

# A Conflict of Laws Study in Hong Kong–China Judgment Regionalism: Legal Challenges and Renewed Momentum

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With the intensifying economic and social dynamics between Hong Kong and Mainland China since the handover in 1997, a comprehensive and effective cross-border judgment recognition and enforcement mechanism is imperative in order for Hong Kong to reinforce its role as a dispute resolution center in the perspective of judgments, in the context of the Belt and Road Initiative, and in the Greater Bay Area. This Article examines in detail the achievements and inadequacies in the current Hong Kong statutory and common law regimes, particularly the Mainland Judgment (Reciprocal Enforcement) Ordinance (Cap. 597), and reveals their tensions and inconsistencies with Mainland regimes and the 2005 Hague Convention on Choice of Court Agreements. Then, the Article provides an exhaustive statistical analysis on cases involving the MJO and explains the evolution to a more pro-enforcement judicial approach towards Mainland judgments in Hong Kong recently. It concludes by looking at the breakthroughs and outstanding issues of the new 2019 Arrangement between Hong Kong and the Mainland, as well as the prospects of Hong Kong in acceding to the

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2005 and 2019 Hague Conventions and developing an interregional judgment recognition and enforcement framework.

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## Introduction

The conflict of laws study between Mainland China (“the Mainland”) and Hong Kong Special Administrative Region (“Hong Kong”) is a sophisticated topic as it is often intertwined with political, economic, and cultural factors in the two regions. In particular, the recognition and enforcement of Mainland judgments in Hong Kong has consistently been a thorny topic. The handover of Hong Kong to the People’s Republic of China (“China”) on July 1, 1997 is a critical turning point for the Hong Kong–Mainland dynamics, as various national development strategies push for more intimate economic relations as well as intensifying social integration between the two regions.<sup>1</sup> A natural concomitant of such dynamics is a significant rise in cross-border disputes, which calls for more judicial assistance measures between the two regions. However, before the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters Pursuant to Choice of Court Agreements was signed between the Mainland and Hong Kong in 2006 (“2006 Arrangement”),<sup>2</sup> Mainland judgments were not qualified for enforcement under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) (“FJO”), and enforcement through the common law was rejected due to lack of “finality” found in Mainland judgments.<sup>3</sup>

The signing of the 2006 Arrangement was seen as a monumental step in bolstering cross-border judicial assistance between the Mainland and Hong Kong under the national principle of “one country, two systems” (*yiguo liangzhi* 一国两制).<sup>4</sup> To implement the 2006 Arrangement at the Hong Kong side, the Mainland Judgment (Reciprocal Enforcement) Ordinance (Cap. 597) (“MJO”) entered into force in Hong Kong in 2008.<sup>5</sup> A lot of expectations have been cast on the MJO in the hope of facilitating Mainland judgments’ recognition and enforcement in Hong Kong. Both the 2006 Arrangement and the subsequent 2008 MJO require a valid choice of court agreement by the disputants concerned to get Mainland judgments enforced in Hong Kong, a requirement largely inspired by the 2005 Hague Convention on Choice of Court Agreements (“Hague Choice of Court Con-

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1. For example, CEPA and the Belt and Road Initiative. See generally CEPA, *Your Springboard to China*, H.K. TRADE DEV. COUNCIL, [http://www.hktdc.com/resources/MI/Article/cepa1/2009/06/274914/1244104141867\\_cepapdf.pdf](http://www.hktdc.com/resources/MI/Article/cepa1/2009/06/274914/1244104141867_cepapdf.pdf) [<https://perma.cc/KY5F-A93X>] (last visited July 1, 2019) (discussing how The Belt and Road Initiative encourages a more intimate connection between Hong Kong and the Mainland).

2. 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, DEP’T JUSTICE (H.K.) (July 14, 2006), <https://www.doj.gov.hk/eng/mainland/pdf/mainlandrej20060719e.pdf> [<https://perma.cc/NQF6-Y5HL>] [hereinafter 2006 Arrangement].

3. See *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun* [1996] 2 H.K.L.R. 395 (H.C.).

4. See SCMP, *Chinese State Council White Paper on ‘One Country, Two Systems’ Policy in Hong Kong*, SOUTH CHINA MORNING POST, <https://www.scmp.com/news/hong-kong/article/1529167/full-text-practice-one-country-two-systems-policy-hong-kong-special> [<https://perma.cc/43Y9-BYE6>] (last visited Oct. 13, 2019).

5. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597 (H.K.).

vention”).<sup>6</sup> As a paper from the Hong Kong Legislative Council showed, the reason why the Hague Choice of Court Convention was chosen as the legislative model for Hong Kong–Mainland judgment regionalism was because it “represents an interface of common law and civil law jurisdiction”;<sup>7</sup> the dynamics between the contracting states of the Hague Choice of Court Convention resemble the interaction between the Mainland (a civil law jurisdiction) and Hong Kong (a common law jurisdiction).<sup>8</sup>

As of May 31, 2018, a decade after MJO was implemented in 2008, there were only a total of 49 enforcement orders granted in the Hong Kong High Court for enforcement of Mainland judgments in Hong Kong under the MJO.<sup>9</sup> This Article argues that the MJO is far from adequate in terms of addressing the Hong Kong–Mainland economic and social dynamics. Among many critiques laid against the MJO, one of the most critical ones is that the MJO has been drafted much more restrictively than the Hague Choice of Court Convention.<sup>10</sup>

This Article seeks to address the following research questions. It first testifies the critiques against the MJO through a very careful comparative study between the MJO and the Hague Choice of Court Convention. The close comparative study aims to answer, in particular, whether the MJO has failed to comply with the Hague spirit of promoting free flow of judgments across the border. Second, it conducts an exhaustive study of all contested cases raised under the MJO since it took effect in 2008, to answer whether Hong Kong has set an even higher threshold than the international benchmark in reviewing Mainland judgments, given that Hong Kong and the Mainland are now two integrated regions within the same sovereign state. Third, it aims to propose a package of reform proposals between Hong Kong and the Mainland to (1) resolve the inadequacy of Hong Kong’s judgement enforcement mechanism with the Mainland in light of the intensifying economic and social dynamics after two decades of the handover, and (2) enhance Hong Kong’s competitiveness as a dispute resolution centre on the aspect of judgments, with its special role as a gateway of Mainland judgments seeking overseas enforcement.

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6. Hague Convention of 30 June 2005 on Choice of Court Agreements, 44 I.L.M. 1294, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> [<https://perma.cc/TUY7-FAEK>] [hereinafter Hague Choice of Court Convention].

7. HONG KONG LEGISLATIVE COUNCIL PAPER NO. CB(2)2091/06-07(01) (2007), <https://www.legco.gov.hk/yr06-07/english/bc/bc56/papers/bc560622cb2-2091-1-e.pdf> [<https://perma.cc/W8ZY-8N8S>].

8. *Id.* In the course of drafting the Arrangement, substantive references were made pursuant to which civil or commercial judgments granted by a contracting state could be recognized and enforced in other contracting states with an effective choice of court agreement. By modelling the Arrangement on the Hague Choice of Court Convention, the Hong Kong Legislative Council intended that Hong Kong could seek assistance from the future case law developed under the Convention.

9. Data collected at the Hong Kong High Court (on file with author). At the time of the writing this paper, this is the most updated data on MJO enforcement collected at the Hong Kong High Court. See *infra* discussion in Part IV.

10. See *infra* discussion in Part III.

At the time of writing of this Article, some of the setbacks of the MJO have already been attended to and picked up. On January 18, 2019, Hong Kong and the Mainland signed a new Arrangement—the Arrangement on Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters (“2019 Arrangement”).<sup>11</sup> The 2019 Arrangement seeks to establish a more comprehensive Hong Kong–Mainland regional judgment mechanism between the two sides, with an aim to address the concerns of rigidity and inadequacy in the MJO.<sup>12</sup> Following the previous practice of the 2006 Arrangement, Hong Kong needs to promulgate local legislations to implement the 2019 Arrangement at the Hong Kong side.<sup>13</sup> It will take effect after both places have completed the necessary legislative procedures to enable local implementation, which may take another one or two years. It will apply to judgments made on or after the local legislation commencement date.<sup>14</sup>

This Article makes various contributions. It provides scholars, judges, lawyers, and policy-makers with comprehensive insights into the problems and solutions in the current cross-border judgment scheme. It constitutes the first-time systematic Hong Kong–Mainland regional conflict of laws study with respect to Mainland judgment recognition and enforcement (“MJRE”) in Hong Kong. It also contributes to Hong Kong’s overall judgment enforcement landscape and enhances Hong Kong’s role as a leading dispute resolution centre in the Asia-Pacific, particularly in context of China’s economic “rise” and Singapore’s delicate pressure. In achieving so, methodologically, this Article conducts multi-tiered studies, both doctrinally (first and second tiers of the study) and empirically (third and fourth tiers of the study). Structurally, it is organized into five parts, which will be explained below.

Following this Introduction, Parts I and II involve the first tier of the study, namely a historical examination of the MJRE landscape in three main phases, the pre-1997 period, from 1997 to 2008, and from 2008 onwards. Existing literatures in the field are mostly written either at the time when the 2006 Arrangement was agreed,<sup>15</sup> or when the MJO initially took effect in 2008. They focused primarily on discussing the theoretical issues arising out of the drafting of the Arrangement with reference to pre-2008 cases.<sup>16</sup> There is a huge gap, whether in the English- or Chinese-language literature, to cover MJRE in the post-2008 period.

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11. *Enforcement of Civil and Commercial Judgments between Hong Kong and the Mainland*, DEP’T JUST. (H.K.), <https://www.doj.gov.hk/eng/public/enforcement.html> [<https://perma.cc/55YT-YZBE>] (last updated Feb. 11, 2019).

12. *Id.*

13. *Id.*

14. *Id.*

15. See Xianchu Zhang & Philip Smart, *Development of Regional Conflict of Laws: On the Arrangement of Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between Mainland China and Hong Kong SAR*, 36 H.K.L.J. 553, 553–84 (2006).

16. See Xianchu Zhang, *A New Stage of Regional Judicial Assistance in Civil and Commercial Matters: Implementation of the Mainland Judgments Ordinance and Certain Issues Beyond*, 39 H.K.L.J. 3, 3 (2009).

Part II also weaves in the second tier of the study, which is a comparative one. There has been some literature discussing the Hague Choice of Court Convention in detail, in both English and Chinese languages.<sup>17</sup> Some have even discussed the impact of the Hague Convention on China.<sup>18</sup> However, none of those studies embraces Hong Kong. This Article aims to bring together the comparative international benchmark from which the MJO seeks inspiration, the true spirit and experience of the Hague Choice of Court Convention, the actual conditions in the Hong Kong-Mainland context, and the objective of facilitating Hong Kong to becoming an international dispute resolution centre from the judgments aspect.

Part III concerns the third tier of the study, which is a statistical analysis from the empirical side. The statistical analysis provides a first-time decade-long judgment enforcement caseload landscape of the MJO since it took effect in 2008. The enforcement caseload of Mainland judgments under the MJO is then compared to the enforcement caseload of Mainland arbitral awards in the same time period under the Arbitration Ordinance, which is deemed as a parallel judicial assistance instrument on civil and commercial matters in Hong Kong with the Mainland under the “one country, two systems.”<sup>19</sup> As such, the study purports to examine whether the cross-border judgment scheme has been much less utilized as compared with the cross-border arbitration scheme and explain the underlying reasons.

Part IV concerns the fourth tier of the study from the empirical side, in which specific cases are examined.<sup>20</sup> The case study surveys all cases which sought to rely on the MJO since it took effect in 2008 and reveals the law in action, which is a lacuna in the literature. It examines in particular those contentious cases where enforcement under the MJO is challenged and judgments interpreting the MJO are handed down by the Hong Kong High Court. It is through the careful reading of those judgments that we discern the evolution of Hong Kong’s judicial attitude towards Mainland

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17. YE BIN (叶斌), *BIJIAO FA SHIJIAO XIA DE 2005 NIAN HAIYA XUANZE FAYUAN XIEYI GONGYUE YANJIU* (比较法视角下的2005年海牙选择法院协议公约研究) [A Comparative Study on the 2005 Hague Convention on Choice of Court Agreements] (2013); Richard Garnett, *The Hague Choice of Court Convention: Magnum Opus or Much Ado about Nothing?*, 5 J. PRIV. INT’L L. 161, 161-80 (2009); Trevor Hartley, *The Hague Choice-of-Court Convention*, 31 EUR. L. REV. 414, 414-24 (2006); James Spigelman, *The Hague Choice of Court Convention and International Commercial Litigation*, 83 AUSTL. L.J. 386, 386-94 (2009).

18. See generally Guangjian Tu, *The Hague Choice of Court Convention: A Chinese Perspective*, 55 AM. J. COMP. L., 347 (2007).

19. See generally Weixia Gu, *15 Years of the Handover: The Rise, Discontent, and Positive Interaction of Cross-border Arbitration in Hong Kong with Mainland China*, 9 U. PA. E. ASIA L. REV., no. 1, 2013, at 42.

20. There was a book published in 2014 on the interregional recognition and enforcement of judgments between Hong Kong, Macau, and the Mainland, in which there is a section dedicated to analyzing the requirements in the MJO: JIE HUANG, *INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENT, LESSONS FOR CHINA FROM US AND EU LAW* (2014). The focus of the discussion is, however, on rhetorical critiques and does not examine how the MJO was implemented in action (i.e. case analyses).

judgments, which will also shed light on the possible jurisprudential developments in light of the new era of the 2019 Arrangement.

Part V reflects on the challenges of the Hong Kong-Mainland judgment regionalism and proposes new momentums by building upon the lessons obtained from the MJO and riding the wave of the 2019 Arrangement.

## I. Prelude

### A. The Problematic Pre-2008 MJRE Landscape

Prior to the 2006 Arrangement, there were only two channels by which judgments granted outside Hong Kong could be recognized in Hong Kong: (1) under common law rules and (2) under the FJO.<sup>21</sup> The FJO provides a mechanism by which foreign judgments satisfying the stated conditions could be registered, and a registered judgment has the same effect as a judgment granted in Hong Kong.<sup>22</sup> Nonetheless, neither before nor after the handover of Hong Kong to China was the FJO applicable to Mainland judgments seeking recognition and enforcement in Hong Kong. The reasons, which could only be comprehended with brief knowledge of the history of Hong Kong, will be explained below.

Prior to the handover, Hong Kong was a British colony and was part of its Commonwealth.<sup>23</sup> Under English law, foreign judgments that are capable of recognition and enforcement are classified into three categories. First, judgments granted within the European Union (“EU”) may be mutually recognized and enforced under the Brussels Convention and the Brussels I Regulations.<sup>24</sup> Second, judgments from Commonwealth jurisdictions which Britain has a bilateral treaty with may be recognized and enforced under the Foreign Judgments (Reciprocal Enforcement) Act (“FJA”).<sup>25</sup> Third, all other judgments may be recognized under common law on a case-by-case basis.<sup>26</sup> It is clear the Brussels Convention is inapplicable to Hong Kong, as Hong Kong was not part of the EU. However, as a previous part of the British Commonwealth, the FJO was enacted in Hong

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21. Foreign Judgments (Reciprocal Enforcement) Ordinance, (1960) Cap. 319 (H.K.) [hereinafter FJO].

22. *Id.*

23. NYSSA LEE-WOOLF, *EVALUATING COMMONWEALTH SCHOLARSHIPS IN THE UNITED KINGDOM: ASSESSING IMPACT IN THE ASIA-PACIFIC REGION* 33 (2011).

24. See 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299), <https://curia.europa.eu/common/reccdoc/convention/en/c-textes/brux-idx.htm> [<https://perma.cc/D53S-QZW9>]. However, these regimes are subject to changes due to the recent “Brexit” from the EU.

25. See Foreign Judgments (Reciprocal Enforcement) Act 1933 23 Geo. 5 c. 13 (U.K.), <https://www.legislation.gov.uk/ukpga/Geo5/23-24/13> [<https://perma.cc/FQ92-T72G>].

26. See Ardavan Arzandeh, *Reformulating the common law rules on the recognition and enforcement of foreign judgments*, 39 *LEGAL STUD.* 56, 56 (2019); PATRICK DORIS, *GETTING THE DEAL THROUGH, ENFORCEMENT OF FOREIGN JUDGMENTS* 2015, at 4-5, <https://www.gibsondunn.com/wp-content/uploads/documents/publications/Falconer-Doris-Enforcement-of-Foreign-Judgments-UK.pdf> [<https://perma.cc/9VSV-XAWR>] (last visited Oct. 15, 2019).

Kong as a British FJA-equivalent in order to recognize and enforce judgments from the Commonwealth member states with whom Britain had entered into bilateral treaties.<sup>27</sup> As the Mainland was neither one of the gazetted Commonwealth countries nor had concluded any bilateral treaties with Britain, the FJO had never been applicable to Mainland judgments. They could only be enforced under common law rules.

After the handover in 1997, the FJO remains in force by virtue of Article 8 of the Basic Law of Hong Kong, which states that all laws previously in force in Hong Kong shall be maintained.<sup>28</sup> Consequently, both before and after the handover, it remains unchanged that judgments from the Mainland could only be enforced under common law rules, except the fact that Hong Kong is no longer a British colony and part of the Commonwealth, but a Special Administrative Region of China.<sup>29</sup>

However, under the common law, Hong Kong courts have all along refused to recognize Mainland judgments due to the lack of “finality” found in Mainland judgments, due to the procedure in the Mainland called “judicial supervision” (or “adjudicative supervision,” *shenpan jiandu chengxu* 审判监督程序)<sup>30</sup> which allows the parties to challenge a final and conclusive judgment.<sup>30</sup> The “finality” issue aside, in practice, a Mainland judgment creditor also suffers from two major disadvantages compared to a judgment creditor who is able to make use of the FJO. First, the Mainland judgment creditor cannot use the simplified procedure of registration that is available under the FJO. The resort to common law procedure requires longer time and involves higher legal costs.<sup>31</sup> Second, the Mainland judgment creditor has to bear the burden of proof to show why the judgment should be enforced in Hong Kong under the common law rules, whereas in the FJO, the burden of proof is shifted to the judgment debtor to disprove that the judgment should not be enforced in Hong Kong.<sup>32</sup>

On the other side, the recognition and enforcement of Hong Kong judgments in the Mainland has met similar challenges. Before the handover, Hong Kong judgments were treated as foreign judgments in the Mainland legal system and their recognition and enforcement were governed by Article 265 of the then PRC’s Civil Procedure Law (“CPL”) (1991).<sup>33</sup> The then CPL provided that foreign judgments could only be

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27. See FJO, *supra* note 21, at § 1.

28. See XIANGGANG JIBEN FA [The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China] art. 8 (H.K.).

29. See Jones Day, *Arrangements for Reciprocal Enforcement of Commercial Judgments Between Mainland China and Hong Kong* (Aug. 2006), <https://www.jonesday.com/en/insights/2006/08/arrangements-for-reciprocal-enforcement-of-commercial-judgments-between-mainland-china-and-hong-kong> [<https://perma.cc/UH5H-3XY9>].

30. See *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun* [1996] 2 H.K.L.R. 395 (H.C.); see also *infra* Part III for more discussion.

31. HONG KONG LEGISLATIVE COUNCIL PAPER NO. CB(2)1365/06-07(02) (2006), <https://www.legco.gov.hk/yr06-07/english/bc/bc56/papers/bc560321cb2-1365-2-e.pdf> [<https://perma.cc/7GAR-MFTX>].

32. *Id.*

33. See *Minshi Susong Fa* (民事訴訟法) [Civil Procedure Law] (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 265-68 (China), <http://>



recognized and enforced in China if there are international treaties concluded with China, or based on the principle of reciprocity.<sup>34</sup> Both requirements presented formidable challenges, as there were no treaties signed between Hong Kong (or Britain before 1997) and the Mainland, and there was a lack of reciprocity between Hong Kong and China as Hong Kong courts had refused to recognize Mainland judgments in the first place.<sup>35</sup> The handover of Hong Kong to China did not improve the situation. Rather, it added more complications and legal uncertainties as Hong Kong was no longer a foreign country to China but rather a Special Administrative Region maintaining a high degree of legal autonomy within China. Yet, there were no other laws in the Mainland which could provide for the recognition and enforcement of Hong Kong judgments after the 1997 handover. There was in effect a legal lacuna created by the changing legal status of Hong Kong. In light of this, Mainland courts had developed conflicting opinions regarding the enforceability of Hong Kong judgments in the Mainland.<sup>36</sup>

It was not only the dubiety in the legal regime that called for the necessity of an arrangement of MJRE. In fact, in the post-handover period, the intense economic integration between the Mainland and Hong Kong brought about by the signing of the climacteric Closer Economic Partnership Arrangement (“CEPA”) in 2003 has made the call for MJRE more compelling.<sup>37</sup> CEPA was a free trade agreement between Hong Kong and the Mainland giving Hong Kong preferential access to China’s market, including trade in goods and services as well as trade and investment facilitation, providing zero tariffs on 90% of Hong Kong’s exports to the Mainland, faster and easier Mainland market access for 18 service sectors, and lower entry thresholds for smaller players.<sup>38</sup> Not only has CEPA brought economic integration, but it also gave rise to more mobility in movement of people between the two sides, with increasing cross-border employment

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[www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-1-01.html](http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-1-01.html) [https://perma.cc/3SNW-AZMY]; Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (2012) (promulgated by the Standing Comm. of the Nat’l People’s Cong., Aug. 31, 2012) art. 281, 82 (China), <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-1-01.html> [https://perma.cc/DZ6C-N4MT].

34. *Id.*

35. HUANG, *supra* note 20, at 59.

36. *Id.* at 64. The first opinion treats recognizing and enforcing Hong Kong judgments in the same way as Taiwanese judgments. The second opinion still treats Hong Kong judgments as foreign judgments but opines that they are not recognizable and enforceable under Civil Procedure Law (1991) art. 265. The third opinion holds that it is improper to apply Civil Procedure Law (1991) art. 265, and since there were no arrangements between Hong Kong and the Mainland regarding the recognition and enforcement of judgments, Hong Kong judgments cannot be recognized and enforced.

37. Details of CEPA could be found at the website of the Trade and Industry Department in Hong Kong: *Mainland and Hong Kong Closer Economic Partnership Agreement*, TRADE & INDUS. DEP’T., <https://www.tid.gov.hk/english/cepa/> (last revised Apr. 26, 2019) [https://perma.cc/DCQ4-YWHD].

38. CEPA - *Your Springboard to China*, H.K. TRADE DEV. COUNCIL, [http://www.hktdc.com/resources/MI/Article/cepa1/2009/06/274914/1244104141867\\_cepapdf.pdf](http://www.hktdc.com/resources/MI/Article/cepa1/2009/06/274914/1244104141867_cepapdf.pdf) [https://perma.cc/2WVW-WU3B] (last visited July 1, 2019).

opportunities and cross-border marriages. The Individual Visit Scheme under the CEPA opened up the door for Mainland residents to visit Hong Kong.<sup>39</sup> CEPA also brought about new job opportunities created for Hong Kong residents in the Mainland,<sup>40</sup> as well as created unprecedented cross-border marriages.<sup>41</sup> It was against this backdrop that the 2006 Arrangement was made between Hong Kong and the Mainland, and the 2008 MJO was subsequently enacted in Hong Kong.

## B. The Enactment of the MJO

The journey to the enactment of the MJO had not been a smooth one. After the handover, several arrangements on mutual judicial assistance between Hong Kong and the Mainland were made, including the Agreement on Service of Judicial Documents in 1998,<sup>42</sup> and the Arrangement on Mutual Enforcement of Arbitral Awards in 1999.<sup>43</sup> Yet, it was not until July 2002 that the first official negotiation on the mutual recognition and enforcement of judgments between the two sides started.<sup>44</sup> The delay in such a negotiation could be attributed to political skepticism and a lack of trust in the Mainland judicial system from the Hong Kong side, and hence Hong Kong courts were not eager to reach an agreement with the Mainland on the mutual recognition and enforcement of judgments.<sup>45</sup>

The negotiation process took more than four years after 2002, during which several drafts were exchanged, seven rounds of consultation were carried out, and the drafts were amended twenty-six times.<sup>46</sup> The Arrangement signed in 2006 provided that it would be entered into force when both sides completed their own implementation procedures.<sup>47</sup> On the Hong Kong side, the implementation took another two years to complete, and on August 1, 2008, the MJO entered into force in Hong Kong to give effect to the 2006 Arrangement.<sup>48</sup>

39. Zhang & Smart, *supra* note 15.

40. See *CEPA Benefits Hong Kong Economy and Business Enterprises*, GOV'T H.K. SPECIAL ADMIN. REGION (June 12, 2007, 6:31 PM), <http://www.info.gov.hk/gia/general/200706/12/P200706120209.htm> [<https://perma.cc/N3RX-2BDW>].

41. See *LCQ1: Marriages between Hong Kong Residents and Mainlanders*, GOV'T H.K. SPECIAL ADMIN. REGION (May 16, 2007, 12:16 PM), <http://www.info.gov.hk/gia/general/200705/16/P200705160113.htm> [<https://perma.cc/EU7P-W7A4>].

42. Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and the Hong Kong Courts, DEP'T JUST. (H.K.), <http://www.doj.gov.hk/eng/topical/pdf/mainlandmutual1e.pdf> [<https://perma.cc/2ELV-NQH9>] (last visited Nov. 11, 2019).

43. Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Courts, H.K. DEP'T OF JUST., <https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf> [<https://perma.cc/4N4R-ML7H>] (last visited Nov. 11, 2019); see Gu, *supra* note 19, at 45.

44. Zhang & Smart, *supra* note 15, at 558.

45. Priscilla M. F. Leung, *Mutual Recognition of Court Judgments amongst Hong Kong, Taiwan and Mainland China*, H.K. L., June 2006, at 49.

46. Zhang & Smart, *supra* note 15.

47. 2006 Arrangement, *supra* note 2, at art. 19.

48. Zuigao Renmin Fayuan Guanyu Neidi Yu Xianggang Tebie Xingzhengqu Fayuan Xianghu Renhe He Zhixing Dangshiren Xieyi Guanxia de Minshangshi Anjian Panjue de Anpai

During the two-year implementation period (from the time when the 2006 Arrangement was signed till the MJO took effect), a multitude of legislative debates had taken place. For instance, since the bill for MJO was introduced by Hong Kong's Chief Executive in January 2007, a Bill Committee was formed, public consultations were carried out, and amendments to the bill were made during the thirteen meetings of the Committee.<sup>49</sup> Compared to the 2006 Arrangement, the 2008 MJO included further details and expanded on some of the original provisions in order to suit the Hong Kong context.<sup>50</sup> On the Mainland side, instead of creating a new legislation, the 2006 Arrangement was given effect by a judicial interpretation promulgated by the Supreme People's Court ("SPC") of the Mainland.<sup>51</sup> The SPC in the Mainland has a *de facto* rule-making power under the Chinese jurisprudence, and such implementation process in the Mainland on these cross-border issues is more straightforward when compared to that in Hong Kong.

## II. MJO in Focus: Comparative Study with the Hague Choice of Court Convention

Despite the huge efforts that Hong Kong and the Mainland have put in during the course of negotiation of the 2006 Arrangement, the MJO remains unsatisfactory. The major criticism is its restrictive requirements and narrow scope of coverage which fails to satisfy the thriving Hong Kong-Mainland economic and societal dynamics.<sup>52</sup> The subsequent discussions will provide a comprehensive comparative critique of the MJRE framework provided under the MJO, through a careful comparative study with the Hague Choice of Court Convention from which the MJO draws its inspiration.

As set out in section 5(2) of the MJO, all five requirements need to be met altogether before a Mainland judgment can be recognized and enforced in Hong Kong:

- (1) The judgment must be given on or after the date of the commencement of the ordinance by a designated Mainland court as defined in sections 5(2)(a)(i)-(iv).<sup>53</sup>

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(最高人民法院关于内地与香港特别行政区法院相互认可和执行当事人协议管辖的民商事案件判决的安排) [Interpretation by the Supreme People's Court on the 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 the Parties' Choice of Court Agreement] (promulgated by the Supreme People's Court, July 3, 2008), [<https://perma.cc/PGF8-2NBR>] 2008 FASHI art. 9 [hereinafter Interpretation].

49. Zhang, *supra* note 16.

50. *Id.*

51. Zhang, *supra* note 16.

52. See, HUANG, *supra* note 20, at §§ 3, 4.

53. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 5.2(a) (H.K.).

- (2) There must be a relevant choice of Mainland court agreement made on or after the commencement date of the Ordinance.<sup>54</sup>
- (3) The judgment must be final and conclusive.<sup>55</sup>
- (4) The judgment must be enforceable in the Mainland.<sup>56</sup>
- (5) The judgment has to be one which orders the payment of a sum of money.<sup>57</sup>

When the five requirements are all satisfied, by virtue of section 14 of the MJO, the Mainland judgment can be registered in Hong Kong and it would have the effect as if it were a judgment originally made in the Court of First Instance (“CFI”) of the High Court in Hong Kong.<sup>58</sup>

The first requirement refers to the list of designated Mainland courts which are authorized to exercise jurisdiction of the first instance in civil and commercial cases involving foreign, Hong Kong, Macao, and Taiwan parties, i.e. “foreign-related” cases.<sup>59</sup> The list is attached as Schedule 1 of the MJO, which includes (1) the Supreme People’s Court in the Mainland, (2) a Higher People’s Court in the Mainland, (3) an Intermediate People’s Court in the Mainland, and (4) a recognized Primary People’s Court.<sup>60</sup>

As not all Primary People’s Courts in the Mainland (more often referred to as “Basic People’s Courts”) are allowed to exercise first instance jurisdiction in foreign-related civil and commercial cases, the Supreme People’s Court has separately compiled a list for those recognized Primary People’s Courts which either had past experience in handling Hong Kong- or foreign-related cases before, or were deemed to be more attuned to international practice. The list for Primary People’s Courts was subsequently updated by the Supreme People’s Court and published by the Secretary for Justice in the Gazette on July 25, 2014 (G.N. 4289 of 2014).<sup>61</sup> Such list was further updated (the “current list”) and published by the Secretary for Justice in the Gazette on December 14, 2018 (G.N. 9195 of 2018) pursuant to section 25(1) of the MJO.<sup>62</sup> The current list includes around 230 Primary People’s Courts in the Mainland,<sup>63</sup> which are located in (1) developed regions such as the Municipalities of Beijing, Shanghai, and Tianjing, as well as Provinces of Guangdong, Jiangsu, and Zhejiang; (2) economically fast-developing regions such as the Provinces of Fujian, Shandong,

54. *Id.* at § 5(2)(b).

55. *Id.* at § 5(2)(c).

56. *Id.* at § 5(2)(d).

57. *Id.* at § 5(2)(e).

58. *Id.* at § 14.

59. In terms of the jurisprudence on foreign-related cases, see WEIXIA GU, *ARBITRATION IN CHINA: THE REGULATION OF ARBITRATION AGREEMENTS AND PRACTICAL ISSUES* 24–25 (2012).

60. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, sched. 1 (H.K.).

61. G.N. 4289 (July 25, 2014), <https://www.doj.gov.hk/eng/topical/pdf/egn201418304289.pdf> [<https://perma.cc/WNM6-XC95>].

62. G.N. 9195 (Dec. 14, 2018), <https://www.gld.gov.hk/egazette/pdf/20182250/egn201822509195.pdf> [<https://perma.cc/EYZ5-5Y27>].

63. There are more than 3000 primary people’s courts in China. See Weixia Gu, *The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?*, 1 CHINESE J. COMP. L. 303, 309.

Liaoning, Hunan, Hubei, Anhui, and Henan; and (3) regions which are geographically close to the Chinese borders and hence more likely to face foreign-related disputes such as the Provinces of Guangxi, Yunan, Hainan, Hailongjian, Jilin, Inner Mongolia, and Tibet.<sup>64</sup>

While the first requirement of “designated Mainland court” is straightforward and easier to follow, the remaining four are more controversial. They will be examined below.

#### A. Choice of Mainland Court Agreement

One of the biggest hurdles of the MJO is what constitutes a valid “exclusive choice of court agreement.”

##### 1. *Exclusive Choice of Mainland Court Agreement*

Under the MJO, a Mainland judgment can only be recognized in Hong Kong if the parties have entered into a “choice of Mainland court agreement” before the dispute has arisen.<sup>65</sup> Under section 3(2) of the MJO, a “choice of Mainland court agreement” must be “exclusive” in the sense that it needs to “specify[] the courts in the Mainland or any of them as the court to determine a dispute which has arisen or may arise in connection with the specified contract to the exclusion of courts of other jurisdictions.”<sup>66</sup> According to the then Hong Kong Secretary of Justice, the “exclusive choice of Mainland court agreement” is meant to allow parties to either choose “courts as a whole in the Mainland” or “one particular court in the Mainland” to resolve the dispute.<sup>67</sup>

On the other hand, on the Mainland side, Article 3 of the SPC Interpretation on the 2006 Arrangement states that “a “choice of court agreement” referred to any agreement in written form made, as from the day of commencement of the Arrangement, by the parties concerned in which a *people’s court of the Mainland* or a *court of Hong Kong* is expressly designated as the court having sole jurisdiction for resolving any dispute which has arisen or may arise in respect of a particular legal relationship.”<sup>68</sup> It seems that the implementation of the 2006 Arrangement in the Mainland is even more stringent than in Hong Kong, i.e. the MJO, as it only allows parties to choose *one* specific court in *one* jurisdiction, to the exclusion of all other courts in that jurisdiction, and to the exclusion of all courts in the other

64. G.N. 9195 (Dec. 14, 2018), <https://www.gld.gov.hk/egazette/pdf/20182250/egn201822509195.pdf> [<https://perma.cc/EYZ5-5Y27>].

65. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 5.2(b) (H.K.).

66. *Id.* at § 3(2) (emphasis added).

67. Lifa Hui: Lvzhengsi Sizhang Zai Quanti Weiyuanhui Shenyi Jieduan Dongyi Xiuzheng “Neidi Panjue (Jiaohu Qiangzhi Zhixing) Tiaoli Cao’an” Zhici Quanwen (立法会：律政司司长在全体委员会审议阶段动议修正《内地判决（交互强制执行）条例草案》致辞全文) [Huang Renlong, Sec’y of Justice, Speech on Moving for Amendments to the Mainland Judgments (Reciprocal Enforcement) Bill at the Committee of the Whole Council] (Apr. 23, 2008), <http://www.info.gov.hk/gia/general/200804/23/P200804230282.htm> [<https://perma.cc/S2D2-GAKR>].

68. Interpretation, *supra* note 48.

jurisdiction, in order for the choice of court agreement to be valid. In other words, the choice of Mainland court agreement must be “double-exclusive.” It then raises the question of interpretational uniformity between the Mainland and Hong Kong, as parties seeking to enforce Hong Kong judgments in the Mainland are potentially put in a disadvantaged position due to the more rigorous requirements on the Mainland side.

In examining international norms in the field, the prevalent approach is Article 3 of the Hague Choice of Court Convention, which defines “exclusive choice of court agreement” as “an agreement concluded by two or more parties that . . . designates . . . *the courts of one contracting state or one or more specific courts of one contracting state* to the exclusion of the jurisdiction of any other courts.”<sup>69</sup> In essence, once the parties have chosen one contracting state as the venue for resolving the dispute, the “exclusiveness” requirement under the Hague Choice of Court Convention would be satisfied.

It is then up to the parties to decide whether to specifically designate one court, a few courts, or all courts in that contracting state to resolve the dispute. As such, the international benchmark encompasses more scenarios than as envisaged by the MJO where the benchmark of “exclusiveness” in the “choice of court agreement” can be easily passed. Citing an example raised by Dr. Ye Bin, a leading Chinese scholar on the Hague Choice of Court Convention, the choice of court agreement designating “(all) courts in France” to resolve the dispute, despite not stipulating which specific court in France, is exclusive under the Hague Choice of Court Convention.<sup>70</sup> Alternatively, the agreement is also exclusive if the parties designate “the Commercial Court of Paris” as the specific court to resolve the dispute. Moreover, if the parties designate “both the Commercial Court of Paris and the Commercial Court of Lyon,” i.e. the “more specific courts” of France, to resolve the dispute, the agreement is still exclusive.<sup>71</sup>

In contrast, under the MJO, the parties only have two options: either to designate all courts in the Mainland to resolve the dispute, or to specifically designate one particular court in the Mainland to resolve the dispute. It does not provide the option to “cherry-pick” several Mainland courts. The practical implication of this limitation is that, if the parties wish to make any specification as to the courts, they must specifically spell out, for instance, “the People’s Court of Yuexiu District, Guangzhou,” as the designated court. Any general specification such as “the courts in the Guangdong Province” would be invalid under the definition of the MJO.

Another critique is the lack of deeming provisions in the MJO. Article 3(b) of the Hague Choice of Court Convention provides that “a choice of court agreement which designates the courts of one contracting state or

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69. Hague Choice of Court Convention, *supra* note 6, at art. 3 (emphasis added). Art. 3(c) requires the agreement to be concluded or documented in writing or by any other means of communication which render information accessible so as to be usable for subsequent referees.

70. YE, *supra* note 17, at 121.

71. *Id.*

one or more specific courts of one contracting state shall be deemed to be exclusive unless the parties have expressly provided otherwise.”<sup>72</sup> Absent such a deeming provision in the MJO, the validity of the choice of Mainland court agreement is thrown into doubt in situations where the parties have chosen Mainland courts but do not explicitly express the exclusion of the Hong Kong courts in their choice of court agreement. A question would arise as to whether the Hong Kong courts should invalidate the agreement. As the subsequent discussion shows, this would largely depend on the interpretation techniques on the matter by the Hong Kong courts, which is an issue more about judicial practice and judicial attitude.

Before the 2006 Arrangement was made, Hong Kong courts were generally more scrupulous in interpreting jurisdictional clauses. In the period shortly after the handover, it appears that in the absence of express stipulation that the agreement is exclusive to other courts or jurisdictions, Hong Kong courts would construe the clause as non-exclusive. For example, in *T & K Electronics Ltd. v. Tai Ping Insurance Co. Ltd.*,<sup>73</sup> a Hong Kong CFI decision in 1997, the contract contained a jurisdictional clause that “the insurance is subject to English jurisdiction.” The court, in construing the clause, held that it was not an exclusive foreign jurisdiction clause; it was merely “permissive.”<sup>74</sup> Subsequently, in *Yu Lap Man v. Good First Investment Ltd.*,<sup>75</sup> a Hong Kong Court of Appeal (“CA”) case in 1998, the clause stated that all disputes arising from the contract were “subject to the jurisdiction of the PRC courts.” After considering *T & K Electronics Ltd. v. Tai Ping Insurance Co. Ltd.*, the CA held that the clause was not exclusive, but merely declaratory or permissive, as clear words could have been used if the parties had intended to create an obligation of litigating exclusively in the Mainland.<sup>76</sup>

An enlightening progress in the area has only been observed in two recent CFI cases after almost a decade of the implementation of the MJO. In two cases in 2016, *Wu Zuo Cheng v. Leung Lai Ching Margaret*<sup>77</sup> and *Bank of China Ltd. v. Yang Fan*,<sup>78</sup> the CFI established a pro-validity approach in construing the exclusive choice of Mainland court agreements. A related concern is that under the Hague Choice of Court Convention, the validity of the exclusive choice of court agreement is to be determined by the law of the jurisdiction chosen.<sup>79</sup> On the contrary, the MJO does not

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72. Hague Choice of Court Convention, *supra* note 6, at art. 3(b) (emphasis added).

73. *T & K Electronics Ltd. v. Tai Ping Insurance Co. Ltd.* [1998] 1 H.K.L.R.D. 172 (C.F.I.).

74. PRIVATE INTERNATIONAL LAW: SOUTH ASIAN STATES' PRACTICE 46 (Sai Ramani Garimella & Stellina Jolly eds., Springer 2017).

75. *Yu Lap Man v. Good First Investment Ltd.* [1998] 1 H.K.C. 726 (C.A.).

76. *Id.*

77. See 吳作程 v. 梁麗瀅 [*Wu Zuo Cheng v. Leung Lai Ching Margaret*], HCMP 2080/2015 (C.F.I. Feb. 16, 2016) (Legal Reference System) (H.K.). The names of the parties are the author's own translation as there is no official translation of the names of the parties.

78. See 中國銀行股份有限公司 v. 楊凡 [*Bank of China Ltd. v. Yang Fan*], [2016] 3 H.K.L.R.D. 7, 18 (C.F.I.).

79. See Hague Choice of Court Convention, *supra* note 6, at art. 5(1), 6(a).

specify the applicable law in determining the jurisdictional agreement. The case *Bank of China Ltd. v. Yang Fan* illustrates such a scenario where the Hong Kong court directly applied the Hong Kong law in determining a choice of Mainland court agreement, thereby attracting criticisms by scholars and practitioners. These two cases will be discussed in greater detail in Part IV of this Article.

## 2. Unrealistic Prospect of Entering into an Exclusive Choice of Mainland Court Agreement

In practice, even if the commercial parties are able to navigate through the technical rigidities of what is meant to refer to a valid exclusive choice of Mainland court agreement, it is only in rare circumstances that commercial parties are willing to enter into such an agreement. The reasons are as follows.

To begin with, from the viewpoints of the parties, in the process of contract negotiation, they would hardly incorporate an exclusive choice of court agreement in favor of either Mainland or Hong Kong courts. It is because practically, the parties might opt for arbitration, which is a well-established and less costly channel of handling disputes, especially those of a cross-border nature.<sup>80</sup>

The general lack of trust in the Mainland court system is another reason why parties would hesitate to choose Mainland courts to resolve disputes. Compared to established rule-of-law jurisdictions, the Mainland Chinese judicial system has many pervasive shortcomings<sup>81</sup> and unsurprisingly, parties might be worried to designate Chinese courts as the sole venue for dispute resolution, let alone to designate one specific Mainland Chinese court.<sup>82</sup>

A further factor which deters commercial parties from entering into an exclusive choice of Mainland court agreement is that the enforceability of Mainland judgments in foreign jurisdictions and vice versa is in doubt.<sup>83</sup> In situations where assets in multiple jurisdictions are involved, the parties would be reluctant to choose Mainland courts to handle the disputes, for if Mainland judgments are not recognized in other jurisdictions, the parties might need to initiate new legal proceedings in multiple jurisdictions, which would substantially increase the legal costs for the parties.

All these difficulties have severely limited the utility of the MJO, which did not turn out to be as popular as it intended.

## B. Qualification of Judgments

Not all civil and commercial judgments delivered in the Mainland are covered under the MJO. The scope of application of the MJO is confined to

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80. Zhang & Smart, *supra* note 15, at 580.

81. See Gu, *supra* note 63.

82. See *supra* Part II.A.1.

83. See Weixia Gu, *China*, in *RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS* 31 (Anselmo Reyes ed., 2019).



only final and conclusive monetary judgments delivered by designated Mainland courts.<sup>84</sup> As “designated Mainland courts” have been analyzed before, the subsequent discussions will focus on the critiques with respect to (1) monetary judgments and (2) final and conclusive judgments.

### 1. *Monetary Judgments*

According to section 2 of the MJO, a “Mainland judgment” means a judgment, ruling, conciliatory statement or order of payment in civil or commercial matters that is given by a designated court.<sup>85</sup> Section 5(2)(e) of the MJO stipulates that it only recognizes and enforces a Mainland judgment if it orders the payment of a sum 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).<sup>86</sup> This is a reflection of the “start small” approach, as taking the first step in judicial assistance by recognizing and enforcing monetary judgments poses the least controversies and difficulties compared to other types of remedies such as specific performance and injunctions.<sup>87</sup>

On the contrary, such restriction is not found in the Hague Choice of Court Convention. Article 4(1) of the Convention defines “judgment” as “any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognized or enforced under this Convention. An interim measure of protection is not a judgment.”<sup>88</sup> In other words, although interim measures are not covered, non-monetary judgments are enforceable as long as they relate to a decision on the merits. The implication is that permanent injunctions or orders for specific performance are enforceable under the Hague Choice of Court Convention. In this aspect, the MJO is much narrower.

Another major restriction of the MJO is its exclusion of employment contracts and “contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party.”<sup>89</sup> From the Hong Kong Legislative Council documents, such restriction was inspired by Article 2 of the Hague Choice of Court Convention, which excluded similar matters.<sup>90</sup> However, as previously discussed, the intensifying social dynamics between Hong Kong and the Mainland, whether in the form of cross-border employment, cross-border marriage, or cross-border consumption, has posed a challenge to the narrow scope of the MJO.

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84. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 5(2)(c)(e) (H.K.).

85. *Id.* at § 2.

86. *Id.* at § 5(2)(e).

87. See HUANG, *supra* note 20, at 100.

88. Hague Choice of Court Convention, *supra* note 6, at art. 4(1).

89. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 2 (H.K.).

90. Hague Choice of Court Convention, *supra* note 6, at art. 2(1); HONG KONG LEGISLATIVE COUNCIL PAPER NO. CB(2)772/01-02(04) (2002).

Fortunately, some of the critiques against the narrow scope of monetary judgments have now been addressed by the 2019 Arrangement. The 2019 Arrangement applies to matters considered to be of a “civil and commercial” nature under both Hong Kong and Mainland law.<sup>91</sup> Most notably, the 2019 Arrangement covers some monetary judgments which are not qualified under the 2008 MJO, for example, disputes between family members on division of property<sup>92</sup> and disputes on property arising from engagement agreements,<sup>93</sup> both of which have high occurrences in light of the ever-increasing mobility of the people between Hong Kong and the Mainland.

## 2. *Final and Conclusive Judgment*

The issue of finality is perhaps the most controversial and perplexing. Under section 5(2) of the MJO, a Mainland judgment must be “final and conclusive” as well as “enforceable” in the Mainland in order to be recognized and enforced in Hong Kong.<sup>94</sup>

The requirement of finality and conclusiveness is further spelt out in section 6(1) of MJO, which reads:

For the purposes of section 5(2)(c), a Mainland judgment is final and conclusive as between the parties to the judgment if—

- (a) it is a judgment given by the Supreme People’s Court;
- (b) it is a judgment of the first instance given by a Higher People’s Court, an Intermediate People’s Court or a recognized Basic People’s Court and—
  - (i) no appeal is allowed from the judgment according to the law of the Mainland; or
  - (ii) the time limit for appeal in respect of the judgment has expired according to the law of the Mainland and no appeal has been filed;
- (c) it is a judgment of the second instance given by a designated court other than a recognized Basic People’s Court; or
- (d) it is a judgment given in a retrial by a designated court of a level higher than the court whose judgment has given rise to the retrial.<sup>95</sup>

In addition, a Mainland judgment is deemed enforceable if the original court issues a certificate of finality which states that the judgment is final and enforceable.<sup>96</sup>

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91. 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, DEP’T JUST. (H.K.) (Jan. 18, 2019), [https://www.doj.gov.hk/eng/public/pdf/2019/Doc3\\_477379e.pdf](https://www.doj.gov.hk/eng/public/pdf/2019/Doc3_477379e.pdf) [<https://perma.cc/XL4C-4CVE>]. This Arrangement is signed between the Supreme People’s Court and the HKSAR Government [hereinafter 2019 Arrangement].

92. 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 (Key Features), DEP’T JUST. (HK), § B(7)(a) (Jan. 2019), [https://www.doj.gov.hk/eng/public/pdf/2019/Doc6\\_481354e.pdf](https://www.doj.gov.hk/eng/public/pdf/2019/Doc6_481354e.pdf) [<https://perma.cc/WHB6-GW4M>] [hereinafter 2019 Arrangement Summary].

93. *Id.* at § B(7)(a).

94. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, §§ 5(2)(c), 5(2)(d) (H.K.).

95. *Id.* at § 6.

96. *Id.* at § 6(2).

In a similar vein with the “exclusive choice of court agreement,” the issue of interpretation uniformity arises again with respect to “finality” between the two sides. At the Mainland side, under Article 2 of the SPC Interpretation of the 2006 Arrangement, the legal term “enforceable final judgment” (*juyou zhixingli de zhongshenpanjue* 具有执行力的终审判决) is used, and the requirement of “finality” and “enforceability” are combined as one.<sup>97</sup> At the Hong Kong side, under the MJO, however, “final and conclusive judgment”<sup>98</sup> and “enforceability”<sup>99</sup> are two separate requirements. There should be clarifications as to how to resolve the discrepancies between the two sides across the border. Moreover, interestingly, the legal term of a “final and conclusive judgment” is not found in the Hague Choice of Court Convention. The Hague Choice of Court Convention merely requires a foreign judgment to have effect and be enforceable in the State of origin.<sup>100</sup>

#### a. Finality and Judicial Supervision Procedure

The requirement that a judgment must be “final” in order to be “enforceable” is a long-established doctrine in common law, but it has posed substantial and recurring obstacles for Mainland judgments seeking recognition and enforcement in Hong Kong due to the procedure in the Chinese legal system called “judicial supervision.”

Hong Kong’s understanding of “finality” is based on the nineteenth-century House of Lords decision *Nouvion v Freeman*,<sup>101</sup> where Lord Watson laid down the requirement that a final judgment must be “final and unalterable in the court which pronounced it,”<sup>102</sup> noting that a pending appeal does not affect the finality of the judgment.<sup>103</sup> While such formulation does not sound problematic at first blush, it might pose problems in the Chinese context due to the “judicial supervision” procedure under PRC’s CPL (the current version being promulgated in 2017), the purpose of which is to rectify a mistake even if the judgment had gone through appeal.<sup>104</sup> Such procedure is to be understood in view of the fact that the Mainland adopts a “two-tier adjudication system” (*liangshenzhongshenzhi* 两审终审制), which is different from Hong Kong and most Western jurisdictions where there are two available appellate jurisdictions. This means that there is only one (instead of two) chance of appeal in the Mainland,

97. Interpretation, *supra* note 48, at art. 2.

98. Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 5(2)(c) (H.K.).

99. *Id.* at § 5(2)(d).

100. Hague Choice of Court Convention, *supra* note 6, at art. 8(3) (“A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.”).

101. *Nouvion v. Freeman* [1889] 15 App. Cas. 1 (H.L.).

102. *Id.*

103. *Id.*

104. *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by National People’s Congress Standing Committee, June 27, 2017, effective July 1, 2017) art. 16 (China).

and the ruling by the court of second instance should be final.<sup>105</sup> In order to rectify the inadequacy of having only one chance of appeal, the judicial supervision procedure could be invoked to challenge and re-open a seemingly final and effective judgment if there are justified mistakes of law, of facts, or procedural irregularities.

There are various ways in which the judicial supervision procedure can be invoked. First, the court president can decide whether to submit its final judgment to the Judicial Committee in that particular court (*shenpanweiyuanhui* 审判委员会) to discuss and re-open the case.<sup>106</sup> Second, the procuratorates (检察院) can launch a protest. Third, the national-level Supreme People's Procuratorate ("SPP") can protest against any final and enforceable judgments, while the higher level procuratorates can protest against the judgments delivered by people's courts from lower levels.<sup>107</sup> Fourth, the parties themselves may by petition apply for retrial of the case, but on the basis that the grievance party must produce evidence to meet one of the grounds stated in the CPL.<sup>108</sup> The court shall also retry the case if it involves corruption, bribery, malpractice and unlawful adjudication.<sup>109</sup> The policy behind the judicial supervision procedure is to ensure that parties could have access to justice even if all appellate procedures have been exhausted and judgments have become final.<sup>110</sup> Yet, it has unintentionally given rise to the issue of lack of finality in the present context.

#### b. Finality and Chiyu Banking Jurisprudence

The first Hong Kong case which questioned the issue of finality of Mainland judgments is *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun*,<sup>111</sup> a case in the CFI, in which the plaintiff bank sought to recognize a judgment delivered by an Intermediate People's Court in Fujian Province in 1995.<sup>112</sup> The defendant lodged an appeal but was dismissed. Subsequently, the defendant presented a petition to the Fujian Provincial-level People's Procuratorate ("Fujian Procuratorate") for a retrial. Under the then CPL (1991), only the SPP could lodge a protest of the judgment.<sup>113</sup> As a result,

105. *See id.* at art. 10, 155, 175.

106. *See id.* at art. 198.

107. For example, provincial-level procuratorates can protest against final and enforceable judgments delivered by city-level intermediate people's courts; city-level procuratorates can protest against district-level primary/basic people's courts.

108. *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by National People's Congress Standing Committee, June 27, 2017, effective July 1, 2017) art. 200 (China). The 13 grounds can be summarized as three main categories: (1) error of fact, (2) error of legal application, and (3) error of procedures.

109. *Id.*

110. HUANG, *supra* note 20, at 192.

111. *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun* [1996] 2 H.K.L.R. 395, para. 20 (H.C.).

112. The judgment did not state which intermediate people's court tried the case.

113. *Minshi Susong Fa* (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 185 (China), <http://www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-1-1-01.html> [<https://perma.cc/3SNW-AZMY>].

the Fujian Procuratorate presented a report to the SPP so that it could lodge a protest. The Intermediate People's Court, upon receiving the protest, would be required to conduct a retrial of the matter under the then CPL.<sup>114</sup> Cheung J. in *Chiyu Banking* cited the words of Lord Watson in *Nouvion* and concluded that the Mainland judgment was not final, as it was not “unalterable in the court which pronounced it” due to the judicial supervision procedure. Although in *Chiyu Banking* no protest had been lodged by the SPP yet, Cheung J. made his ruling on the basis that the procedure had been involved after a report was presented to the SPP and there could be a possibility for the judgment being altered.<sup>115</sup>

The ruling in *Chiyu Banking* bears three implications. First, Hong Kong law should be applied to determine whether a Mainland judgment is final or not. Second, a judgment is not final owing to the fact that under the judicial supervision regime, a court retains the power to alter its own judgment. Third, even if the protest has not yet been lodged, the mere possibility of a retrial would render the Mainland judgment not final and unenforceable.<sup>116</sup> It is certainly an unintended consequence that Mainland judgments can never be recognized, and the *Chiyu Banking* stands awkwardly against the current trend that the Mainland and Hong Kong are becoming even more integrated.<sup>117</sup>

At the time when the 2006 Arrangement was being drafted, Hong Kong courts were generally evasive of the question of “finality” of Mainland judgments. The majority opinion in the Hong Kong CA decision of *Lee Yau Wing v. Lee Shui Kwan* in 2005 simply left open the question of whether Mainland judgments would be final and conclusive in view of the existence of the judicial supervision system.<sup>118</sup> While the majority judgment declined to make any remarks on the judicial supervision system, what was less noticed was the dissenting judgment delivered by Chung J. who expressed the view that the grounds on which judicial supervision could be invoked are very similar to the grounds of appeal in Hong Kong, and therefore the existence of the judicial supervision system should not render a Mainland judgment inconclusive and not final. The dissenting judgment, despite not being able to bind subsequent decisions, has however paved the way for distinguishing *Chiyu Banking* in the future. Disappointingly, in the “gap period” after the Arrangement was made and before the MJJO came into effect, the Hong Kong CFI in *Wu Wei v. Liu Yi Ping* simply followed the majority judgment of *Lee Yau Wing* in leaving open the question of “finality” of Mainland judgments, without seizing the opportunity to review the judicial supervision system and express some preliminary views on the

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114. *See id.* at art. 187.

115. *Chiyu Banking Corp. Ltd. v. Chan Tin Kwun* [1996] 2 H.K.L.R. 395, para. 20 (H.C.).

116. HUANG, *supra* note 20, at 197.

117. *Id.*

118. 李祐榮 v. 李瑞群 [*Lee Yau Wing v. Lee Shui Kwan*], [2007] 2 H.K.L.R.D. 749, para. 26 (C.A.).

“finality” of Mainland judgments.<sup>119</sup>

As suggested by the late Professor Philip Smart, the reasoning in *Chiyu Banking* is in itself problematic. This is because the precedent of *Nouvion v. Freeman* arose in a totally different context of Spanish “executive” proceedings, which are similar to summary proceedings in common law.<sup>120</sup> These executive proceedings are limited in scope and there is little room to raise any defense. Thus, these judgments are not final in the sense that it is readily foreseeable that the party against which the judgment is granted would exercise its right to bring a full hearing at which every defense could be raised, and it is likely that the results would have been altered upon hearing more defenses.<sup>121</sup> It is flawed to compare interim Spanish judgments with Chinese judgments which are delivered after a full hearing with the examination of evidence.

Twenty years after *Chiyu Banking* was delivered, unfortunately, none of the Hong Kong cases has effectively overruled it. It seems that Hong Kong courts have a genuine concern that all Mainland judgments are potentially subject to retrial. However, this is a misunderstanding as there are very few qualified cases which could invoke the judicial supervision procedure. Even if the procedure is invoked, it does not necessarily lead to retrial or an alternation of the original judgment.<sup>122</sup> Exceptionally, there may be some regions in the Mainland with problematic judicial practice which have led to the re-trial of many cases under the judicial supervision procedure, but this was the problem of some particular regions, rather than the procedure itself.<sup>123</sup> Ultimately, the debate of “finality” boils down to the weak mutual trust between courts in the Mainland and those in Hong Kong. This might be due to the less developed rule of law and judicial system in the Mainland. No matter how skeptical Hong Kong courts are towards the Mainland judiciary, this Article maintains that it is going too far to regard all Mainland judgments as not final due to the existence of such a procedure, which are only invoked in extreme circumstances.

In a recent 2016 case in Hong Kong, *Bank of China Ltd. v. Yang Fan*, which will be discussed more extensively later, the judge rigorously attempted to distinguish *Chiyu Banking* by classifying the judicial supervision procedure as an appellate regime.<sup>124</sup> *Bank of China Ltd. v. Yang Fan* has offered an “exit route” for Hong Kong courts from *Chiyu Banking*, and it is essential that Hong Kong courts take a turn in their approach, taking into consideration the handover of Hong Kong to China, the closer economic relationship between Hong Kong and the Mainland, as well as the improving judicial quality in the Mainland.

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119. Wu Wei v. Liu Yi Ping, HCA 1452/2004 (C.F.I. Jan. 30, 2009) (Legal Reference System) (H.K.).

120. See Philip St John Smart, *Finality and the Enforcement of Foreign Judgments Under the Common Law in Hong Kong*, 5 OXFORD U. COMMONWEALTH L. J. 301, 303 (2005).

121. See *id.* at 308.

122. Guangjian Tu, *Recognition and Enforcement of Mainland China's Civil and Commercial Judgments in Hong Kong - An Update*, 25 ASIA PAC. L. REV. 190, 196-97 (2017).

123. See *id.* at 196.

124. *Bank of China Ltd. v. Yang Fan*, [2016] 3 H.K.L.R.D. 7, paras. 51-53 (C.F.I.).

### C. Caution on the MJO Framework

#### 1. *Achievement as a Semi-Manufactured Product*

It has been generally agreed that the 2006 Arrangement and the resulting 2008 MJO have contributed to the regional conflict of laws between the Mainland and Hong Kong and enhanced cross-border commercial certainty, and at the same time established Hong Kong as an international dispute resolution hub due to the possibility to enforce Mainland judgments.<sup>125</sup> This is especially so in view of the disparities in legal and socio-economic systems between the two regions. As pointed out by Dr. Jie Huang, there are three macro challenges for establishing an MJRE framework in Hong Kong with the Mainland.<sup>126</sup> First, the conflicts between capitalism in Hong Kong and socialism in the Mainland. Second, the conflicts between common law system in Hong Kong and civil law system in the Mainland. Third, the disparities in social systems, which lead to weak mutual trust between the two regions towards each other.<sup>127</sup> Such conflicts and disparities between the two regions have rendered the recognition and enforcement of judgments an onerous task as the different phases of economic, social, and legal development in the two regions resulted in incompatible judicial standards and practices. The promulgation of the MJO amidst such challenges certainly deserves applause. Nonetheless, the Arrangement is only the first step towards a more comprehensive scheme of MJRE. It is cautioned as a “semi-manufactured product” and remains inadequate.<sup>128</sup>

In light of the Hong Kong–Mainland dynamics, it is paramount to have an effective cross-border judgment scheme in place. As explained by the former Hong Kong Secretary of Justice Mr. Rimsky Yuen, there are three major reasons for this.<sup>129</sup> First, while foreign judgments can be effectively recognized under the FJO in Hong Kong, Hong Kong and the Mainland now belong to the same sovereign State after the handover, which provides even greater incentive and justification for Mainland judgments to be recog-

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125. ZHENG SOPHIA TANG, YONGPING XIAO & ZHENGXIN HUO, CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA 382–83 (2016).

126. HUANG, *supra* note 20.

127. *See id.*

128. *See* Zhi Hong Yu, *Di'erjie Neidi, Xianggang, Aomen Quji Falv Wenti Yantao Hui Zongshu* (第二届内地、香港、澳门区际法律问题研讨会综述) [*Report of the Second Conference regarding Interregional conflicts of law among Mainland China, Hong Kong and Macau*], 147 FAXUE PINGLUN (法学评论) [Law Review] 156, 158 (2008) (cited in HUANG, *supra* note 20, at 120, n. 441).

129. Lvzhengsi Sizhang Yu “Neidi Yu Xianggang Tequ Minshangshi Sifa Xiezhu Ershi Zhounian Huigu Yu Zhanwang Zhuanti Yantaohui” Kaimuli Zhici Quanwen (律政司司长于「内地与香港特区民商事司法协助二十周年回顾与展望专题研讨会」开幕礼致辞全文) [Rimsky Yuen Kwok-keung, Secretary of Justice, Speech at the Opening Ceremony of “The 20th Anniversary Seminar on Judicial Cooperation between Mainland China and the Hong Kong Special Administrative Region in Civil and Commercial Matters – Retrospect and Prospects”] (Apr. 23, 2017), <https://www.info.gov.hk/gia/general/201704/23/P2017042300200.htm> [<https://perma.cc/MBS9-J39G>].

nized under an effective judgment scheme.<sup>130</sup> Second, the economic and social interactions between the two regions have become more frequent, and a comprehensive cross-border judgment scheme is indispensable to protect the legal rights of the parties in both regions. Third, Hong Kong is a springboard for Mainland enterprises to enter into the international market, and foreign enterprises view Hong Kong as a gateway to gain access to the Mainland market.<sup>131</sup> To maintain the mutually beneficial relationship, an effective cross-border judgment scheme is essential to Hong Kong.<sup>132</sup>

The role of an effective MJRE scheme can be further exemplified in light of some recent macro developments. In 2015, the Chinese government launched the Belt and Road Initiative (“BRI”), a key diplomatic development strategy to connect the new markets such as China, the Association of Southeast Asian Nations, the Middle East, and Central and Eastern Europe.<sup>133</sup> To facilitate the BRI, in 2018, the Chinese Premier Li Keqiang announced the establishment of the Guangdong–Hong Kong–Macau Greater Bay Area (“GBA”), which aims to bring along economic and social integration in 11 cities from the three regions, creating an economic bloc comparable to the San Francisco Bay Area, the Greater New York, and the Greater Tokyo Bay.<sup>134</sup> The GBA is expected to play the role of “super-connector” for China, connecting China with other parts of the world. Most recently, in February 2019, the Outline Development Plan for Guangdong–Hong Kong–Macau Greater Bay Area (*yuegangao dawanqu fazhan guihua gangyao* 粤港澳大湾区发展规划纲要) was published by China’s Central People’s Government, in which one of Hong Kong’s key roles in the GBA is to be the leading international legal and dispute resolution service provider in China and the Asia-Pacific region.<sup>135</sup> Undoubtedly, the success depends on whether there is an effective legal framework to enhance commercial certainty and reliability over cross-border businesses and transactions between Hong Kong and the Mainland, where the free flow of cross-border commercial judgments is an important element. The lack of an effective MJRE framework has impeded Hong Kong’s role as

130. See Bureau of East Asian and Pacific Affairs, *U.S. Relations With Hong Kong: Bilateral Relations Fact Sheet*, U.S. DEP’T STATE (July 17, 2018), <https://www.state.gov/u-s-relations-with-hong-kong/> [https://perma.cc/Z5UX-CK9X].

131. Phila Siu, *Hong Kong Still the Gateway to Mainland China for Foreign Companies, Commerce Chief Says*, SOUTH CHINA MORNING POST (Oct. 29, 2017, 5:45 PM), <https://www.scmp.com/print/news/hong-kong/economy/article/2117499/hong-kong-still-gateway-mainland-china-foreign-companies> [https://perma.cc/QX43-PSLC].

132. *Id.*

133. *The Belt and Road Initiative - A Road Map to THE FUTURE*, BELT & ROAD, <https://beltandroad.hktdc.com/en/belt-and-road-basics> [https://perma.cc/9ZCT-SPGM] (last visited July 1, 2019).

134. David Ketchum & Scott Cheng, *Can “One Country, Multiple Systems” Work for China’s Bay Area Development?*, SOUTH CHINA MORNING POST (Feb. 13, 2018, 6:27 PM), <https://www.scmp.com/comment/insight-opinion/article/2133143/can-one-country-multiple-systems-work-chinas-bay-area> [https://perma.cc/6MPE-9V8X].

135. See CE Welcomes the Promulgation of Outline Development Plan for Guangdong–Hong Kong–Macau Greater Bay Area, GOV’T H.K. SPECIAL ADMIN. REGION (Feb. 18, 2019, 7:00 PM), <https://www.info.gov.hk/gia/general/201902/18/P2019021800825.htm> [https://perma.cc/BER2-MWEY].



a dispute resolution center in the perspective of judgments, particularly in light of her niche position as a potential gateway of Chinese judgments going out.

## 2. *Has the MJO Complied with the True Spirit of the Hague Choice of Court Convention?*

Concluded on June 30, 2005, the Hague Choice of Court Convention is the first international convention of recognition and enforcement of foreign civil and commercial judgments and is undoubtedly a milestone in the realm of private international law.<sup>136</sup> First initiated by the United States, the Hague Choice of Court Convention was intended as the parallel instrument of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (more commonly known as the “New York Convention”).<sup>137</sup> Nonetheless, due to seriously divergent views between the EU and the United States (“US”) in the negotiation process which represented a conflict between common law and civil law ideologies, an interim draft in 2001 was vetoed.<sup>138</sup> Due to the setbacks during the negotiation process, the end product in 2005, after rounds of tough political negotiations and compromise, was a much narrower covenant based on choice of court agreements. As one commentator vividly described, the negotiation process was “an elephant that gave birth to a mouse.”<sup>139</sup>

The spirit of the Hague Choice of Court Convention is to promote the free flow of judgments across the globe so as to facilitate international trade and investment. By establishing uniform rules on jurisdiction and recognition and enforcement of foreign judgments, the Convention provides certainty for commercial parties and ensures that the exclusive choice of court agreements that have been drafted in their contracts will remain valid and be enforced.<sup>140</sup> The justification of the Convention lies fundamentally in the respect for commercial parties’ autonomy. Once the commercial parties have chosen a court for jurisdiction, all nations who have entered into the Convention must respect the parties’ decision. In other words, the chosen court must take up the case and is not allowed to refuse the case on grounds such as *forum non conveniens*.<sup>141</sup> Further, the other courts which have not been chosen must refuse to hear the case and if an action is commenced, it must be dismissed.<sup>142</sup> Most importantly, the judgment rendered by the chosen court shall be recognized and enforcea-

136. See Hague Choice of Court Convention, *supra* note 6, at pmbl.

137. See Mukarrum Ahmed & Paul Beaumont, *Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and its Relationship with the Brussels I Recast Especially Anti-suit Injunctions, Concurrent Proceedings and the Implications of BREXIT*, 13 J. OF PRIV. PUB. INT’L L. 386, 390 (2017).

138. See Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53(3) AM. J. COMP. L. 543, 545 (2005).

139. Jeffrey Talpis and Nick Krnjevic, *The Hague Conference on Choice of Court of June 30, 2005: The Elephant that Gave Birth to a Mouse*, 13 SW. J. L. & TRADE AM. 1 (2006).

140. See Hague Choice of Court Convention, *supra* note 6, at pmbl.

141. See *id.* at art. 5.

142. See *id.* at art. 6.

ble in other Contracting States of the Convention, unless one of the exceptions apply.<sup>143</sup>

As at April 1, 2019, there are only 32 Contracting States to the Hague Choice of Court Convention, including 7 national Contracting States (China, Denmark, Mexico, Montenegro, Singapore, Ukraine, the US) and the EU as a Regional Economic Integration Organization (“REIO”).<sup>144</sup> Among the 32 signatories, only 3 entered into force—the EU, Mexico, and Singapore (with the latest ratification taking place in Singapore in June 2016).<sup>145</sup> In contrast to the 159 signatories of the New York Convention as at April 1, 2019, the narrow scope of the Hague Choice of Court Convention and the requirement of the exclusive choice of court agreement are blamed as possible reasons that have hindered its popularity. The fact that the People’s Republic of China signed the 2005 Hague Convention in September 2017<sup>146</sup> indicates the commitment of China towards making the process of recognizing and enforcing foreign judgments more aligned with international standards. The prospect of Hong Kong joining the Hague Choice of Court Convention as a Special Administrative Region of China under the arrangement of Hong Kong’s Basic Law and China’s “one country, two systems” will be discussed later.<sup>147</sup>

The MJO can be described as a miniature of the Hague Choice of Court Convention in the localized context, which similarly seeks to promote free flow of judgments across the borders of Hong Kong and the Mainland. Although the MJO is inspired by the Convention, upon close comparison, the MJO is in fact even more restrictive than the Convention, thereby setting unrealistic rigidities for cross-border movement of judgments. Not only is the MJO exceptionally narrow in confining its scope of application to monetary judgments arising out of commercial debts, but also the definition of exclusive choice of court agreement is excessively technical to be fulfilled. The exclusion of employment and family matters from the MJO is not compatible with the Hong Kong–Mainland societal needs.<sup>148</sup> Drafting issues aside, the effectiveness of the MJO is further undermined by the uncertainties revolving around the issue of “finality” of Mainland judgments as well as the inconsistencies in interpretation of the

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143. See *id.* at art. 8, 9.

144. For the latest updates of the Hague Convention Contracting States see *STATUS TABLE: Convention of 30 June 2005 on Choice of Court Agreements*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> [<https://perma.cc/NC4W-5LA7>] (last visited July 1, 2019).

145. See *id.*

146. For a report of China’s accession to the 2005 Hague Convention, see *DETAILS: China Signs the 2005 Choice of Court Convention*, HCCH (Sep. 12, 2017), <https://www.hcch.net/en/news-archive/details/?varevent=569> [<https://perma.cc/6FYG-YCJQ>].

147. See *infra* Part V.B.2.

148. Cross-boundary labour has become a norm rather than exception in the two regions, and cross-boundary marriages have made up 35% of the registered marriages in Hong Kong in 2015. See Paul Yip, *Hong Kong Should Welcome Cross-border Marriages, and Make it Easier for More to Wed*, SOUTH CHINA MORNING POST (Aug. 23, 2016), <https://www.scmp.com/comment/insight-opinion/article/2007445/hong-kong-should-welcome-cross-border-marriages-and-make-it> [<https://perma.cc/HQ8U-B334>].

2006 Arrangement and the 2008 MJO between the Mainland side and the Hong Kong side.

While the narrow scope of the Hague Choice of Court Convention is comprehensible as a matter of political reality due to the setbacks suffered in political negotiations between the EU and the US, there is no strong justification why MJO, which concerns with matters in two highly integrated regions within the same country, should be drafted even more restrictively than an international convention. On the other hand, when compared to the common law regime which imposes similar requirements on judgment recognition and enforcement, the MJO has not made Mainland judgments more advantageous than foreign judgments that seek enforcement under common law at all.<sup>149</sup> It is concluded that a narrow and restrictive legal arrangement does not reflect the underlying spirit of the Hague Convention, which is to promote the free flow of judgments in an era of free trade and business. Nor can it serve the intensifying dynamics between Hong Kong and the Mainland. From the statistics shown in Part III below, it is clear that MJO is seldom used in real practice.

### III. Statistical Analysis of the MJO

This part focuses on the statistical side of the MJO in implementation. It provides statistical analysis of the registration and enforcement data of the Mainland judgments under the MJO from August 2008 to May 2018, covering the period from the implementation of MJO until the time when the most recent data on the matter is available. Mainland judgments outside the scope of the MJO are enforced under the common law regime and are excluded from the current research. The statistical analysis in this Part is confined to Mainland judgments which are enforced by virtue of the MJO.

The author has obtained the registration and enforcement data from two main sources. First, the author has conducted interviews with judges and judicial administrators of the Hong Kong Judiciary, as well as barristers practising in the field, to obtain exclusive data which are not publicly available. Second, the author has conducted an exhaustive search from publicly available case law research databases<sup>150</sup> and has consolidated cases from the Hong Kong Judiciary in which the MJO was discussed or referred to.

First, from the data provided by the Hong Kong Judiciary, as of 31 May 2018, there were a total of 49 orders for enforcement of Mainland judgments in Hong Kong granted by the High Court of Hong Kong under the MJO.<sup>151</sup> Among those 49 enforcement orders, 48 orders were granted

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149. For the common law requirements of MJRE see GRAEME JOHNSTON & PAUL HARRIS, *THE CONFLICT OF LAWS IN HONG KONG* (3rd ed. 2017).

150. These include, for example, Westlaw and LexisNexis.

151. Data collected at the Hong Kong High Court (on file with the author). At the time of the writing of this paper, this is the most updated data on MJO enforcement collected at the Hong Kong High Court.

uncontested (i.e. orders granted without entering into judicial proceedings) and only one order was granted contested (i.e. orders granted after entering into the judicial proceeding and a judgment was made), that is, *Wu Zuo Cheng v. Leung Lai Ching Margaret*.<sup>152</sup> As the applications for enforcement orders of Mainland judgments in Hong Kong were largely granted or refused on paper without any written judgments, it is estimated that this does not represent the full picture. The total number of enforcement applications of Mainland monetary judgments in Hong Kong under the MJO would be more than 49 in number for the following two reasons. First, some enforcement applications might be simply refused on paper in the application processes and as such, no enforcement orders could be granted by the Hong Kong courts. Second, some enforcement applications with contested issues did enter into judicial proceedings, but parties might have settled in the course and thus did not lead to a judgment. Hence, there was no need for the Hong Kong courts to grant an enforcement order.

Second, from the publicly available case law research databases, upon cross-checking between Westlaw and Lexis, there are a total of 14 cases which mentioned the MJO in the period, either substantially or briefly. For clarity, the author has further categorized these cases into three groups. The first group comprises ten cases in which the MJO was either inapplicable or was only briefly mentioned in the judgment. The second group includes three cases which have discussed the MJO, but only for the purpose of granting interim orders in aid of Mainland proceedings. The third group concerns one case in which enforcement under the MJO was contested, i.e. *Wu Zuo Cheng v. Leung Lai Ching Margaret*.<sup>153</sup> Among the 14 cases, the author is of the view that the second and third groups of cases are more worthy of research as they contained detailed discussion of the MJO to elucidate the application of the MJO provisions, from which the evolution of Hong Kong's judicial attitude towards Mainland judgments can be discerned. As such, the four cases that fall into Group Two and Group Three will be studied in detail in Part IV of this Article.

As discussed previously, the 49 enforcement orders granted by the Hong Kong High Court include both enforcement orders granted on paper (uncontested), as well as those granted after being contested in the court (with contested issues). The relationship between the data collected from the Hong Kong Judiciary and the publicly available case law research databases is summarized in Table 1 below.

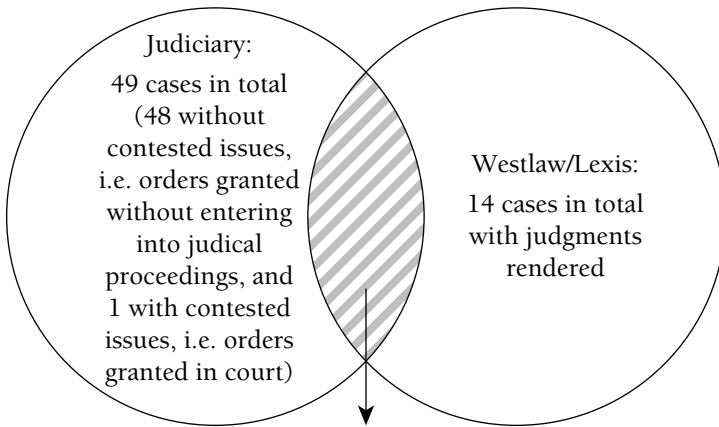
As illustrated by Table 1, *Wu Zuo Cheng v. Leung Lai Ching Margaret* represents the interface between the two data sources as it is the one contested case out of the 49 enforcement orders that was granted by the High Court, as well as one of the 14 reported cases on Westlaw and LexisNexis where the MJO was discussed or referred to.

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152. See 吳作程 v. 梁麗瀅 [*Wu Zuo Cheng v. Leung Lai Ching Margaret*], HCMP 2080/2015 (C.F.I. Feb. 16, 2016) (Legal Reference System) (H.K.).

153. *Id.* See *infra* discussion Part IV.A.

**Table 1: Relationship between the Data Collected at the Hong Kong Judiciary and Westlaw/Lexis**



On the other hand, from 2008 to 2017, according to the statistics provided by the Hong Kong International Arbitration Center (“HKIAC”), there were 82 Mainland arbitral awards enforced in Hong Kong under the Arbitration Ordinance (“AO”).<sup>154</sup> Among the 82 arbitral awards enforced, seven enforcement orders were granted contested. Table 2 provides a summary on the number of Mainland judgments enforced under the MJO and the number of Mainland arbitral awards enforced under the AO.<sup>155</sup> The comparison is incorporated for two purposes. First, both the MJO and AO are restricted to adjudicative outcomes arising out of similar types of disputes, i.e. commercial/monetary judgments/awards.<sup>156</sup> Second, like the relationship between the Hague Choice of Court Convention and the New York Convention, the MJO is deemed as an important legal instrument parallel to the AO on judicial assistance in commercial matters between the Mainland and Hong Kong in the post-handover period.<sup>157</sup> Table 2 demonstrates that for almost the same period of time, as far as those reported enforcement orders are concerned, the MJO is much less used than the AO.

154. For the enforcement statistics provided by the HKIAC from 2008 to 2017 see *Enforcement of Awards*, HKIAC, <https://www.hkiac.org/about-us/statistics/enforcement-awards> [<https://perma.cc/7GCK-7XSC>] (last visited July 1, 2019). The data for 2018 is not yet available.

155. The Arbitration Arrangement is incorporated into the Hong Kong Arbitration (Amendment) Ordinance, No. 2, (2000) and codified as Hong Kong Arbitration Ordinance, (2000) Cap. 341, pt. IIIA. The content of the Arbitration Arrangement is also confirmed in the new Arbitration Ordinance, (2011) Cap. 609 (H.K.), having taken effect on June 1, 2011. For further details see Gu, *supra* note 19.

156. Mainland arbitral awards enforceable under the Arbitration Ordinance are restricted to commercial awards rendered in the Mainland. See Arbitration Ordinance, (2011) Cap. 609, 1, 82(1) (H.K.).

157. The Hong Kong Constitution states that “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.” XIANGGANG JIBEN FA [The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China] art. 95 (H.K.).

**Table 2: The Number of Mainland Judgments and Mainland Awards Enforced under the MJO and the AO**

	Number of Mainland judgments/arbitral awards enforced	Number of contested judgments/arbitral awards among successfully enforced judgments/arbitral awards	Number of uncontested judgments/arbitral awards among successfully enforced judgments/arbitral awards
MJO	49	1	48
AO	82	7	75

Source: Data collected from HKIAC and the Hong Kong Judiciary

In light of the ever-intensifying commercial integration between the Mainland and Hong Kong, the number of Mainland commercial judgments enforced in Hong Kong was only around 49. This was contrasted with the larger number of 82 Mainland arbitral awards being enforced in Hong Kong in almost the same period. This Article contends that the count of 49 was relatively few and was far from sufficient to reflect the intensity of economic activities between the Mainland and Hong Kong in the last decade. This Article proposes two possible explanations for a comparatively lower enforcement caseload of Mainland judgments than that of the Mainland arbitral awards. First, the uncertainty revolving around the “finality” of Mainland judgments has rendered them more difficult to enforce, while arbitral awards are immune from the “finality” concerns. Second, the Mainland adjudicative institutions which deliver these potentially enforceable documents are very different. Mainland arbitral awards were made by Mainland arbitration institutions, while Mainland judgments were made by Mainland courts. With regard to the continuing concerns and doubts about the quality of judgments handed down by Mainland courts and their competency in handling cross-border disputes, Hong Kong courts might be skeptical towards the Mainland courts, which resulted in a hindrance in enforcement of Mainland judgments in Hong Kong. But has the judicial attitude towards Mainland judgments remained unchanged? Part IV of this Article analyses the evolution of the judicial attitude towards Mainland judgments.

#### IV. Evolution of Judicial Attitude

As discussed above, there were only four cases in which the MJO was substantially discussed and all these cases took place after the year of 2015,<sup>158</sup> reflecting the development of judicial attitude of Hong Kong

158. These cases are: 中國進出口銀行 v. 劉慶平 [Export-Import Bank of China] v. [Liu Qingping], HCMP 1684/2015 (C.F.I. July 17, 2015) (Legal Reference System) (H.K.); 吳作程 v. 梁儷靜 [Wu Zuo Cheng v. Leung Lai Ching Margaret], HCMP 2080/2015 (C.F.I. Feb. 16, 2016) (Legal Reference System) (H.K.); Bank of China Ltd. v. Yang Fan, [2016] 3 H.K.L.R.D. 7 (C.F.I.); and 北京橙天嘉禾影視製作有限公司 v. 張承勳 [Beijing Golden Harvest Entertainment Co. Ltd. v. Cheung Shing-Sheung], HCMP 2418/2013 (C.F.I. June 16, 2016) (Legal Reference System) (H.K.).

courts towards Mainland judgments. Part IV studies these cases to show the jurisprudential patterns and how they are shaped are contingent on a number of variables triggered by the particular context of those cases.

A. Successful Enforcement of a Contested Case under the MJO: *Wu Zuo Cheng v. Leung Lai Ching Margaret* (February 2016)<sup>159</sup>

This is the first and only successful enforcement case with contested issues with respect to Mainland judgments in Hong Kong under the MJO since it came into effect in 2008.

The case concerned a scenario of failure to repay a loan. The plaintiff lender and the first defendant borrower entered into a loan agreement in 2013 in Shenzhen in the Mainland, which was guaranteed by the second to fifth defendants.<sup>160</sup> Subsequently, the borrower defaulted on the payment. The parties then reached a mediation settlement agreement in Shenzhen (the “Mainland Judgment delivered in Shenzhen,” or the “Shenzhen Judgment”) after attending mediation sessions at the Shenzhen Intermediate People’s Court (“Shenzhen Court”).<sup>161</sup> Yet, the defendants failed to make part of the payments required by the Shenzhen Judgment. As a result, the plaintiff applied to enforce the Shenzhen Judgment in the Shenzhen Court (the “Shenzhen Enforcement Order”). The plaintiff subsequently obtained a certificate from the Shenzhen Court certifying that the Shenzhen Judgment is final and enforceable in the Mainland (the “Certificate of Finality”).<sup>162</sup> As the debtor had enforceable assets in Hong Kong, the Plaintiff presented the Certificate of Finality to the Hong Kong Court of First Instance and successfully registered the unsatisfied part of the Shenzhen Judgment under the MJO in October 2015.<sup>163</sup>

Since the plaintiff had obtained the Certificate of Finality, the Shenzhen Judgment was deemed enforceable in the Mainland and the burden was shifted to the defendant to “prove the contrary.”<sup>164</sup> The defendants alleged that the first defendant had made an earlier application to the Shenzhen Court to set aside the Shenzhen Enforcement Order which was still pending, and further alleged that the Shenzhen Court did not unfreeze their assets on time to allow repayments to be made, and hence, the Shenzhen Judgment was not enforceable in the Mainland.<sup>165</sup> Nonetheless, Master Leong in the CFI rejected the defendants’ arguments and empha-

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159. HCMP 2080/2015. Subsequently in *Re Leung Lai Ching Margaret*, [2018] H.K.C.F.I. 1910, the HKCFI granted a bankruptcy order against Leung Lai Ching Margaret for her failure to pay the judgment debt under the Mainland Judgment registered under the MJO.

160. HCMP 2080/2015, at para. 2.

161. Cap. 597 MJO, § 2 defines “Mainland judgment” as “a judgment, ruling, conciliatory statement or order of payment in civil or commercial matters that is given by a designated court.” Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 2 (H.K.). A mediation settlement agreement is a kind of “conciliatory statement” and thus falls within the definition of Mainland judgment.

162. HCMP 2080/2015, at para. 7.

163. *Id.* at para. 8.

164. Cap. 597 MJO, § 6(2) (H.K.).

165. HCMP 2080/2015, at paras. 11-12.

sized that “a pending application (if indeed it is still pending) to set aside the enforcement order (not the Mainland Judgment) is far from enough,” taking into account the fact that the defendants submitted no evidence as to the progress of such alleged “set aside application.”<sup>166</sup>

Despite being a case with straightforward facts, this case has several important implications. To begin with, the Hong Kong court has shown and demonstrated a pro-enforcement attitude towards Mainland judgments by flexibly construing the exclusive choice of Mainland court agreement. According to the MJO, the choice of Mainland court agreement has to designate Mainland courts as a whole, or one specific Mainland court to the exclusion of other courts.<sup>167</sup> Looking at the terms of the loan agreement and the guarantee agreement, it was only stipulated that “disputes shall be resolved by the people’s court at the place of signing the loan agreement.”<sup>168</sup> Notwithstanding the fact that there were no wordings expressly excluding the jurisdiction of other courts, the judgment was still deemed as validly “exclusive” and hence registered in Hong Kong.<sup>169</sup>

In addition, the finality issue of Mainland judgments was liberally handled in this case. Judge Lin Jian Yi from the Shenzhen Court who handled this case and granted the Mainland judgment subsequently analyzed the implications of this case in the Mainland’s mainstream judicial press, the People’s Court Daily.<sup>170</sup> Judge Lin pointed out that this case could serve as a useful reference for future Hong Kong cases when dealing with the issues of finality and enforceability of Mainland judgments.<sup>171</sup> As illustrated by this case, there are three reasons why the finality requirement could be satisfied. First, the Certificate of Finality was presented but the defendant failed to provide any evidence to rebut.<sup>172</sup> Second, even if the defendant wanted to set aside the Shenzhen Judgment based on the grounds he alleged, the application was out of time. In fact, under PRC’s CPL, such application should have been made within 6 months since the Shenzhen Judgment took effect, i.e. by May 2015.<sup>173</sup> Since the time limit for filing an application of judicial supervision to challenge the Shenzhen Judgment lapsed and no such application was filed, the judgment was regarded as final and conclusive under the MJO.<sup>174</sup> Third, even if there was a challenge as alleged by the defendant, it was only a challenge to the Shenzhen Enforcement Order, which was a procedural order rather than

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166. *Id.* at para. 22.

167. See Cap. 597 MJO, § 3(2).

168. Lin Jianyi (林建益), *Xianggang Fayuan Renke Neidi Panjue de Zhongai Yu Tupo* (香港法院认可内地判决的障碍与突破) [*The Obstacles and Breakthroughs for Hong Kong Courts in Recognising Mainland Judgments*], RENMIN FAYUAN BAO (人民法院报) [PEOPLE’S COURT DAILY] (Jan. 25, 2017), [http://rmfyb.chinacourt.org/paper/html/2017-01/25/content\\_121253.htm?div=-1](http://rmfyb.chinacourt.org/paper/html/2017-01/25/content_121253.htm?div=-1) [<https://perma.cc/AQC7-XP7T>].

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. See Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 6(1)(b)(ii) (H.K.).



the Shenzhen Judgment itself.<sup>175</sup> The mere possibility of overturning the Shenzhen Judgment due to the fact that there is a pending application to set aside the enforcement order in the Mainland was not sufficient. More compelling evidence is required by the Hong Kong court.

The judicial approach demonstrated by the Hong Kong courts in this case exhibited greater trust and confidence in Mainland judgments. It also enhanced legal certainty and forged confidence among cross-border judgment creditors. This pro-enforcement approach is to be commended and has been well-taken as a signal to redefine the MJRE landscape since the enactment of the MJO.

## B. Interim Judgments Referring to the MJO

The following two cases have substantially discussed the application of the MJO in the context of *Mareva* injunctions in aid of Mainland proceedings. One of the requirements for applying for such an interim relief is that the parties need to establish a good arguable case that the Mainland judgment to be obtained will be subsequently recognized and enforced in Hong Kong under the MJO.<sup>176</sup>

### 1. *Export-Import Bank of China v. Liu Qingping (July 2015)*<sup>177</sup>

In a 2015 CFI case *Export-Import Bank of China v. Liu Qingping*, a Mainland judgment was granted by Beijing No. 4 Intermediate People's Court against the defendant for a sum of RMB 100 million with interest of about RMB 4 million.<sup>178</sup> The applicant is applying for an interim *Mareva* injunction to prevent the judgment debtor (the defendant) from disposing his assets in Hong Kong.<sup>179</sup>

The Mainland judgment has not been registered yet as the plaintiff (the applicant of the *Mareva* injunction and the judgment creditor) was waiting for the administrative process of issuing the Certificate of Finality. Apart from that, all other requirements under the MJO were satisfied: (1) there was a valid exclusive choice of court agreement choosing a specific Mainland court,<sup>180</sup> and (2) the judgment was final and conclusive as the period of appeal had expired with no appeal being lodged.<sup>181</sup> After considering the evidence and establishing that there is a real risk of dissipation of assets by the defendants in Hong Kong, Au-Yeung J. granted the *Mareva* injunction.<sup>182</sup> What was noteworthy was a comment made by Au-Yeung J. that "although the Mainland court could not have made the asset preservation order against the Listco shares (which are outside the Mainland), there

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175. See Lin, *supra* note 168.

176. High Court Ordinance, (2017) Cap. 4, § 21M.

177. *Export-Import Bank of China v. Liu Qingping*, HCMP 1684/2015 (C.F.I. July 17, 2015) (Legal Reference System) (H.K.).

178. *Id.*

179. *Id.*

180. Note that the clause was not set out in the judgment.

181. HCMP 1684/2015.

182. *Id.* at para. 25.

is no reason why the Hong Kong court should not render its assistance.”<sup>183</sup>

Even though the Certificate of Finality had not yet been issued, Au-Yeung J. did not hesitate to grant the *Mareva* injunction by concluding that there would be a final and enforceable Mainland judgment.<sup>184</sup> The pro-enforcement attitude of Au-Yeung J. in assisting Mainland proceedings has demonstrated confidence in the Mainland judiciary and willingness to provide mutual judicial assistance.

## 2. Bank of China Ltd v. Yang Fan (April 2016)<sup>185</sup>

In *Bank of China Ltd v. Yang Fan*, the plaintiff commenced actions against the defendant who acted as the guarantor of two defaulted loans advanced by the plaintiff to two Mainland companies. The plaintiff first obtained property preservation orders in the Rizhao Intermediate People’s Court in Shandong Province and subsequently obtained a *Mareva* injunction in Hong Kong to restrain the defendant from disposing his assets in Hong Kong.<sup>186</sup> Owing to the fact that the Mainland judgment ultimately obtained must be enforceable under the MJO, the defendant opposed to the application on the grounds that (1) there was no valid exclusive choice of court agreement, and (2) the Mainland judgment was not final and conclusive, such that the Mainland judgment obtained is not registrable under the MJO and not enforceable in Hong Kong.<sup>187</sup>

The choice of Mainland court agreement in *Bank of China v. Yang Fan* was drafted as follows:

Any party can choose the third way below to settle the case if there is no agreement upon negotiations:

1. . . .
2. . . .
3. Submit the case to the People’s Court which has the jurisdiction.<sup>188</sup>

On the face of it, the choice of Mainland court agreement did not expressly exclude the jurisdiction of other courts; nor did the parties create a mandatory obligation to submit the case to the People’s Court by using the word “can.” Nonetheless, Anthony To J. held that depending on the context, words such as “can” or “may” could also be construed to mean “must” or “shall,” after considering that the parties concerned are both Mainland parties residing and carrying on business in the Mainland, and that the loan agreements and guarantees are executed in the Mainland and governed by the Mainland law.<sup>189</sup> As a result, Anthony To J. incorporated an element of “exclusiveness” to the choice of Mainland court agreement and its validity was upheld.<sup>190</sup>

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183. *Id.* at para. 14.

184. *Id.* at paras. 13-14.

185. *Bank of China Ltd. v. Yang Fan*, [2016] 3 H.K.L.R.D. 7, 18 (C.F.I.).

186. *Id.* at paras. 1-2.

187. *See id.* at paras. 19, 20, 25.

188. *Id.* at para. 28.

189. *See id.* at paras. 33-34.

190. *See id.* at para 34.

Further, after reviewing *Chiyu Banking* and its subsequent authorities, Anthony To J. ruled that despite the question of whether a PRC judgment could be final and conclusive was complicated in nature and had public importance which could not be determined in interlocutory proceedings, he expressed the view that the judicial supervision regime in the Mainland has undergone substantive changes since January 1, 2013 (i.e. the current version of the PRC's CPL when *Bank of China v. Yang Fan* was heard) such that they are rendered more like an appellate regime.<sup>191</sup> As *Chiyu Banking* and some subsequent authorities were decided many years before the current PRC's CPL took effect, Anthony To J. took the view that they are distinguishable from the present case.<sup>192</sup> There is no doubt that the decision was one which best echoes the pro-validity approach of Hong Kong courts towards Mainland judgments. The judgment made invaluable contribution to the finality issue and could be seen as paving the way for overruling *Chiyu Banking* in the future. Despite the rigidity of the MJO, it appears from the cases above that the Hong Kong courts, since 2015, have been adopting a more lenient approach in enforcing Mainland judgments.

On the other hand, *Bank of China v. Yang Fan* was not without criticisms. From a pragmatic point of view, it is far from clear whether the MJO requires an express statement of "exclusiveness." Anthony To J. was also criticized for directly applying the Hong Kong law to determine the validity of the choice of Mainland court agreement without first determining the applicable law under Hong Kong's conflict of laws rules.<sup>193</sup> Professor Yuko Nishitani commented that while the Hague Choice of Court Convention requires the law of the chosen court to determine the validity of the choice of court agreements, the court in *Wu Zuo Chen v. Leung Lai Ching Margaret* seems to have omitted or overlooked such an issue when deciding the case under the MJO.<sup>194</sup> On the other hand, the logic of the reasoning flows quite naturally that the validity of a choice of Mainland court agreement is to be determined by Hong Kong law, as the judgment creditor is seeking enforcement in a Hong Kong court. The lack of guidance on the applicable law in determining the validity of choice of court agreements is also an obvious shortfall of the MJO, which should be picked up in the future.

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191. See *id.* at paras. 52–54.

192. See *id.* at para. 54.

193. The MJO does not stipulate whether Mainland or Hong Kong law should be applied to determine the validity of choice of Mainland court agreement. The only seemingly relevant provision is MJO § 18 which provides that a registered Mainland judgment shall be set aside if "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." See Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597, § 18 (H.K.). However, this provision has only dealt with the choice of law after a Mainland judgment is registered and not at the initial stage when the Mainland judgment is seeking recognition.

194. Yuko Nishitani, Talk at the University of Hong Kong: Implications of the Hague Choice of Court Convention in the Asia-Pacific (Apr. 18, 2018).

3. Beijing Golden Harvest Entertainment Co Ltd v. Cheung Shing-Sheung (June 2016)<sup>195</sup>

In a 2016 CFI decision, *Beijing Golden Harvest Entertainment Co Ltd v. Cheung Shing-Sheung*, a judgment was rendered against the defendant in the Beijing Chaoyang District People's Court for failure to repay a loan in 2012, and a Certificate of Finality was issued.<sup>196</sup> For some unknown reasons the plaintiff did not register the Mainland judgment in Hong Kong under the MJO regime. Instead, the plaintiff successfully obtained a default judgment from the Court of First Instance to enforce the Mainland judgment under the common law regime.<sup>197</sup> The defendant then applied to set aside the default judgment on various grounds, one of which being that the Mainland judgment is not final and conclusive due to the adjudication supervision procedures.<sup>198</sup> Unfortunately, before the debate on the finality issue was fully fleshed out, the plaintiff made a concession at the date of hearing and no longer objected to the setting aside of the default judgment. Instead, the plaintiff asked the court to impose a condition to ask the defendant to pay the judgment sum into court when setting aside the judgment.<sup>199</sup>

An interesting aspect of the case was that, in spite of the plaintiff's concession which rendered the issue of finality an academic one, the defendant still sought leave to adduce evidence to prove the existence of the supervisory function of the Supreme People's Procuratorate, the protest system and judicial supervision procedure under the Mainland law, and whether these features would render a Mainland judgment inconclusive and final.<sup>200</sup> Recognizing that these academic discussions could benefit the Hong Kong courts in clarifying their position on this point of law which has been much dwelled on but still left open since the ruling of *Chiyu Banking*, Judge Bebe Chu (Bebe Chu J.) granted leave to adduce such evidence.<sup>201</sup> From the judgment, Bebe Chu J. was hesitant in applying the jurisprudence developed under the MJO to the common law regime. After cases such as *Bank of China v. Yang Fan* and *Wu Zuo Cheng v. Leung Lai Ching Margaret*, it appears that under the MJO, as long as the plaintiff has obtained a Certificate of Finality, the finality of the Mainland judgment is conclusively proved.<sup>202</sup> In the current case, however, Bebe Chu J. takes the view that if a Mainland judgment is not registered under the MJO, the final-

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195. 北京橙天嘉禾影視製作有限公司 v. 張承勳 [Beijing Golden Harvest Entertainment Co. Ltd. v. Cheung Shing-Sheung], HCMP 2418/2013 (C.F.I. June 16, 2016) (Legal Reference System) (H.K.).

196. *Id.* at para. 2 ("P obtained a civil judgment in its favour on 10 November 2011 ('PRC Judgment').").

197. *Id.* at paras. 6, 9.

198. *Id.* at para. 18.

199. *Id.* at para. 21.

200. *Id.* at para. 104.

201. *Id.* at paras. 106-07.

202. *Bank of China Ltd. v. Yang Fan*, [2016] 3 H.K.L.R.D. 7, at para. 14; 吳作程 v. 梁麗濤 [Wu Zuo Cheng v. Leung Lai Ching Margaret], HCMP 2080/2015, at para. 15 (C.F.I. Feb. 16, 2016) (Legal Reference System) (H.K.).

ity of the Mainland judgment is not proved despite the issuance of a Certificate of Finality.<sup>203</sup> Bebe Chu J., adopting a rather rigid approach towards the Mainland judgment in the current case, seems to be going backwards in terms of the development in the discussion of finality. The interim conclusion is that, in order to benefit from the “Certificate of Finality” mechanism, one should always register the judgment under the MJO, and the “Certificate of Finality” does not provide any assistance under the common law regime.

### C. Summary on the Jurisprudential Pattern

The aforementioned cases manifested the evolution of Hong Kong courts’ judicial attitude from a more conservative and stringent treatment of Mainland judgments towards a more pro-enforcement approach. This is shown in two aspects.

First, Hong Kong courts used to be reluctant to accept a jurisdiction clause as being exclusive to Mainland courts without clear and unequivocal words to such effect.<sup>204</sup> Yet, the Hong Kong courts in *Wu Zuo Cheng v. Leung Lai Ching Margaret* and *Bank of China v. Yang Fan* adopted a pro-validity approach and demonstrated flexibility in interpreting the choice of Mainland court agreements to be exclusive.<sup>205</sup>

Second, Anthony To J.’s meticulous reasoning in *Bank of China v. Yang Fan* on the Mainland judicial supervision procedure is an acknowledgment by the Hong Kong courts of the contemporary development in the Mainland civil procedure law system, thereby distinguishing the context when the decision of *Chiyu Banking* was handed down. It is also noteworthy that the Hong Kong courts are cautious in setting aside registered Mainland judgments, and it is believed that this is an act to preserve, or even, to breed public trust and confidence in the efficacy of the MJO.<sup>206</sup> While it is generally agreed that a pro-validity approach is beneficial to Hong Kong as a gateway for Mainland judgments in overseas enforcement, there are counter-arguments that it is in the better interest of international investors and with respect to Hong Kong’s role as an international financial center that the Hong Kong courts should uphold stringent standards in reviewing Mainland judgments.<sup>207</sup> This is due to the concerns of international investors in Hong Kong that their assets might be liquidated easily if Mainland

203. [2016] H.K.L.I.I. 1050, at para. 106.

204. See *Yu Lap Man v. Good First Investment Ltd.* [1998] 1 H.K.C. 726, at para. 15 (C.A.) (discussed in *supra* Part III); *T & K Electronics Ltd. v. Tai Ping Insurance Co. Ltd.* [1998] 1 H.K.L.R.D. 172, at para. 14 (C.F.I.).

205. See HCMP 2080/2015, at paras. 22, 30, 32; see also [2016] 3 H.K.L.R.D. 7, at paras. 34-35.

206. See Denis Brock et al., *Hong Kong Law Update: Registering a Mainland Judgment in Hong Kong*, O’MELVENEY (May 24, 2016), <https://www.omm.com/resources/alerts-and-publications/publications/registering-a-mainland-judgment-in-hong-kong/> [https://perma.cc/W5N8-K63J] (discussing another case that “confirms that the CFI will not lightly set aside registration of a Mainland Judgment for enforcement in Hong Kong”).

207. See Melissa Kaye Pang, *Hong Kong as a Base for Doing Business in Mainland China*, AM. BAR ASS’N (June 30, 2013), [https://www.americanbar.org/groups/business\\_law/publications/blt/2013/06/01\\_pang/](https://www.americanbar.org/groups/business_law/publications/blt/2013/06/01_pang/) [https://perma.cc/JNS5-QBK3].

judgments are readily enforced in Hong Kong.<sup>208</sup>

The cases have largely touched upon the major requirements of the MJO such as the exclusive choice of Mainland court agreement and the finality issue. However, other grounds in setting aside Mainland judgments remain undiscussed, such as fraud and public policy. It has been anticipated by academics and practitioners that if the finality argument eventually fails, “fraud” or “public policy” might be the successive obstacles to MJRE due to the mistrust in the Mainland judiciary.<sup>209</sup> Yet, if the pro-enforcement approach towards Mainland judgments could be solidly planted among the Hong Kong courts, as what has happened in the cross-border arbitration arena,<sup>210</sup> one could be assured that Hong Kong courts would not set aside Mainland judgments without outrageous evidence of fraud or breach of public policy.

## V. Retrospect and Prospect

In retrospect and prospect, this Part first reflects on the challenges of the Hong Kong–Mainland cross-border judgment regionalism and proposes new momentums by building upon the lessons obtained from the current MJO and riding the wave of the 2019 Arrangement. The key features of the new 2019 Arrangement, its critiques, and its impact on the MJRE in the future will be analyzed below. The ultimate goals are to resolve the need of civil and commercial judgment mobility arising out of ever-intensifying economic and social dynamics between Hong Kong and the Mainland after Hong Kong’s handover for over two decades. This Part then discusses how to enhance Hong Kong’s competitiveness as an international dispute resolution center on the aspect of judgments in light of China’s economic rise, particularly its potential to join the 2005 Hague Choice of Court Convention and the 2019 Hague Judgments Convention.

### A. For Hong Kong–Mainland MJRE

Since the handover of sovereignty and the launch of the 2006 Arrangement, Hong Kong has faced the dual challenges of balancing her need to establish a cross-border judgment scheme with the Mainland and developing herself into an international dispute resolution center on the aspect of judgments. On one hand, due to concerns about the quality of judgments in the Mainland, Hong Kong courts are keen to maintain a rigid level of review to ensure that only those Mainland judgments that adhere to the high standard of Hong Kong are to be recognized and enforced in Hong Kong.<sup>211</sup> On the other hand, Hong Kong is in pursuit of being the interna-

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208. Comment raised to the author when delivering a talk at the University of Hong Kong Staff Seminar (May 30, 2018).

209. JOHNSTON & HARRIS, *supra* note 149.

210. Gu, *supra* note 19.

211. See Andy Liao & Bonita Chan, *A Review of the New Mainland-HKSAR Judgment Recognition Arrangement*, H.K. LAW. (Apr. 2019), <http://www.hk-lawyer.org/content/review-new-mainland-hksar-judgment-recognition-arrangement> [https://perma.cc/6KSN-EVEW].

tional dispute resolution center in competition with rival jurisdictions such as Singapore.<sup>212</sup> Undoubtedly, a more flexible treatment towards Mainland judgments could justify Hong Kong's strategic role as a gateway to the Mainland as easy MJRE is one of the niches that Hong Kong can offer over its competitors.

Currently, two of the biggest challenges under the MJO are the exclusive choice of Mainland court agreement and the finality issue. It is argued that in the past few years, both challenges seem to be well-tackled liberally.<sup>213</sup> The finality issue could be resolved within the Hong Kong courts by following the "Certificate of Finality" mechanism, with the Certificate issued by the Mainland court, and gradually moving towards the overruling of *Chiyu Banking*. In the meantime, the exclusive choice of Mainland court agreement could be relaxed by the pro-validity approach adopted by the Hong Kong courts.

As discussed previously, not only was the requirement of exclusive choice of Mainland court agreement drafted with excess technicality, but it was also commercially impractical to expect commercial parties to enter into such agreements. In light of the criticisms, the former Hong Kong Secretary of Justice Mr. Rinsky Yuen had a meeting with Justice Shen Deyong, the then Vice President of the SPC, in March 2016, whereby both parties agreed to start negotiations on a broader scale of MJRE arrangement which could govern situations without the exclusive choice of Mainland court agreement.<sup>214</sup> This has led to the conclusion of the much broader 2019 Arrangement.

### 1. *The New 2019 Arrangement*

On January 18, 2019, the 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 was signed.<sup>215</sup> The 2019 Arrangement addresses some of the rigidity and insufficiency concerns of the current MJRE mechanism and establishes a more comprehensive mechanism between the two regions. Moreover, it seeks to establish a bilateral regional conflict of laws mechanism with greater clarity and certainty for the recognition and enforcement of judgments in wider range of civil and commercial matters between the two

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212. See Zimo Chen, *Hong Kong to Lead in Mediation Services*, CHINA DAILY (Mar. 26, 2019, 2:36 PM), <https://www.chinadailyhk.com/articles/115/1/169/1553582434308.html> [<https://perma.cc/7GTE-VTRA>].

213. See Tu, *supra* note 122, at 193, 195, 197.

214. See *Secretary for Justice Attends Conference in Xian on Mutual Legal Assistance Between the Mainland and Hong Kong in Civil and Commercial Matters (With Photos)*, DEP'T JUST. (H.K.) (Apr. 23, 2017), [https://www.doj.gov.hk/eng/public/pr/20170423\\_pr1.html](https://www.doj.gov.hk/eng/public/pr/20170423_pr1.html) [<https://perma.cc/ZF42-EKBT>].

215. See *HKSAR and Mainland Sign Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (With Photos)*, GOV'T H.K. SPECIAL ADMIN. REGION (Jan. 18, 2019, 3:31 PM), <https://www.info.gov.hk/gia/general/201901/18/P2019011800504.htm> [<https://perma.cc/J6YE-5F7Y>].

regions.<sup>216</sup> To implement the 2019 Arrangement in Hong Kong, following the practice of the 2006 Arrangement, Hong Kong needs to promulgate local legislations. It will take effect after both places have completed the necessary localization procedures, which may take another one or two years.<sup>217</sup>

The 2019 Arrangement has introduced some new features and will impact the MJRE landscape as follows. To begin with, as one of the key challenges of the current MJRE mechanism is the requirement of an exclusive choice of the Mainland court agreement (see section 3(2) of the MJO), this requirement has now been removed in the new round of the 2019 Arrangement.<sup>218</sup> The development is also in line with the direction of the 2019 Convention on the Recognition and Enforcement of Foreign Judgments (“2019 Hague Judgments Convention”), which does not require a choice of court agreement for the global movement of judgments.<sup>219</sup> The Special Commission on the Judgement Project met on 24 to 29 May 2018 which resulted in the 2018 Draft Hague Judgments Convention.<sup>220</sup> The 2018 Draft Convention was most recently passed by the Hague Conference on Private International Law on 2 July 2019, i.e. the 2019 Hague Judgments Convention.<sup>221</sup> Unlike the 2005 Hague Choice of Court Convention, the 2019 Hague Judgments Convention will not require a choice of court agreement as a precondition of recognition and enforcement. The proposed new Convention instead seeks to “extend the benefits of enhanced access to justice, and reduced costs and risks of cross-border dealings, to a broader range of cases” even in the absence of a jurisdictional agreement.<sup>222</sup> Hence, as with the 2019 Arrangement, even if parties do not agree on a written exclusive jurisdiction agreement, the judgments may now be recognized and enforced across the Hong Kong–Mainland border. As to the relationship with the 2006 Arrangement, upon its commencement, the 2019 Arrangement will supersede the 2006 Arrangement. However, the 2006 Arrangement will remain applicable to any choice of court agreement signed between the parties before the 2019 Arrangement comes

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216. *Id.* See 2019 Arrangement, *supra* note 91.

217. 2019 Arrangement, *supra* note 91, at art. 29.

218. The key features of the 2019 Arrangement are provided by the Department of Justice of Hong Kong. See 2019 Arrangement Summary, *supra* note 92.

219. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, art. 1, July 2, 2019, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> [<https://perma.cc/9XFM-SGP7>] [hereinafter 2019 Hague Judgments Convention].

220. The 2018 Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, concluded at the fourth meeting of the Special Commission on the Judgment Project, May 29, 2018. The press release prepared by the Hague Conference is available at, <https://www.hcch.net/en/news-archive/details/?varevent=607> [<https://perma.cc/A8MQ-6ZDP>]. The full English version of the 2018 Draft Convention is available at, <https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffb0d0dd.pdf> [<https://perma.cc/7PCF-QPFV>].

221. 2019 Hague Judgements Convention, *supra* note 219.

222. Francisco J. Garcimartín Alférez & Geneviève Saumier, *Judgments Convention: Revised Preliminary Explanatory Report*, HAGUE CONF. PRIV. INT’L L., no. 10, Apr. 2018, at 5.



into effect (which will take place after both places have completed the necessary legislation procedures and will apply to judgments made on or after the commencement date).<sup>223</sup>

Moreover, the 2019 Arrangement covers matters which are considered to be of a “civil and commercial” nature under both Hong Kong and Mainland law.<sup>224</sup> It covers both monetary (excluding exemplary or punitive damages) and non-monetary relief.<sup>225</sup> Most importantly, the scope expands to a wider range of civil and commercial matters: judgments arising out of certain intellectual property right (“IPR”) disputes and family disputes are now covered.<sup>226</sup> All these new developments are much welcomed to address the deficiencies of the disappointing 2006 Arrangement and the 2008 MJO and to tackle the ever-intensifying Hong Kong-Mainland socio-economic dynamics.

IPRs are often left out in the discussion of cross-border recognition and enforcement of judgments between the two sides, but the protection of IPRs is an indispensable element to ensure cross-border creativity can flourish and cross-border businesses could be conducted in a fair manner.<sup>227</sup> The current MJO does not expressly exclude IPR-related judgments, thus, in theory, they are enforceable in Hong Kong. Yet, in practice, the MJO offers little assistance to cross-border IPR disputes, due to the fact that the current MJO only covers commercial contracts with obligations involving monetary payments. However, as evident in the nature of IPR dispute, most cases of IPR infringement are tortious claims and do not involve a contractual relationship between the wrongdoer and the victim. It is virtually impossible to expect the wrongdoer and the victim to enter into a jurisdiction agreement before the dispute arises. Even if there is prior contractual relationship between the parties with a valid exclusive choice of Mainland court agreement, the usual remedies for IPR infringement are often non-monetary remedies, such as the grant of injunctions and specific performance, which are all unenforceable under the 2008 MJO.<sup>228</sup> These critiques are addressed now, with the 2019 Arrangement extended to provide both monetary remedies and non-monetary remedies, in order to promote the cross-border recognition and enforcement of IPR judgments.

Another key area of MJRE concerns the recognition and enforcement of cross-border matrimonial and family judgments. Since Hong Kong’s

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223. 2019 Arrangement, *supra* note 91, at art. 29.

224. See 2019 Arrangement Summary, *supra* note 92, at para. 2.

225. 2019 Arrangement, *supra* note 91, at arts. 16, 17(2); 2019 Arrangement Summary, *supra* note 92, at para. 24.

226. See 2019 Arrangement Summary, *supra* note 92, at pt. B.

227. See *Intellectual Property Protection*, Gov. H.K. 香港特別行政區政府, [www.gov.hk/en/residents/communication/infosec/intproperty.htm](http://www.gov.hk/en/residents/communication/infosec/intproperty.htm) [<https://perma.cc/9SRS-NC7D>] (last reviewed May 2019).

228. See Lindsay Esler, *Reciprocal Enforcement of Judgments Between Mainland China and the Hong Kong SAR - FAQ's*, WORLD SERV. GROUP (May, 2007), <http://www.worldservicesgroup.com/publications.asp?action=article&artid=1946> [<https://perma.cc/GLT2-T5PH>].

handover, cross-border marriages between residents from Hong Kong and the Mainland have become a prevailing social phenomenon. Statistics show that from 2009–2014, cross-border marriages registered in Hong Kong have arisen from 32% to 37%.<sup>229</sup> Further, out of all the divorce cases filed in the Hong Kong Family Court from 2010–2014, 20–30% of them concern marriages which were formed in the Mainland.<sup>230</sup> Consequently, there is a compelling need for Mainland matrimonial orders and ancillary reliefs to be recognized by Hong Kong courts. Under the legal framework of Hong Kong, Mainland divorce orders are recognized under the Matrimonial Causes Ordinance (Cap. 197), but the lacuna lies in the recognition and enforcement of Mainland maintenance orders, property distribution orders, as well as child custody orders. There is no proper legal mechanism in Hong Kong that deals with these orders until the matter is picked up by the 2017 Matrimonial Arrangement and the 2019 Arrangement.<sup>231</sup>

The matter is triggered by a recent Hong Kong Court of Final Appeal (“CFA”) case *ML v. YJ* in 2010,<sup>232</sup> in which the Shenzhen Intermediate People’s Court granted an order for divorce, an order for the distribution of properties, and a child custody order. Unfortunately, only the order for divorce was recognized by the CFA, as there was no legal mechanism to cover the recognition of orders of financial relief granted in the Mainland. While the Maintenance Orders (Reciprocal) Enforcement Ordinance (Cap. 188) and the FJO govern the recognition and enforcement of matrimonial orders made in foreign jurisdictions, matrimonial orders made in the Mainland are not covered by these two Hong Kong legislations. In light of such deficiencies, the case prompted the Hong Kong Legislative Council to discuss potential reforms. In June 2016, the Consultation Paper on the Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments on Matrimonial and Related Matters was released by the Department of Justice<sup>233</sup> and the Matrimonial Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases (“2017 Matrimonial Arrangement”) was signed in June 2017.<sup>234</sup> The 2017 Matrimonial Arrangement covered the reciprocal recognition and enforcement of divorce decrees, maintenance orders, and custody orders for the purpose of return of children in parental abduc-

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229. H.K. Dep’t of Justice, Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments on Matrimonial and Related Matters (June, 2016) (Consultation Paper), [https://www.doj.gov.hk/eng/public/pdf/2016/consultation\\_pd2.pdf](https://www.doj.gov.hk/eng/public/pdf/2016/consultation_pd2.pdf) [<https://perma.cc/G9GA-AXD3>].

230. *Id.* at para. 3.

231. LegCo Panel on Admin. of Justice & Legal Servs. (H.K.), Information on Reciprocal Recognition / Enforcement of Matrimonial Judgments with the Mainland, Hong Kong Legislative Council Paper No. CB(2)1781/10-11(04) (May 2011), <https://legco.gov.hk/yr10-11/english/panels/ajls/papers/aj0523cb2-1781-4-e.pdf> [<https://perma.cc/9KNS-XB55>].

232. *ML v. YJ*, [2010] 13 H.K.C.F.A.R. 794.

233. See H.K. Dep’t of Justice, *supra* note 229.

234. *Enforcement of Civil Judgments in Matrimonial and Family Cases Between Hong Kong and the Mainland*, DEP’T JUST. (H.K.), <https://www.doj.gov.hk/eng/public/family.html> [<https://perma.cc/7XJF-PL7M>] (last revised Feb. 11, 2019).

tion cases across the border. Most recently, judgments arising out of disputes between family members on the division of property and disputes on property arising from engagement agreements which are not covered by the 2017 Matrimonial Arrangement are now covered by the 2019 Arrangement.<sup>235</sup> The 2019 Arrangement made it clear that judgments in matrimonial or family matters already covered by the 2017 Matrimonial Arrangement will be governed by that Arrangement; the 2019 Arrangement does not apply to those matters.<sup>236</sup>

## 2. *Critiques on the 2019 Arrangement*

One critique that persisted throughout the 2006 Arrangement, the 2008 MJO, and will persist with the 2019 Arrangement is the consistency of interpretation on the MJRE instruments between the Mainland and Hong Kong. For example, the 2006 Arrangement was implemented by the MJO using the Hong Kong contextualized wordings, which is clearly a Hong Kong local legislation. It is unclear as to the legal status of the 2006 Arrangement in Hong Kong. On the Mainland side, the judicial interpretation promulgated by the SPC to implement the 2006 Arrangement (i.e. localized legislation in the Mainland on the 2006 Arrangement) used the exact same words as the 2006 Arrangement. Thus, when the MJO promulgated in Hong Kong in 2008 had adapted the wordings of the 2006 Arrangement to suit the local context, textual and interpretational discrepancies existed between the localized legislation in Hong Kong and the Mainland, i.e. between the 2008 MJO and the 2006 Arrangement. To implement the 2019 Arrangement in the Mainland and Hong Kong also requires localization procedures at both sides. It is therefore uncertain whether such discrepancy issues will be handled in the manner similar to the situation where a Hong Kong local legislation conflicts with an international treaty to which Hong Kong is a member, or whether the Arrangement will warrant special treatment due to its special status as a regional cross-border judicial assistance scheme under “one country, two systems.” To resolve the matter, a feasible solution is that both sides should meet regularly to coordinate and ensure interpretation consistency regarding the MJRE conditions in Hong Kong and those in the Mainland, in light of the change of the dynamics and circumstances between the two sides.

The other critique concerns with the eligible Mainland courts that would benefit from this new MJRE mechanism. What is not clear from the 2019 Arrangement is that it seems to open the gate to all Mainland courts instead of the “designated courts” in Schedule 1 of the MJO (Cap. 597).<sup>237</sup> What is just mentioned in the 2019 Arrangement is that in relation to the

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235. See 2019 Arrangement Summary, *supra* note 92, at para. 7.

236. See 2019 Arrangement, *supra* note 91, at art. 31.

237. Unlike the 2006 Arrangement and 2008 MJO, the 2019 Arrangement does not seem to provide a list of “Primary People’s Courts” (“Designated Courts” in MJO, Sch. 1). See 2006 Arrangement, *supra* note 2, at art. 2; Mainland Judgment (Reciprocal Enforcement) Ordinance, (2008) Cap. 597 (H.K.). Cf. 2019 Arrangement, *supra* note 91.

Mainland, it is applicable to any legally enforceable Mainland judgments given by the Primary People's Courts or above, as long as they satisfy the requirement covered by the Arrangement.<sup>238</sup> Obviously, there are Mainland courts which have never had experience in handling Hong Kong-related or foreign-related disputes, and the quality of the judgments thereof might be less-established than those listed in Schedule 1. Is it the case that the Hong Kong courts are ready to recognize and enforce judgments from all Mainland Chinese courts? It might be something to be subject to the consideration of the local legislation in Hong Kong, as has been reflected in the practice of the 2008 MJO after the signing of the 2006 Arrangement.

Lastly, some civil and commercial judgments are excluded from the 2019 Arrangement—insolvency judgments being one of the most controversial ones in the cross-border context. Cross-border insolvency is defined as a situation where a failed debtor company, its assets, creditors, and place of incorporation are located in different jurisdictions.<sup>239</sup> In the context of Hong Kong and the Mainland, there is an emergent need for a legal framework which could reciprocally enforce and recognize judgments involving cross-border insolvency matters. The need is further intensified in light of the economic integration and the rise of cross-border insolvency cases from the thriving cross-border economic activities between the Mainland and Hong Kong against the national strategies such as the Belt and Road Initiative, the Guangdong-Hong Kong-Macau Greater Bay Area, and the Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone.

As a result, the recognition and enforcement of cross-border insolvency judgments has become a thorny issue. A commonly seen corporate structure is one which involves Hong Kong investors making investment in the Mainland by way of a joint venture located in the Mainland. The situation could be further complicated if the Hong Kong investors incorporate a company in offshore jurisdictions, such as Bermuda, the British Virgin Islands, and the Cayman Islands, with the objective of investing in the joint venture.<sup>240</sup> It could be anticipated that, upon the failure of business, courts in Hong Kong, the Mainland and offshore jurisdictions all have legitimate grounds to claim jurisdictions for the disputes. If a Chinese insolvency judgment is not enforceable by Hong Kong courts, the parties would have to start another set of proceedings in Hong Kong. Not only is this a matter of cost and time, but also it creates incentives for forum shopping, favoring creditors who are more savvy or resourceful at the expense of other creditors.<sup>241</sup> Legal certainty is one of the most important factors in attracting foreign investments and promoting cross-border trade, and this is particularly so in light of the economic integration in Hong Kong and the

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238. 2019 Arrangement, *supra* note 91, at art. 4; 2019 Arrangement Summary, *supra* note 92, at para. 14.

239. Emily Lee, *Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China*, 63 AM. J. COMP. L. 439, 445 (2015).

240. *Id.* at 443-44.

241. *Id.* at 445.

Mainland. The MJO has been criticized in excluding insolvency matters,<sup>242</sup> and the 2019 Arrangement turning a blind eye to the matter<sup>243</sup> can by no means satisfy the needs of commercial parties in respect of insolvency matters.

Scholars have cautioned that if MJRE is to be extended to cover insolvency matters in the future, certain amendments have to be made. First, the requirement of an exclusive choice of court agreement should be removed, as it is unlikely that the debtor and creditor would enter into an exclusive choice of Mainland court agreement in reality, due to concerns about judicial corruption and local protectionism in Mainland courts which might result in the favoring of Mainland enterprises over foreign ones.<sup>244</sup> The exclusive choice of court requirement has already been dispensed with by the 2019 Arrangement. Second, the requirement of monetary judgments should be expanded, as insolvency judgments often include non-monetary rulings such as the release of financial documents or the appointment of liquidators.<sup>245</sup> The 2019 Arrangement has already covered non-monetary relief and hence, this worry is also relieved. Third, employment contracts should also be included, as insolvency cases inevitably involve employment matters such as outstanding employment entitlements.<sup>246</sup> As the 2019 Arrangement does not cover cross-border employment disputes, employment matters are yet to be attended to in the MJRE mechanism in the future. As such, although cautiously optimistic about the arrival of the 2019 Arrangement, the conditions to revitalize the discussion of cross-border insolvency matters and cross-border employment matters in the MJRE mechanism are yet to be expected.

### 3. *To Develop an Interregional Framework*

Scholars in the field of MJRE, such as Professor Xianchu Zhang and the late Professor Philip Smart, have already contemplated the possibility of a more comprehensive system of MJRE when the 2006 Arrangement was concluded.<sup>247</sup> More recently, a comprehensive multilateral judgment recognition and enforcement framework between the Mainland, Hong Kong, and Macau has been proposed by Dr. Jie Huang. Huang's proposed interregional framework is even broader in scope than the 2019 Arrangement, so that it could cover all civil and commercial judgments, on top of insolvency judgments, judgments for personal consumption disputes, and judgments of civil compensation collateral to criminal proceedings and related issues.<sup>248</sup>

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242. *Id.* at 452.

243. The 2019 Arrangement does not cover judgments on corporate insolvency and debt restructuring nor personal insolvency. See 2019 Arrangement, *supra* note 91, at art. 3(5).

244. Lee, *supra* note 239, at 449.

245. *Id.* at 452.

246. *Id.*

247. Zhang & Smart, *supra* note 15, at 584.

248. HUANG, *supra* note 20, at 186.

In explaining the framework, Huang raised the example of the EU to illustrate how the Brussels Convention promoted cross-border trade and investment in the EU by providing a channel of judgment recognition and enforcement with low cost and high legal certainty.<sup>249</sup> From the earlier CEPAs that the Mainland signed with Hong Kong, to the most recent Greater Bay Area national strategy which will involve collaboration among Hong Kong, Macau, and the Mainland, a highly integrated region similar in nature to the EU single market in China is likely to be formed. An interregional framework comparable to the Brussels Convention may therefore be plausible in the cross-border recognition and enforcement of civil and commercial judgments among the three places.

The multilateral interregional framework is dedicated to realizing free circulation of judgments among the Greater China region, which may not be accomplished by the existing complex and conflicting bilateral arrangements. As explicated by Huang, there are currently two major obstacles to enforce judgments between Hong Kong, Macau, and the Mainland. The first problem is that thus far, there are only bilateral arrangements between different jurisdictions in the region, but there are insufficient tri-directional arrangements which could consolidate relevant authorities in the three jurisdictions.<sup>250</sup> Claimants inevitably would need to invest colossal time and money enforcing judgments according to different regional laws. The second problem is that the majority of judgments are unrecognizable and unenforceable between the Mainland and Hong Kong, especially because the MJRE mechanism has not been substantively improved by the 2008 MJO, as the law is not widely used.<sup>251</sup> It has been suggested that in implementing the interregional framework, the SPC in the Mainland, the Department of Justice in Hong Kong, and the Hong Kong Judiciary should all be invited to participate in an annual forum and engage in dialogues with one another.<sup>252</sup> Hong Kong and Mainland judges are also suggested to receive training on MJRE on a regular basis. Moreover, in order to enhance interpretation consistency, it is desirable to construct a database where cases in the Mainland and Hong Kong on MJRE matters are gathered for reference, and academics are encouraged to conduct research to contribute to the development of MJRE jurisprudence. Entering into an interregional arrangement is a long-term vision which requires mutual trust, as well as persistent negotiation, communication, and coordination between Hong Kong and the Mainland.

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249. *Id.* at 24.

250. *Id.* at 21.

251. *Id.* at 22.

252. *Id.* at 269-74. Huang proposed three specific ways of implementing the multilateral framework. First, the three regions should exchange information about the specific judgments that are to be enforced in order to resolve doubts as to the authenticity of judgments. Second, the three regions should maintain interpretational uniformity through annual meetings to exchange information on their implementing legislation and relevant cases. Third, there should be some coordination organizations for resolving interregional legal conflicts.

## B. For Hong Kong as a Dispute Resolution Centre in the Perspective of Judgments

### 1. *Hong Kong's Accession to the 2005 Hague Choice of Court Convention*

As discussed, in September 2017, China joined the 2005 Hague Choice of Court Convention as a member. The accession to the Convention is seen as a milestone. Academics have suggested that the Hague Choice of Court Convention would bring more certainty in comparison with the current recognition and enforcement regime in China and will greatly enhance the legal capacity building of China, the second largest economy in the world, in international litigations.<sup>253</sup> China's accession to the Convention is in line with its recent supportive approach in the recognition of foreign judgments, which includes enforcing a Singapore judgment in 2016<sup>254</sup> and a California judgment in 2017 based on the principle of reciprocity.<sup>255</sup> All these efforts of China in gearing towards international standards and practices are seen to be incentivized under the broader context of the Belt and Road Initiative.

The Hague Choice of Court Convention may be viewed as a cross-border enforcement instrument parallel to the 1958 New York Convention. However, as previously discussed, in comparison with the New York Convention, the Hague Choice of Court Convention still has a limited number of Contracting States. As of April 1, 2019, there are only 32 Contracting States to the Hague Choice of Court Convention, including seven national Contracting States (China, Denmark, Mexico, Montenegro, Singapore, Ukraine, and the US) and the EU as a REIO.<sup>256</sup> Among them, only three entered the Convention into force—the EU, Mexico, and Singapore. The fact that China has signed the Hague Choice of Court Convention shows China's commitment towards making the process of recognizing and enforcing foreign judgments more convenient and efficient. It also shows the enhancement of global credibility, legitimacy, and capacity in international commercial litigations with respect to China. Although China has not yet ratified the Hague Choice of Court Convention domestically, it is generally believed that there are currently no obstacles that might hinder ratification, as the instrument is in line with China's political and economic interest. However, China's accession to the Hague Choice of Court Convention will not have immediate legal effect in Hong Kong. International conventions signed by China do not automatically apply to Hong

253. Tu, *supra* note 18. See also “Haiya Fayuan Xuanze Xieyi Gongyue” Yantaohui (《海牙法院选择协议公约》研讨会) [Seminar on the Hague Choice of Court Convention], CHINA U. POL. SCI. & LAW, <http://sil.cupl.edu.cn/info/1040/1018.htm> [https://perma.cc/9YV4-U55Q] (last visited July 1, 2019).

254. 高尔集团股份有限公司诉江苏省纺织工业集团进出口有限公司 (Gao'er Jituan Gufen Youxian Gongsi su Jiangsushen Fangzhi Gongye Jituan Jinchukou Youxian Gongsi) [Kolma v. SUTEX Group], Case No. (2016) Su-01 She Wai Ren No. 3 Civil Judgment (Nanjing Interm. People's Ct. Dec. 9, 2016).

255. 刘莉诉桃李和吴彤 (Liu Li su Tao Li he Wu Tong) [Liu Li v. Tao Li & Wu Tong] (Wuhan Interm. People's Ct. June 30, 2017).

256. See Hague Choice of Court Convention, *supra* note 6.

Kong.<sup>257</sup> As the membership to the Hague Choice of Court Convention is only limited to sovereign states, if Hong Kong is interested to join the Convention, it has to seek permission from the Central People's Government for the Convention to be applied to Hong Kong in accordance with Article 153 of the Basic Law.<sup>258</sup> If the Central People's Government is of the view that the Hague Choice of Court Convention ought to be applied in Hong Kong, it can make a declaration to such effect.

Prior to China joining the Hague Choice of Court Convention, Hong Kong had already conducted two rounds of consultation on its applicability to Hong Kong in 2004 and 2007 respectively. The responses to the consultations were divergent. The Judiciary and the Law Society<sup>259</sup> supported the application, but the Bar Association<sup>260</sup> expressed reservations.<sup>261</sup> While Hong Kong was still at the consultation stage, Singapore had already ratified the Hague Convention in June 2016, and the Convention entered into force in October 2016.<sup>262</sup> Singapore's act is a clear manifestation of her aspiration to become an international dispute resolution hub by attracting transnational parties to utilize Singapore's newly created Singapore International Commercial Court.<sup>263</sup> Being constantly compared with Singapore in terms of arbitration and litigation infrastructure and practices, Hong Kong has apparently lagged behind in promoting the enforceability of foreign judgments. In addition to Singapore's considerable pressure, this Article further argues why joining the Hague Choice of Court

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257. XIANGGANG JIBEN FA [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] art. 2 (H.K.).

258. See *id.* at art. 153, which provides that:

The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.

259. The Law Society of Hong Kong is a professional association for solicitors in Hong Kong. See *About the Society*, LAW SOC'Y H.K., [http://www.hklawsoc.org.hk/pub\\_e/about/](http://www.hklawsoc.org.hk/pub_e/about/) [https://perma.cc/J3MQ-48E9] (last visited July 1, 2019).

260. The Hong Kong Bar Association is the professional organisation of barristers in Hong Kong. See *About HKBA*, H.K. BAR ASS'N, <http://www.hkba.org/content/about-us> [https://perma.cc/K6DB-Y933] (last visited July 1, 2019).

261. The then Secretary for Justice, Mr. Rimsky Yuen commented that joining the Convention could attract more commercial parties to choose Hong Kong as the venue of commercial dispute resolution. However, his concern was that as the Convention had only been acceded to by Mexico and EU at the time of the consultation; its impact on Hong Kong is limited.

262. See *Singapore Ratifies Hague Convention on Choice of Court Agreements*, SING. MINISTRY LAW (June 2, 2016), <https://app.mlaw.gov.sg/news/press-releases/singapore-ratifies-hague-convention-on-choice-of-court-agreement> [https://perma.cc/M24D-GSK9].

263. *The Hague Convention: The Next Big Thing in International Dispute Resolution?*, ASHURST (Apr. 1, 2015), <https://www.ashurst.com/en/news-and-insights/legal-updates/the-hague-convention-the-next-big-thing/> [https://perma.cc/3S9C-2B3Y].



Convention would render Hong Kong, instead of the Mainland, the biggest beneficiary of the move for China in becoming a member state to the Hague Choice of Court Convention.

Due to the relatively immature legal system of the Mainland, it is foreseeable that Mainland courts would not be a popular venue of forum shopping by foreign enterprises. The Mainland judiciary ranks comparatively lower in terms of rule of law, judicial independence, and judicial quality.<sup>264</sup> As such, it is envisaged that after the Hague Convention's ratification in China, Mainland courts will be flooded by foreign judgments seeking enforcement in the Mainland. Due to the lack of experience in enforcing foreign judgments, it would present formidable challenges to the Mainland judiciary. Practically, if China has ratified the Convention, it is more likely that Mainland courts would enforce foreign judgments where foreign courts are chosen in the choice of court agreements, rather than Mainland courts being chosen and Mainland judgments seeking enforcement in foreign courts. Hong Kong, on the contrary, in "receiving" the English common law legacy, has a well-established judicial system and is experienced in recognition and enforcement of foreign judgments as an international dispute resolution center in the East. Together with her mature legal professionals, Hong Kong is more likely to become a popular forum in the competition of choice of court if Hong Kong accedes to the Convention. There are currently three separate regimes in which a non-Hong Kong judgment could be enforced in Hong Kong: (1) the common law, (2) the FJO, and (3) the MJO. This Article argues that by making Hong Kong a member jurisdiction of the Hague Choice of Court Convention, the judgment enforcement landscape in Hong Kong would become more robust, comprehensive, and international. It would also make Hong Kong an international dispute resolution center parallel to her rival, Singapore, on the aspect of judgments.

## 2. *Hong Kong's Accession to the 2019 Hague Judgments Convention*

The boldest move that Hong Kong can take would be to accede to the 2019 Hague Judgments Convention.<sup>265</sup> As discussed, unlike the 2005 Hague Choice of Court Convention, the proposed 2019 Hague Judgments Convention will not require a choice of court agreement as a precondition of recognition and enforcement. The proposed new convention instead seeks to "extend the benefits of enhanced access to justice, and reduced costs and risks of cross-border dealings, to a broader range of cases."<sup>266</sup> Further, when compared to the 2005 Hague Choice of Court Convention,

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264. Qisheng He (何其生), *Zhongguo Jiaru Haiya "Xuanze Fayuan Xieyi Gongyue" de Guize Chayi yu Kaoliang* (中国加入海牙《选择法院协议公约》的规则差异与考量) [*The Differences in Rules and Considerations of China Joining the Hague Choice of Court Convention*], 69 *WUHAN U. J. (PHIL. & SOC. SCI.)* 79, 81-82 (2016).

265. See generally *Special Commission on the Judgments Project*, HCCH, <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission> [<https://perma.cc/HUW9-2K2V>] (last visited July 1, 2019).

266. Alférez & Saumier, *supra* note 222.

the 2019 Hague Judgments Convention covers a much wider scope of judgments.

The 2019 Hague Judgments Convention was recently adopted by the Hague Conference on Private International Law on 2 July 2019. It is clear that Hong Kong has manifested preliminary interests to join this new Convention. As early as October 2016, the Hong Kong Department of Justice had circulated the Consultation Paper on the 2016 Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments.<sup>267</sup> The Department of Justice mentioned that once the Hague Judgments Convention is adopted, the government of Hong Kong will consider the applicability to Hong Kong after assessing its impact on the legal system of Hong Kong and interested parties.<sup>268</sup>

This Article argues that extending the application of the 2005 Hague Choice of Court Convention and the 2019 Hague Judgments Convention to Hong Kong serves dual purposes. First, with the considerable pressure exerted by Singapore, Hong Kong has incentives to catch up with the international benchmark such as the two Hague instruments so as to echo with its ambition of becoming the leading center for dispute resolution in the Asia-Pacific on judgment aspects.<sup>269</sup> Second, the accession to both Hague instruments motivates the expansion of the scope of the eligible civil and commercial judgments that could be recognized and enforced between Hong Kong and the Mainland, particularly in light of the bold 2019 Hague Judgments Convention. As the application of the international law instruments, such as those of the Hague, to Hong Kong requires the Central People's Government's permission under Article 153 of the Basic Law, and taking into account that China will need to first work on the ratification and implementation of the 2005 Hague Choice of Court Convention prior to joining any further international conventions in the field, it is less likely that Hong Kong will gain immediate advantages from the 2019 Hague Judgments Convention.

## Conclusion

Under the Basic Law and the national policy of "one country, two systems," it is an imperative that Hong Kong and the Mainland develop healthy judicial assistance relations.<sup>270</sup> In the light of the ever-intensifying business integration between Hong Kong and the Mainland, the 2006 Arrangement was agreed between the two sides and the resulting MJO enacted in 2008 in Hong Kong allowed Mainland monetary judgments to

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267. Dep't of Justice, Int'l Law Div., Consultation Paper on the 2016 Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments (Oct. 2016), [http://www.doj.gov.hk/eng/public/pdf/2016/consultation\\_ild.pdf](http://www.doj.gov.hk/eng/public/pdf/2016/consultation_ild.pdf) [<https://perma.cc/W3VJ-VY8C>].

268. *Id.*

269. See *Dispute Resolution*, DEPT. JUST. (H.K.), <http://www.doj.gov.hk/eng/public/alternative.html> [<https://perma.cc/2NLB-QN5V>] (last revised Jan. 17, 2019).

270. See XIANGGANG JIBEN FA [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] art. 95 (H.K.).

be recognized and enforced in Hong Kong to enhance mobility of cross-border judgments and reduce costs of access to cross-border civil justice. Disappointingly, for a whole decade, the MJO was not much used, with a total of only around 49 enforcement orders granted in the Hong Kong High Court.

This Article has argued that the MJO is far from adequate in terms of addressing the Hong Kong–Mainland economic and social dynamics and needs. The fundamental problem is that the MJO has been drafted much more restrictively than its international benchmark, the 2005 Hague Choice of Court Convention. As such, the MJO has failed to comply with the Hague spirit of promoting free flow of judgments across the border. Moreover, while the judicial attitude by Hong Kong courts towards the Mainland monetary judgments in the early days was plagued by the restrictiveness of the understanding of the “exclusive choice of court agreement” and “finality,” the salient shift to a more liberal judicial interpretation in light of China’s development of the civil procedure system is much welcomed. Further improvements will, however, hinge upon Hong Kong’s comprehensive revision of its approach in the enforcement of Mainland judgments and the continuity of trust and confidence of Hong Kong courts towards the integrity and quality of the Mainland judicial system. After providing comprehensive insights into the problems in the current cross-border judgment scheme, this Article then provides suggestions and solutions.

This Article argues that the MJO should be amended and substantially expanded to reflect the actual needs of the cross-border integration. China’s accession to the 2005 Hague Choice of Court Convention in 2017 provides a golden opportunity for Hong Kong to consider potential improvements to the MJRE mechanism with the Mainland. As argued, some of the setbacks of the MJO are already addressed by the new round of the 2019 Arrangement. There is a bright future in light of the correct direction propelled by the 2019 Arrangement such as the removal of the “exclusive choice of court agreement” as a prerequisite to the recognition and enforcement of cross-border judgments, as well as the extension of the scope of the eligible monetary judgments to certain family and IPR disputes. As the Article argues, the remaining legal challenges of Hong Kong–Mainland judgment regionalism, as the current 2019 Arrangement stands, lie in (1) the consistency of interpretation of the MJRE instruments between Hong Kong and the Mainland, (2) the eligible Mainland courts that should be included in the new MJRE mechanism, and (3) the exclusion of cross-border insolvency and cross-border employment judgments. This Article further proposes new momentums by building upon the lessons obtained from the MJO and riding the wave of the 2019 Arrangement. The principles and goals are to resolve the need for civil and commercial judgment mobility arising between Hong Kong and the Mainland after Hong Kong’s handover for over two decades, and also to enhance Hong Kong’s competitiveness as an international dispute resolution center in the

Asia Pacific on the aspect of judgments in light of China's economic rise and Singapore's considerable pressure.

With these principles in mind, and drawing upon experiences of the international benchmarks in the field, i.e. the two Hague instruments (the 2005 Hague Choice of Court Convention and the 2019 Hague Judgments Convention), this Article suggests that it would be to the distinct advantage of Hong Kong if Hong Kong could be a member jurisdiction to these Hague instruments. It is further advocated that the Central People's Government in China shall, through the procedures of Article 153 of the Basic Law, make at least the 2005 Hague Choice of Court Convention to be applicable to Hong Kong. In doing so, China should herself ratify the 2005 Hague Choice of Court Convention first. Over time, when China consolidates experiences in dealing with the 2005 Hague Choice of Court Convention and considers the accession to the 2019 Hague Judgments Convention, Hong Kong will then gradually be benefited in a more comprehensive manner.

Finally, it is hoped that the proposals put forward in this Article could generate more discussions in the field for the future reform of MJRE. The existing literature on Hong Kong's post-handover relationship with the Mainland, as with the general legal approaches, focuses mainly on the constitutional order of "one country, two systems," and to some extent, the role of Hong Kong in the context of China's booming economy and trade internationalization. Little attention has been devoted to legal interactions in the conflict of laws field, such as civil and commercial judgment regionalism, its legal challenges, and its renewed momentum (as this Article has identified, argued, and proposed). It is also hoped that this Article can enhance the academic sensitivity to the issues generated by the rapid transformations in the field, and that this Article can contribute to, and stimulate greater interest in, the study of regional conflict of laws issues in Hong Kong with China.