



Enforcement of foreign judgements in
Hong Kong

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I. Introduction

There are certain cases and situations where it is necessary to enforce a judgment obtained from a court in another jurisdiction (country) in Hong Kong. For example, the plaintiff may sue the defendant outside of Hong Kong, because both, the plaintiff and the defendant reside in another country, e.g. Germany.

However, even with a valid and enforceable judgment obtained in Germany, it can be difficult or even impossible to enforce the judgment in Germany, because the defendant does not have any assets in Germany, or because the defendant does not reside in Germany anymore, but he is residing in Hong Kong now. In such circumstances, it is necessary to enforce the foreign judgment in Hong Kong ..

Judgments awarded by a court other than a court in Hong Kong are referred to as "foreign judgments", which include judgments awarded in the courts in Mainland China and Macau. At common law, foreign judgments have no direct effect in Hong Kong courts. As a solution to that problem a judgment creditor (the person who succeeded in the proceedings, or Plaintiff) may, on the one hand, commence proceedings again in a Hong Kong court as long as a Hong Kong court has jurisdiction over the respective matter. In this case he would obtain another judgment regarding the same matter from a Hong Kong court which would then be enforceable as a domestic judgment without the process of recognition.

On the other hand, the judgment creditor may register the foreign judgment with the Hong Kong court and seek to enforce the foreign judgment in Hong Kong.

The *Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319)* provides a system of registration and court orders to enforce and recognize a foreign judgment obtained in a foreign country (jurisdiction) with the exception of judgments from Mainland China and Macao Courts because the Ordinance does not include circumstances to enforce or recognize

foreign judgments obtained from Mainland China and Macau courts..

II. Common law regime vs. statutory regime

There are two regimes governing the enforcement and recognition of foreign judgments in Hong Kong: the common law regime and the statutory regime.

a. The common law regime

The common law regime is based on principles established by case law, and it governs the recognition and enforcement of foreign judgments from all courts in most countries.

b. The Statutory regime

Contrary, the statutory regime only governs judgments from "superior courts" in a small number of foreign countries. The foreign countries under the statutory regime include the Commonwealth countries, such as Australia, Bermuda, Brunei, India, Malaysia, New Zealand, Singapore, and Sri Lanka. It also includes some EU countries, such as Belgium, **Germany**, France, Italy, Austria, and The Netherlands, and interestingly, it also includes one non-EU and non-Commonwealth country: Israel, according to *Foreign Judgment (Reciprocal Enforcement) Order [Cap 319A, schedule 1 and schedule 2]*.

Except for Australia, the statutory regime only enforces and recognizes judgments from "superior courts" from the abovementioned countries. The "superior courts" are defined as the courts having unlimited jurisdictions in civil and criminal matters, according to *Foreign Judgment (Reciprocal Enforcement) Order [Cap 319A, paragraph 4(b)]*. In addition, the statutory regime only enforces foreign judgments that order a payable sum of money.

c. The differences between the two regimes

Although there are many differences between the common law regime and the statutory re-

gime, the underlying substantive rules and principles are largely similar and comparable. According to “*The conflict of laws in Hong Kong*”, Sweets & Maxwell Asia (2005), the differences between the two regimes are marginal and should not be exaggerated. Johnson states that the countries and courts which are not covered by the statutory regimes are covered by the common law regime, and the judgments which are not for a payable sum of money are covered by the common law regime as well.

d. Conclusion

Therefore, as a result, any civil judgment from any court in the world outside Hong Kong is, in principle, enforceable and recognizable by Hong Kong courts. The following section will amalgamate the common law regime and the statutory regime and provide the requirements to enforce a foreign judgment in Hong Kong.

III. Requirements to enforce a Foreign Judgment in Hong Kong

a. Judgment to be final and conclusive

According to the *Foreign Judgment (Reciprocal Enforcement) Ordinance [Cap 319, section 3 (2)(a)]*, a foreign judgment must be final and conclusive in order to be enforceable in Hong Kong. The foreign judgment must be a conclusively and permanently decided matter between the parties. Similarly, in the case *Nou-vion v Freeman* (1989) 15 AC 1, the judge stated that the foreign judgment must be “conclusively, finally and forever established” in order to be enforced.

If, according to the foreign law, the foreign judgment can be challenged by the judgment debtor (defendant) in the same court with the possibility of being varied or set aside, the judgment will not be regarded as final and conclusive and will not be enforced in Hong Kong.

However, if a judgment is potentially subject to appeal, or even during a pending appeal, it does not prevent the judgment from being fi-

nal and conclusive, according to *Linprint PTY Ltd v Hexham Textiles PTY Ltd* [1993] 23 NSWLR 508. The reason is that the judgment debtor always has a right to appeal due to his natural human rights, and he may use this procedural advantage to delay the judgment creditor to enforce the judgment. However, in practice, Hong Kong courts will not enforce judgments until the outcome of the appeal has been determined.

b. Foreign judgment not for a payable tax or criminal penalty.

According to the *Foreign Judgment (Reciprocal Enforcement) Ordinance [Cap 319, section 2]*, a foreign judgment that shall be enforced in Hong Kong shall be in respect of civil proceedings or criminal proceedings concerning a fixed sum of money. A foreign judgment for a tax payment or for the payment of a fine or other penalties (e.g. criminal penalty) will not be enforced, according to the *Foreign Judgment (Reciprocal Enforcement) Ordinance [Cap 319, section 3(2)(a)]*. It is not the function of Hong Kong courts to assist in enforcing another country’s revenue or criminal penalty.

c. Sufficient notice of the original proceeding

According to the *Foreign Judgment (Reciprocal Enforcement) Ordinance [Cap 319, section 6(1)(a)(iii)]*, the judgment debtor may object the enforcement of the foreign judgment in Hong Kong if he was not given a sufficient notice of the proceedings in the foreign court, and in effect he did not have an opportunity to defend his case. This concept of reasonable notice and opportunity is the heart of the notion of substantial justice/natural justice.

However, the threshold for the judgment debtor to object the enforcement of the foreign judgment is quite high.. This reason of objection was only successful once in a reported case in England, *Adams v Cape Industries plc* [1990] 1 Ch 433.

d. Judgment not to be obtained by fraud

Hong Kong courts will not recognize and enforce any foreign judgment which is obtained by fraud, according to the *Foreign Judgment (Reciprocal Enforcement) Ordinance* [Cap 319, section 6(1)(a)(iv)].

The definition of fraud includes:

- (1) a party knows of any false evidence,
- (2) a party procures any false evidence;
- (3) a party deceives foreign courts;
- (4) intimidation by violence or other illegal acts, and
- (5) the foreign court acts corruptly.

An example of fraud is the case *Prince v Dewhurst* (1837) 8 Sim 279, where the judge had a financial interest in the outcome of the case.

In addition, a judgment debtor can allege the foreign judgment and claim it was obtained by fraud even if this fraud allegation was rejected in the foreign court, according to *Abouloff v Oppenheimer* (1882) 10 QBD 295.

- e. Judgment not to be contrary to public policy in Hong Kong

According to the *Foreign Judgment (Reciprocal Enforcement) Ordinance* [Cap 319, section 6(1)(a)(v)], the enforcement of foreign judgments must not be contrary to public policy (“ordre public”) in Hong Kong. There are very few cases where the judgment debtor did successfully argue not to enforce the foreign judgment based on this reasoning in Common Law countries, and there is no such reported case in Hong Kong.

- f. Conflicting Judgment

Under Common Law tradition and the principle of *res judicata*, a Hong Kong court will not recognize and enforce a foreign judgment if there has been a previous conflicting Hong Kong decision on the same matter, according to the case *Vervaeke v Smith* [1983] 1 AC 145. Further, according to the case *Showlag v Man-*

sour [1994] 2 All ER 129, if there are two conflicting foreign decisions, the one decided first in time will normally be the one recognised.

- g. The foreign court has to have jurisdiction on the case

According to the *Foreign Judgment (Reciprocal Enforcement) Ordinance* [Cap 319, section 6(1)(a)(ii)], a Hong Kong court will not recognize and enforce a foreign judgment if the foreign court did not have jurisdiction on the case. In other words, it is a question of whether the foreign court’s exercise of jurisdiction is legitimate. There are two ways to prove a foreign court’s legitimate jurisdiction. First, the judgment debtor resided in the foreign jurisdiction at the time of commencement of proceedings. Second, the judgment debtor must have participated in the foreign court hearing.

The judgment debtor resided in the foreign jurisdiction means that, as a defendant of the original proceeding in the foreign court, he was a resident in the foreign country at the time of the start of the proceeding according to the foreign law. If this is the case, then the foreign court is deemed to have legitimate jurisdiction, *Foreign Judgment (Reciprocal Enforcement) Ordinance* [Cap 319, section 6(2)(a)(iv)]. If the judgment debtor is a company, then the office of the company must be either registered in the foreign country or its place of business was in the foreign country for the period of time of the proceeding, according to *Foreign Judgment (Reciprocal Enforcement) Ordinance* [Cap 319, section 6(2)(a)(iii)(iv)].

The judgment debtor must have had a certain level of participation or consent in the court proceedings. If the judgment debtor voluntarily appears in the original proceedings in the foreign court, then the foreign court is deemed to have jurisdiction to the case, according to the *Foreign Judgment (Reciprocal Enforcement) Ordinance* [Cap 319, section 6(2)(a)(i)]. In addition, if the judgment debtor counter-claimed in the original proceedings, then, similarly, the foreign court is also deemed to have jurisdiction to the case, according to the *Foreign Judgment (Reciprocal Enforcement) Ordinance* [Cap 319, section 6(2)(a)(ii)].

Another noteworthy issue is that, if the judgment debtor was entitled to diplomatic protection or immunity to the foreign country of the original proceedings, and he did not submit himself to the foreign court, the foreign court has no legitimate jurisdiction to the case.

IV. Procedure to enforce a foreign judgment in Hong Kong

a. Time Limitation

According to the *Foreign Judgments (Reciprocal Enforcement) Ordinance [Cap 319, section 4 (1)]*, any person who obtained a foreign judgment may have the judgment registered at the Court of First Instance within 6 years of the judgment date. Subject to proof of the prescribed preconditions, the Court may order the judgment to be registered.

b. Application to register foreign judgment

An application made to enforce a foreign judgment may be made *ex parte* (without notifying the other party). “Writ of fieri facias to enforce foreign registered judgment” should be used [*Rule of High Court (Cap 4A), App. A, Form 63*]. The Court may direct the applicant to issue the originate summons by the “originating summons-expedited form” [*Rule of High Court (Cap 4A), App. A, Form 10*], and serve to the Defendant.

According to the *Rule of High Court, [(cap 4A), order 71, rule 3]*, the application must be supported by an affidavit, and the following shall be included:

- (1) The authenticated copy of the judgment
- (2) The name, business and last know adobe of the judgment creditor and judgment debtor.
- (3) The best information to prove that the judgment creditor is entitled to enforce the judgment and the judgment is enforceable in Hong Kong.

- (4) Other evidence to prove that the judgment is enforceable in a foreign country.

c. Court’s order for registration

After applying the judgment for registration in Hong Kong, the court will make an order for registration [*Rule of High Court (cap 4A), order 71, rule 5*]. This order will state the period in which the judgment debtor may apply to set aside the registration of the foreign judgment. Also, this order needs to be served to the judgment debtor along with the Notice of Registration.

d. Notice of Registration

The notice of registration of a foreign judgment must be served to the judgment debtor, either by delivering it to him personally, or by sending it to him to his last known address or place of business [*Rule of High Court (cap 4A), order 71, rule 7*]. This notice must state:

- (1) Full particulars of the registered judgment and the order for registration
- (2) Name and address of the judgment creditor or his solicitor
- (3) The judgment debtor has the right to set aside the registered judgment
- (4) The period in which the judgment debtor may apply to set aside the registered judgment.

e. Application to set aside registration

According to the *Foreign Judgments (Reciprocal Enforcement) Ordinance [Cap 319, section 6 (1)]*, the judgment debtor may apply to the court to set aside the registered judgment if the judgment:

- (1) was obtained by fraud
- (2) is contrary to public policy
- (3) the foreign court has no jurisdiction
- (4) was obtained without giving any sufficient opportunity to the judg-

ment debtor to defend in the foreign court.

f. Issue of execution

After the period to apply to set aside the registration has expired, or, in case of the application to set aside has made and the court has determined not to set aside, the judgment creditor may issue the execution of the judgment by providing an affidavit of service of the notice of registration to the Registrar of High Court.

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