22. The words “where appropriate” in Article 22 indicate that reliance on the interpretive rule is restricted to situations where the nonunified characteristic of the State of origin is relevant. In cases where the filter refers to a connecting factor with the territory of a State (e.g., in Art. 5(1)(a), (b), (d) or (g)), the analysis provided in the previous paragraph will be relevant to the interpretation of that filter.....” (Para 360)*



Explanatory Notes of HCCH Judgments Convention

“Other provisions in the Convention. The issue of interpretation may also arise when the requested State is a non-unified State. For example, under Article 13, the rule that the procedure for recognition or enforcement is governed by the law of the requested State may appropriately be a reference to the law of the territorial unit in a State with a non-unified judicial system” (Para 362)



Explanatory Notes of HCCH Judgments Convention

“Article 22(2) specifies that a State with two or more territorial units in which different systems of law are applied is not bound to apply the Convention to situations involving solely such different territorial units. This is consistent with Article 1(2) of the Convention that defines the scope of the Convention in terms of recognition and enforcement in one State of judgments given in another State. The recognition and enforcement obligations under the Convention only arise with respect to foreign judgments, understood in the international sense.” (Para 365)



Explanatory Notes of HCCH Judgments Convention

“Article 22(3) states that there is no obligation of recognition or enforcement in one territorial unit flowing from the recognition or enforcement of a foreign judgment in another territorial unit of the same State. Thus, for example, a French judgment enforced under the Convention in Quebec, Canada need not be automatically enforced in Ontario, Canada. This is a natural consequence of the scope of the Convention, as defined in Article 1(2), but it is explicitly addressed in Article 22(3) to avoid confusion.” (Para 366)





Definition of REIO

- EU
- ASEAN?
- APEC?



Article 25 of HCCH Judgments Convention

Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.
2. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
3. This Article shall not apply to Regional Economic Integration Organisations.



Explanatory Notes of HCCH Judgments Convention

“Non-unified legal systems. Article 25, like Article 22, refers to States that have two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention. Since the Convention deals with procedural matters (recognition and enforcement of judgments), such a definition really refers to States composed of two or more territorial units, each with its own judicial system (see supra, paras 355-356). This is the case for federal States, e.g., Canada or the United States of America, but it may occur in other States as well, e.g., the People’s Republic of China or the United Kingdom. REIOs, however, are not covered by this Article (see para. (3)).” (Para 389)

Explanatory Notes of HCCH Judgments Convention

*“**Declaration.** Article 25(1) permits States to declare that the Convention shall extend to all their territorial units or only to one or more of them. This declaration may be made at the time of signature, ratification, acceptance, approval or accession or any time thereafter. It may also be modified by submitting another declaration at any time afterwards. These declarations shall be notified to the depositary and shall state expressly the territorial unit or units to which the Convention applies. The entry into force and the application in time of the Convention in these cases are addressed by Article 28 (see *infra*, paras 405-406).” (Para 390)*



Explanatory Notes of HCCH Judgments Convention

*“**Declaration.** Article 25(1) permits States to declare that the Convention shall extend to all their territorial units or only to one or more of them. This declaration may be made at the time of signature, ratification, acceptance, approval or accession or any time thereafter. It may also be modified by submitting another declaration at any time afterwards. These declarations shall be notified to the depositary and shall state expressly the territorial unit or units to which the Convention applies. The entry into force and the application in time of the Convention in these cases are addressed by Article 28 (see *infra*, paras 405-406).” (Para 390)*



Compare with HKSAR Basic Law

- Two or more territorial units (same territory)?
- Two legal jurisdictions.
- Two systems (capitalism and socialism).





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IV. 3 Statues for Mainland Judgments (Reciprocal Enforcement)





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Cap 597 Mainland Judgment (Reciprocal Enforcement) Ordinance (“MJ(RE)O”) (Choice of Court) (1 August 2008)





Cap 597 MJ(RE)O (Choice of Court) (1 August 2008)

- Time Limit: 2 years (Section 7)
- Choice of Court (Section 3(1)(2))
- Recognition of ML Judgments (Section 5)



Cap 597 MJ(RE)O (Choice of Court) (1 August 2008)

Finality of Mainland judgments

1. (a) A judgment given by the Supreme People's Court
 - (b) first instance and
 - no appeal
 - time for appeal expired
 - (c) second instance given by a designated court other than a recognized Primary People's Court
 - (d) judgment given in a retrial by a designated court
2. Deemed enforceable in the Mainland if a certificate is issued by the original court certifying that the judgment is final and enforceable in the Mainland.

Cap 597 MJ(RE)O (Choice of Court) (1 August 2008)

- Registration of registered judgments shall be set aside (Section 18 – (1) (a) – (k))
- May be set aside (Section 19) when pending appeal

Cap 597 MJ(RE)O (Choice of Court) (1 August 2008)

Effect of setting aside

- Final if set aside under Section 18
- Can be reviewed if under Section 19
- Set aside under Section 18(1)(b) can still order judgment for balance of judgment debt to be satisfied



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Judgments Convention

Cap 639 Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance)



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Long Title

An Ordinance to provide for the recognition and enforcement in Hong Kong of judgments in matrimonial and family cases given in the Mainland, for facilitating the recognition and enforcement in the Mainland of such judgments given in Hong Kong, and for the recognition of Mainland divorce certificates, so as to give effect to the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region made between the Supreme People's Court of the People's Republic of China and the Government of the Hong Kong Special Administrative Region; and to provide for related matters.



Requirements for registration (s8)

- Care related order
- Maintenance related order (relevant payment or act)





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Setting aside (s16) (cf MJREO civil and commercial)





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Judgments Convention

Cap 645 Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance





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Part 1 Preliminary

Part 2 Registration

Division 1 (Applications)

Division 2 (Registration orders and registration)

Division 3 (Setting Aside Registration)

Division 4 (Effect of Registration)

Division 5 (Restriction on HK Court proceedings)

Part 3 Facilitation of recognition and enforcement in ML of HK judgments in civil and commercial matters

Part 4 Miscellaneous



Definition of Mainland Judgments (Section 3)

- civil or commercial in nature
- criminal in nature under the law of the Mainland, and contains an order for the payment of a sum of money in respect of compensation or damages by a party to the proceedings
- not an excluded judgment
- Note “qualifying judgments” Section 3(2) included



Definition of HK Judgments (Section 4)

- in civil proceedings
 - Not judicial review
 - Not exercise of an administrative power
- AND not an excluded judgment
- Note “qualifying judgments”



Excluded Judgment Section 5 (cf HCCH JC/#2), Note

- (a) excluded matrimonial or family case within the meaning of section 6
- (c) excluded intellectual property case within the meaning of section 7
- (f) (i) specified election proceedings (ii) proceedings for a declaration of the disappearance or death of a natural person (iii) determination of legal capacity for performing civil acts
- (g) arbitration exception
- (h) Mainland and HK judgment of recognition or enforcement of a court outside Mainland or HK



Include Intellectual Property (by negative list in s7)

Excluded IP cases

- **Mainland Judgment**

- (a) tortious dispute over an infringement of an invention patent or utility model patent

- (b) licence fee rate of a standard-essential patent; or

- (c) intellectual property right that is not a specified intellectual property right (as defined in section 2)

Include Intellectual Property (by negative list in s7)

Excluded IP cases

- **Hong Kong Judgment**

- (a) a tortious dispute over an infringement of a standard patent, or a short-term patent (Patents Ordinance)
- (b) licence fee rate of a standard-essential patent; or
- (c) not a specified intellectual property right (section 2)



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Final and Conclusive Requirement

- Section 8 - Effective Mainland Judgments (trial supervision)
- Section 9 - Effective Hong Kong Judgments (includes Small Claim Tribunal, Lands Tribunal, Competition Commission, Labor Tribunal) [BUT.....]



Registration

- IPR (Section 15)
 - subject ruling not registrable (section 15(1) (b))
- IPR (Section 16 (1)(b))
 - excluded reliefs not registrable (section 16(3))
- Punitive damages (section 18(3)) not registrable
 - tax
 - fine or penalty, other than in subsection (2)(c) (i.e. cost/fine)
 - punitive or exemplary OTHER THAN tortious dispute over an infringement of a specified IPR

Setting Aside Registration

- 14 days (Section 21(1))
- “must” set aside, has proved (section 22(1))
 - Division (1) and Division (2) not complied with
 - (s22(1)(b)) Not comply with jurisdictional requirement of original proceeding in section 23
 - section 22 (1) (c) – (k)

Jurisdictional Requirements s23

Elaborates on s22(1)(b)

- S23(1)(a) (i) Tortious dispute over infringement of specified IPR or civil dispute over an act of unfair competition under Article 6 of the Mainland Anti-Unfair Competition Law
 - committed in ML and rights protected in ML



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- S23(1)(a)(ii) meets conditions in s23(3) (cf HCCH JC/Art 5)
- S23(1)(b) if Court considers the exercise of jurisdiction by original ML court over the proceedings is consistent with the law of HK





Restriction on HK court proceedings

S29 Stay of HK proceedings if registration applications are made “must”





Facilitate recognition and enforcement in ML of HK judgments

Issue a certificate upon application by judgment creditor, certifying that the judgment is a HK judgment in civil and commercial matter and is effective in HK





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Thank you

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