



The American Chamber of Commerce in Hong Kong

Response by the American Chamber of Commerce in Hong Kong to the Department of Justice Consultation Paper on the Proposed Arrangement Between Hong Kong and the Mainland on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Published on July 31, 2018

September 28, 2018

I. Introduction

The American Chamber of Commerce in Hong Kong ("**AmCham**") appreciates the opportunity to comment on the Consultation Paper on the Proposed Arrangement (the "**Proposed Arrangement**") Between Hong Kong and the Mainland on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "**Consultation**") published by the Department of Justice ("**DoJ**") on July 31, 2018.

AmCham is a diverse group of business professionals residing in Hong Kong and covering a wide range of industries and organizations. We are bound by our common goal to foster commerce among the United States of America, Hong Kong, and Mainland China, and to collectively work to enhance Hong Kong's stature as an international business center.

AmCham believes the objectives of the Proposed Arrangement are consistent with these goals. In particular, we believe that it would help to promote the reliable enforcement of judgments between Hong Kong and the Mainland, which is essential to attracting and fostering international business.

Below we provide select responses to particular items of interest to the American business community residing in Hong Kong.

II. Select Responses

After gathering feedback from interested AmCham members, AmCham respectfully offers the following remarks concerning the scope of the Proposed Arrangement and the types of relief that would be available. We look forward to continued engagement with the DoJ should the Proposed Arrangement continue to take form.

- The proposal to limit the Proposed Amendment to "*civil and commercial matters*" under both Hong Kong and Mainland law is sensible.
- Intellectual property rights are of particular concern to AmCham's membership, and to Hong Kong's international business community at large. We are in favour of the Proposed Arrangement's inclusion of judgments ruling on validity or infringement of intellectual property rights. Limiting such judgments to those involving rights that are registered or subsist in the requesting place seems consistent with other international reciprocal recognition regimes.
- We understand the proposed scope may encompass private causes of action created by laws of an administrative/public nature (*e.g.*, Anti-Monopoly Law, Unfair Competition Law). While legislative differences are unavoidable in a system that tries to balance common law and Mainland administrative codes, our membership has some concern that the inclusion of causes

of action such as these may give way to aggressive extraterritoriality arguments from the Mainland that may naturally favor Mainland parties. We look forward to reviewing the specific mechanisms under the Proposed Arrangement in this regard.

- The Proposed Arrangement is limited to those judgments that are “*legally enforceable*.” In our view, Mainland judgments should be considered “*legally enforceable*” in Hong Kong if they have taken legal effect in accordance with the Civil Procedure Law. This includes the issuance of a court mediation statement in respect of which the time limit for an appeal has expired. Given the fact that the court systems are significantly different between Hong Kong and the Mainland, especially with respect to how quickly and extensively the courts on the Mainland can compel inspections and the turnover of documents, capacity building is necessary to support parties and the Courts here to effectively evaluate Mainland proceedings.
- The proposal to potentially enforce judgments granting non-monetary relief is of particular importance to American businesses that have entered into commercial arrangements with Mainland counterparties. The Proposed Arrangement should cover all types of relief, whether monetary or otherwise, as long as they are available under the law of the requesting place. Indeed, the provision for enforcement of judgments granting specific performance addresses a major limitation in the Choice of Court Arrangement, and is to be welcomed. However, we recognize that it may be challenging for Hong Kong courts to order specific performance in a form acceptable or recognizable to the Mainland courts. Difficulties may be experienced in enforcing specific performance in practice, and we encourage the DoJ to continue engaging with the business community to devise clear guidelines on the enforcement of equitable remedies under the Proposed Arrangement.
- The Proposed Arrangement notes the similarities in scope with the Arrangement on Mutual Assistance in Taking of Evidence in Civil and Commercial Matters (the “Arrangement on Taking Evidence”). American businesses have often availed themselves of the mechanisms outlined in the Arrangement on Taking Evidence, and we would encourage the DoJ to ensure that the Proposed Arrangement incorporates these mechanisms and further enhances the free flow of information necessary for both Hong Kong and Mainland judges to properly adjudicate criminal and commercial matters.
- It is suggested to retain the two-year time limit for enforcement of Hong Kong or Mainland arbitral awards, in keeping with the time limit under the Choice of Court Arrangement. It would remain to be seen how the Proposed Arrangement would measure up to the Arbitral Awards Arrangement— *i.e.*, would it be easier to enforce an arbitral award or a Hong Kong court judgment in Mainland courts?
- The Proposed Arrangement should supersede the Choice of Court Arrangement, with recognized courts being those in the Proposed Arrangement. We foresee a need for a provisional arrangement should this change take effect.

III. Conclusion

AmCham supports the expansion of mechanisms to allow private parties to effectively litigate and resolve each phase of a dispute, whether civil or commercial. Importantly, the Proposed Arrangement would offer foreign companies, both in Hong Kong and the Mainland, a new forum for the reliable enforcement of judgments in their favor. By doing so, the Proposed Arrangement would enhance Hong Kong's status as a major international business and financial center, while further advancing the economic integration and prosperity of the Greater Bay Area. We welcome continued dialogue with the DoJ as the specific mechanisms and guidelines of any subsequent arrangement continue to develop.