

Enforcement of Foreign Judgments

In 28 jurisdictions worldwide

Contributing editor
Patrick Doris



2015

GETTING THE
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Enforcement of Foreign Judgments 2015

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Yes. Hong Kong is a party to a bilateral treaty with the PRC on the Arrangement on Reciprocal 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, in respect of the enforcement of civil and commercial judgments in each other's jurisdictions. This bilateral treaty has been further encapsulated under Hong Kong legislation, the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap.597, MJREO) (see questions 3 and 6).

Other than with the PRC, Hong Kong has not entered into any international treaties for the reciprocal recognition of enforcement of foreign judgments. In general, since the PRC resumed sovereignty over Hong Kong on 1 July 1997, Hong Kong's approach to entering into these treaties will be governed by China's decision whether to extend the territorial application of such treaties to Hong Kong as well (eg, China extended the territorial application of the Convention on the Recognition of and Enforcement of Foreign Arbitral Awards, the New York Convention, to Hong Kong on 1 July 1997).

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Not applicable, since Hong Kong consists of only one jurisdiction.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Foreign judgments may be enforced in Hong Kong under statute or at common law.

The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319, FJREO) enables the enforcement of foreign judgments via a process of registration of judgments from superior courts in designated countries which have reciprocal arrangements with Hong Kong. The designated countries include: Australia, Bermuda, Brunei, India, Malaysia, New Zealand, Singapore, Sri Lanka, Belgium, France, Germany, Italy, Austria, the Netherlands and Israel. The rules governing the registration and enforcement of foreign judgments pursuant to the FJREO are found under the subsidiary legislation, Order 71 of the Rules of the High Court (Cap. 4A, RHC).

The MJREO provides for the mutual enforcement of final judgments between Hong Kong and China in respect of the payment of a sum of money in civil and commercial cases only. The rules governing the registration and enforcement of judgments obtained in the Mainland pursuant to the MJREO are found under the subsidiary legislation, Order 71A of the RHC.

Foreign judgments emanating from countries other than those listed above, including the UK and USA, only have recourse under common law,

meaning that proceedings must be commenced on the foreign judgment in the Hong Kong courts by writ.

The judgment creditor does not have to re-litigate the underlying cause of action. However, as the judgment debtor is generally not allowed to re-argue any defences to the underlying cause of action, a writ based on a foreign judgment is usually followed by a summary judgment application.

The ordinance provisions can be found at: www.legislation.gov.hk.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Not applicable, as Hong Kong is not a party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Under section 4(1) of the FJREO, a judgment creditor has six years after the date of the judgment to have the judgment registered in the Court of First Instance of the High Court of Hong Kong (CFI). Where there have been proceedings by way of appeal against the judgment, then the judgment creditor has six years after the date of the last judgment given in those proceedings to register the judgment. However, the CFI does retain discretion whether to allow registration of the judgment 'subject to proof of the prescribed matters and to the other provisions of [the FJREO]' (see also question 11).

Under section 7 of the MJREO, the time limit for making an application for registration of a Mainland judgment is two years. The time commences to run either:

- where a period for performance of the Mainland judgment has been specified in the judgment, from the last day of the period; or
- the date from which the judgment takes effect.

There is no provision in either of the ordinances for the Hong Kong courts to consider the statute of limitations of the foreign jurisdiction.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Under the FJREO, only final money judgments, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, may be enforceable in Hong Kong.

Under the MJREO, only final judgments requiring the payment 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 penalty) in civil or commercial cases may be enforceable. These cases involve disputes arising from civil or commercial contracts where the parties have made a prior express

agreement (whether in writing or by any electronic means), and specified a designated court of the Mainland or Hong Kong to have sole jurisdiction to resolve a dispute.

At common law, a foreign money judgment, including a Mainland judgment, may be recognised and enforced by action as a debt, subject to the following overriding principles:

- the judgment is given by a court of competent jurisdiction, as determined by the Hong Kong courts in accordance with the rules of private international law;
- it is a judgment for a definite sum of money; and
- it is a final judgment conclusive on the merits of the claim.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

A party seeking to enforce a foreign judgment pursuant to the FJREO or MJREO should apply to the CFI to register the foreign judgment. Similarly, a party seeking to enforce a foreign judgment in Hong Kong pursuant to the common law must also commence proceedings in the CFI.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Section 4 of the FJREO and section 5 of the MJREO both require a foreign judgment to first be registered in the CFI before it will be recognised in Hong Kong. The judgment creditor must first apply for leave from the CFI to register the foreign judgment. The CFI will then assess each judgment individually to ensure that it fulfils the necessary criteria as stipulated in section 4 of the FJREO and section 5 of the MJREO before giving leave to the applicant to register the foreign judgment.

Once leave is given to register the foreign judgment and the notice of registration of the judgment is properly served on the judgment debtor personally, the foreign judgment can be enforced in the same way as a Hong Kong judgment. A number of enforcement options are available, such as writs of fieri facias, garnishee proceedings and charging orders.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A party may apply to set aside the foreign judgment on the basis of limited grounds as set out in the ordinances as follows:

In section 6(1)(a) of the FJREO, the registration of the judgment shall be set aside if the registering court is satisfied that:

- the judgment does not fall under the provisions of the FJREO or was registered in contravention of any of the provisions of the FJREO; or
- the court issuing the judgment did not have jurisdiction to issue the judgment; or
- the judgment debtor (ie, defendant) did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear; or
- the judgment was obtained by fraud; or
- the enforcement of the judgment is contrary to the public policy in the country of the registering court; or
- the rights under the judgment are not vested in the person making the application for registration.

In addition, pursuant to section 6(1)(b) of the FJREO, the CFI may exercise its discretion to set aside the registration of the judgment if it is satisfied that the matter in dispute in the original court had been a final and conclusive judgment by that court having jurisdiction in the matter.

Section 18(1) of the MJREO is modelled after section 6(1) of the FJREO.

In section 18(1) of the MJREO, the registration of the judgment shall be set aside if the CFI is satisfied that:

- the judgment is not a Mainland judgment which satisfies the requirements specified in section 5(2)(a) to (e) of the Ordinance (see question 11, second bullets); or

- the judgment has been registered in contravention of the Ordinance; or
- the relevant choice of Mainland court agreement is invalid under the law of the Mainland unless the original court has determined that the agreement is valid; or
- the judgment has been wholly satisfied; or
- the courts in Hong Kong have exclusive jurisdiction over the case according to the law of Hong Kong; or
- the judgment debtor who did not appear in the original court to defend the proceedings was not summoned to appear according to the law of the Mainland or was summoned but was not given sufficient time to defend the proceedings according to the law of the Mainland; or
- the judgment was obtained by fraud; or
- the judgment on the same cause of action between the parties to the judgment has been given by a court in Hong Kong or an arbitral award on the same cause of action between the parties has been made by an arbitration body in Hong Kong; or
- a judgment on the same cause of action between the parties to the judgment has been given by a court in a place outside Hong Kong, or an arbitral award on the same cause of action between the parties has been made by an arbitration body in a place outside Hong Kong, and the judgment or award has already been recognised in or enforced by the courts in Hong Kong; or
- the enforcement of the judgment is contrary to public policy; or
- the judgment has been reversed or otherwise set aside pursuant to an appeal or a retrial under the law of the Mainland.

Separately under common law:

In a common law action brought on a foreign judgment, a number of defences may be raised by the judgment creditor (although the defences may be limited), such as:

- the lack of jurisdiction of the foreign court according to the rules of private international law; or
- the judgment was obtained by fraud or in breach of natural justice; or
- the judgment is inconsistent with a prior Hong Kong judgment or foreign judgment which is entitled to recognition in Hong Kong; or
- it would be contrary to Hong Kong public policy to enforce the judgment.

However, a judgment debtor is generally not allowed to re-argue any defences to the underlying cause of action. Please see last bullet points.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Provided the foreign judgment falls within the scope of the FJREO or MJREO, then a defendant may prevent foreign judgment enforcement proceedings by making an application to set aside the registration of the judgment, on the basis of the grounds outlined above. The rules governing an application to set aside the registration of a judgment are found at Order 71 rule 9 RHC (FJREO) and Order 71A rule 8 RHC (MJREO).

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Under section 3 of the FJREO, the basic requirements for recognition of a foreign judgment are:

- there is reciprocity of treatment in respect of the enforcement of foreign judgments between Hong Kong and the reciprocating country;
- that the courts of the foreign country are deemed superior courts of that foreign country;
- that the judgment is final and conclusive and in respect of a sum of money (other than taxes, penalties or fines); and
- the court makes an order directing that the provisions of the FJREO shall extend to that foreign country.

Under section 5 of the MJREO, the basic requirements for recognition of a foreign judgment are that the judgment must be:

- from a court chosen by the parties by prior express agreement and designated by the MJREO (section 5(2)(a) MJREO);

- certified as final and conclusive and as being enforceable in the Mainland; and
- an order for the payment of a sum of money (other than taxes, penalties or fines).

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

The factors that are to be taken into consideration as outlined above are specified and mandatory. However, the CFI also has discretion to decide whether to allow the foreign judgment to be registered or not and will assess each case on an individual basis. As to the situations where the court may exercise its discretion, refer to questions in 5, 9, 18, 19 and 20.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

No.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Pursuant to section 6(2)(a) of the FJREO, the foreign court is deemed to have jurisdiction in the case of a judgment given in an action in personam in the following circumstances:

- if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
- if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or
- if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
- if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
- if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

Pursuant to the MJREO, there is no such requirement to show personal jurisdiction over the defendant. Rather, the Ordinance requires that the civil or commercial contracts in dispute must specify that the Mainland or Hong Kong courts have sole jurisdiction to determine a dispute arising out of the contract.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

Pursuant to section 6(2) of the FJREO, where the issue of subject matter is raised, the court needs to be satisfied that the foreign court had jurisdiction. The foreign court will be deemed to have jurisdiction where:

- the court has personal jurisdiction over the parties if any of the requirements for personal jurisdiction, as expressed in question 14, are met;
- the subject matter is moveable or immovable property and the property was at the time of the proceedings in the original court situate in the country of that court; or
- in respect of a judgment given in any other action other than mentioned in the paragraphs above, if the jurisdiction of the original court is recognised by the law of the registering court.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Both the FJREO and MJREO require that the judgment debtor, being the defendant in the original court, received notice of those proceedings in sufficient time to enable him to defend the proceedings. Failure to provide sufficient notice to the judgment debtor of the proceedings forms one of the basis upon which the CFI must set aside registration of the foreign judgment.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

No, inconvenience of the foreign jurisdiction to the defendant is not a basis for the CFI to decline to register a foreign judgment under the FJREO and MJREO.

18 Vitiation by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Pursuant to section 6(1)(a)(iv) of the FJREO and section 18(1)(g) of the MJREO, a foreign judgment that has been obtained by means of fraud is a ground for the CFI to set aside registration of the judgment. If a judgment debtor makes an application to set aside the registration of a judgment and there is an allegation of fraud involved, the CFI will have to carefully examine whether the judgment was obtained by fraud in the foreign courts and exercise its discretion accordingly.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Pursuant to section 6(1)(a)(v) of the FJREO and section 18(1)(j) of the MJREO, the CFI may set aside the registration of the foreign judgment if the enforcement of the foreign judgment is contrary to public policy in the country of the registering court or the Mainland, respectively.

Under common law, one of the defences that the judgment debtor can raise is that enforcing the foreign judgment is contrary to Hong Kong public policy (see question 9), and the court will exercise its discretion in respect of these cases.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Pursuant to section 6(1)(b) of the FJREO, if the foreign judgment is inconsistent with a previous final and conclusive judgment by a court having jurisdiction in the matter, then the CFI has the discretion to set aside the registration of the foreign judgment.

With respect to the MJREO, there is no such provision, since section 6 of the MJREO specifies the circumstances when a Mainland judgment is considered to be final and conclusive as between the parties to the judgment, which is related to the level of the Mainland court that has issued the judgment.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

If a judgment creditor wishes to enforce a judgment against a party other than the named judgment debtor, then the judgment creditor will need to commence fresh proceedings against such party and plead the circumstances under which the judgment creditor maintains that the third party is an agent, alter ego or proxy.

Update and trends

In *Desarollo v Kader* [2014] 1 HKLRD 419, the High Court of Hong Kong was asked to determine whether a judgment creditor should be required to provide security for the judgment debtors costs in proceedings based upon a foreign judgment. Desarollo commenced proceedings against Kader in Hong Kong to enforce a judgment a judgment obtained in Arizona, US. The court, having weighed all the background of the matter, held that it did not sit well 'on the scale of justice to order security for costs against Desarollo in favour of Kader when the latter is indebted to the former'.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

There is no specific provision in the FJREO and MJREO with regards to parties having an option to use alternative dispute resolution to resolve a dispute. Section 18(1)(h) and (i) of the MJREO does provide that, where an arbitral award on the same cause of action between the parties has been made by an arbitration body in Hong Kong, or an arbitral award on the same cause of action between the parties has been made by an arbitration body in a place outside Hong Kong, and the award has already been recognised in or enforced by the courts in Hong Kong, then these would be grounds for the CFI to set aside the registration of the judgment.

Where the parties have an enforceable agreement to use alternative dispute resolution, and the party seeking to enforce has not followed this requirement, then it is likely that the judgment debtor would have already raised this defence in the foreign court, and that this issue would have already been heard and determined by that foreign court before it granted final judgment.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Judgments of any reciprocating countries pursuant to the FJREO listed in question 3, and pursuant to the MJREO from Mainland China, are registrable in the CFI provided that they meet the requirements for registration as outlined above. Once registered, those judgments are treated as though they are Hong Kong judgments and enforced in the same manner. Judgments from jurisdictions others than those listed in question 3 and the Mainland China, are not directly enforceable in Hong Kong and fresh proceedings must be commenced in the CFI to sue upon the judgment and a fresh judgment obtained in such proceedings (see question 3).

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The Hong Kong Court will only register money judgments. Therefore, if on the application for the registration of a judgment, it appears to the CFI that the judgment is in respect of matters other than money judgments, the CFI will only register the part of the judgment in respect of the payment of a sum of money, but not in respect of the other provisions (section 4(5) FJREO and section 9 MJREO).

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Since the foreign judgment will be enforced in the same manner as a Hong Kong judgment, section 4(3) of the FJREO and section 11 of the MJREO provides that where the judgment to be registered is expressed in a currency other than Hong Kong currency, the judgment when registered shall be registered in the equivalent sum in Hong Kong currency on the basis of the rate of exchange prevailing at the date of registration.

Pursuant Order 71 rule 3(1)(d) of the RHC, in respect of registration of foreign judgments under the FJREO, an application for registration of a foreign judgment in Hong Kong should specify the amount of interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of registration.

Pursuant to Order 71A rule 3(1)(d) of the RHC, in respect of registration of Mainland judgments under the MJREO, an application for registration of a Mainland judgment in Hong Kong should specify the amount of the interest, if any, which by the law of the Mainland has become due under the judgment up to the time of registration together with the costs duly certified by the original court for the judgment.

In summary, the law of the foreign jurisdiction upon which the foreign judgment is applying for registration in Hong Kong, is the law which governs the rate of interest claimed under the foreign judgment.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Pursuant to section 7 of the FJREO, a judgment debtor may apply to set aside the registration of the foreign judgment on the basis that an appeal is pending, or that he is entitled and intends to appeal, against the judgment. If the applicant satisfies the court as such, the court may either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period, as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.

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Pursuant to Order 71 rule 4 of the RHC, the Hong Kong court may order the judgment creditor to give security for the costs of the application for registration and of any proceedings which may be brought to set aside the registration, except as otherwise provided for by an order of the court. However, there is no corresponding provision for the defendant to provide security for costs to ensure the judgment will be enforceable against the defendant if it is later affirmed.

Pursuant to section 19 of the MJREO, if the CFI is satisfied that an appeal against the judgment is pending or the case on which the judgment was based is ordered to be retried by a competent designated court, the CFI may, on such terms as it thinks just, either set aside the registration or adjourn the application until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.

Pursuant to Order 71A rule 4 of the RHC, the Hong Kong court may order the judgment creditor to give security for the costs of the application for registration of a Mainland judgment and of any proceedings which may be brought to set aside the registration. Similarly to the FJREO, there is no corresponding provision for the defendant to provide security for costs to ensure the judgment will be enforceable against the defendant if it is later affirmed.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once the foreign judgment is registered in Hong Kong, it may then be enforced in the same manner as any Hong Kong judgment. See question 8.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

The RHC which normally contains detailed commentary on court application procedures does not specify in Orders 71 and 71A any particular pitfalls to be avoided, when seeking recognition or enforcement of a foreign or Mainland judgment in Hong Kong. However, a judgment creditor seeking to make an application to register a foreign or Mainland judgment should follow the requirements for preparing their evidence in support of application pursuant to Order 71 rule 3 and Order 71A rule 3, RHC, to maximise their chances of obtaining leave from the court to enforce the judgment.

NB It is important to note Hong Kong's unique status as a Special Administrative Region (HKSAR) of the People's Republic of China (PRC), meaning that, while it falls under the sovereignty of China, it has an entirely autonomous government, legal and monetary system that is independent from that of Mainland China. Hong Kong has two separate sets of legislation for the enforcement of foreign judgments - in respect of Mainland China and other foreign countries that have corresponding reciprocal enforcement arrangements. Please note that the terms PRC, China or Mainland/Mainland China, and Hong Kong or HKSAR, are used interchangeably and are references to the same place.

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