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The Editor
The Guardian

Dear Editor

**Clarifications of misconceptions in your article
dated 28 January 2024
regarding the enforcement of Mainland judgments in Hong Kong**

It has come to our attention that the Guardian published an article titled “Chinese courts to rule on Hong Kong commercial disputes under new law” on 28 January 2024, which contains numerous fundamental misconceptions about 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*¹ which took effect in both the Mainland China and Hong Kong on 29 January 2024. I write to clarify these misconceptions.

¹ The arrangement titled “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” (《關於內地與香港特別行政區法院相互認可和執行民商事案件判決的安排》) was signed between the Government of the Hong Kong Special Administrative Region and the Supreme People's Court on 18 January 2019 and took effect on 29 January 2024.

(1) Mainland courts NOT empowered to rule on Hong Kong commercial disputes under the Arrangement

It is incorrect to say that under the Arrangement, Mainland courts are “*to rule on Hong Kong commercial disputes under new law*”.

The Arrangement provides for a mechanism for reciprocal enforcement of judgments in civil and commercial matters between Hong Kong and the Mainland. In simple terms, this is a legal mechanism enabling the enforcement of civil and commercial judgments made by Hong Kong courts in the Mainland and at the same time, providing a new statutory regime for the enforcement of Mainland judgments in Hong Kong with a higher degree of certainty and efficiency.

The new mechanism introduced by the Arrangement is party-driven. A party seeking to enforce a Mainland judgment in Hong Kong could apply to the Court of First Instance for registration of the Mainland judgment. The court would register the judgment upon satisfaction that the relevant conditions are met. The registered judgment may then be enforced in Hong Kong like a local judgment. The party seeking enforcement would be required to send a written notice to the party against whom enforcement is sought. That other party may oppose and apply to the court to set aside the registration and the court would then decide if any one of the grounds for setting aside has been proved.

Likewise, a party seeking to enforce a Hong Kong judgment in the Mainland may apply to the Intermediate People’s Court in the location where the applicant or the respondent resides in the Mainland or where the assets of the respondent are located. If the application is granted, the Hong Kong judgment may then be enforced like a Mainland judgment in the Mainland.

The new mechanism has struck a fair balance between the rights and interests of judgment creditors and judgment debtors and has built in safeguards aligned with the international best practice, including the Hague Judgments Convention of 2019.

The Arrangement has no impact on the prevailing law in either Hong Kong or the Mainland on direct jurisdictional rules governing the acceptance and hearing of civil and commercial cases. In other words, whether a Mainland court would hear a commercial dispute irrespective of whether a Hong Kong party is involved or whether the dispute is related to Hong Kong in any aspects, continues to be a matter governed by the relevant laws and regulations of the Mainland, which is **beyond** the scope of the Arrangement.

It is therefore incorrect to say that Mainland courts are “*to rule on Hong Kong commercial disputes under new law*”.

(2) Safeguards under the Arrangement

Your article also wrongly alleges that “[a]sset managers may no longer be able to advise wealthy clients with total confidence that their investments would be protected in Hong Kong”.

As mentioned above, the new mechanism under the Arrangement has, in line with the international practice, provided for sufficient safeguard measures protecting the rights and interests of both judgment creditors and judgment debtors. To begin with, a judgment would only be registered when the Hong Kong court is satisfied that the Mainland judgment complies with the requirements set out in the local legislation implementing the Arrangement in Hong Kong, namely, the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap. 645). For example, the Mainland judgment has to be effective in the Mainland before one could apply for enforcement of the

same in Hong Kong under Cap. 645.

More importantly, upon registration, the registrant must notify the other party so that the latter may consider whether to apply to the Hong Kong court for setting aside the registration. To safeguard the legal interests of the other party, Cap. 645 prescribes, in a clear and precise manner, the grounds upon which a registration may be set aside. These grounds are consistent with those provided under the existing law of Hong and the international best practice. They include, for example, when the Mainland judgment was obtained by fraud, the defendant in the original Mainland proceedings was not summoned to appear or was not given a reasonable opportunity to defend the proceedings.

Only when the registration order has not been set aside by the Hong Kong court would the judgment creditor be able to apply for execution of the Mainland judgment in Hong Kong through the relevant legal proceedings under Hong Kong law. **The Arrangement does not enable the direct freezing or confiscation of assets by Mainland courts in Hong Kong, nor the other way round.**

With such safeguards under the Arrangement, Hong Kong remains a reliable and competitive hub for asset management. To say “[m]any wealthy people, including Chinese citizens, no longer see Hong Kong being a destination that is out of reach from arbitrary confiscation from mainland authorities” is a complete distortion of how the Arrangement works.

Indeed, there are precedents that Mainland judgments are enforceable elsewhere in other common law jurisdictions such as Singapore, United Kingdom and the United States of America.

(3) Coverage of compensation orders made in criminal cases

Your article further states that “[t]he ordinance also allows for civil awards made in criminal cases in the mainland to be enforced in Hong Kong, which create[s] paths for enforcing aspects of PRC criminal law in [Hong Kong]”.

This statement is again incorrect. The Arrangement only applies to the reciprocal enforcement in Hong Kong and the Mainland judgments on civil and commercial matters. **No aspects of criminal law of the both places would be enforced through the Arrangement.**

Cap. 645 only applies to orders of payment in respect of compensation or damages awarded in criminal proceedings by Mainland courts.

Under Mainland law, compensation orders made ancillary to criminal proceedings would refer to orders granted for compensation for physical harm excluding mental harm.² For example, if the defendant has caused personal injuries to a victim, he/she would be ordered by the Mainland court to compensate the victim for medical expenses.³ For cases of wrongful possession or wrongful handling of a victim’s property, the Mainland court may order the recovery or refund of the relevant property⁴ and such an order is **not** within the scope of the Arrangement.

The underlying rationale of the coverage under the Arrangement of compensation orders made in criminal proceedings is simple – these orders are **civil in nature under both Hong Kong and Mainland law**. The coverage of such compensation orders, similar to the coverage of

² Article 101 of the Criminal Procedure Law of the PRC and Article 175 of the Judicial Interpretation promulgated by the Supreme People’s Court on the Criminal Procedure Law of the PRC.

³ Article 192 of the Judicial Interpretation promulgated by the Supreme People’s Court on the Criminal Procedure Law of the PRC.

⁴ Article 176 of the Judicial Interpretation promulgated by the Supreme People’s Court on the Criminal Procedure Law of the PRC.

similar orders made in contractual or tortious disputes, would avoid a re-litigation in another place for the purpose of cross-boundary enforcement of such awards. This is the primary objective of the Arrangement.

It is therefore totally incorrect to say that the Arrangement would “*create paths for enforcing aspects of PRC criminal law in [Hong Kong]*”.

It is also noteworthy to point out that the coverage of compensation orders made in criminal proceedings is again nothing new to Hong Kong. Such orders are covered under the current statutory regime for enforcing in Hong Kong money judgments from foreign countries (like Germany, France, Singapore, etc.), namely the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) which has been applicable in Hong Kong for over 60 years.

Conclusion

Under the fundamental principle of “one country, two systems”, it is essential to maintain a clear demarcation between the legal system of the Mainland and that of Hong Kong. At the same time, it is necessary to construct linkages between the two systems so that the unique advantages offered by Hong Kong's common law system may be fully utilised to serve the national interests of China as a whole. This is achieved by, among other things, the conclusion of different types of mutual legal assistance arrangements between the Mainland and Hong Kong pursuant to Article 95 of the Basic Law.

The Arrangement is indeed an excellent example demonstrating how such a mutual legal assistance arrangement enables Hong Kong to better utilise the unique advantages offered by Hong Kong's common law system. Hong Kong is the only common law jurisdiction which has established with the Mainland a mechanism of internationally compatible

standards for reciprocal enforcement of civil and commercial judgments with a comprehensive coverage.

The Arrangement makes the option of choosing Hong Kong as the jurisdiction to resolve any contractual dispute more attractive, given that a Hong Kong judgment may be recognised and enforced in the Mainland where the assets of the other contracting party are located. This will be conducive to enhancing Hong Kong's status as an international legal and dispute resolution services centre.

For the reasons stated above, your article dated 28 January 2024 contains incorrect and misleading information. It is imperative for the Guardian to clarify the misconceptions as soon as possible.

Yours faithfully,



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