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A balanced way for China's inter-regional cross-border insolvency cooperation

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Part II China's Special Political Regime and Current Regional Cross-border Legal Cooperation

Introduction

2.01 This part is composed of three chapters. I will provide a general overview of the political, economic and legal integration among the four regions in China. In particular, the current regional cross-border legal cooperation will be explained in detail.

Ch.1 Political Integration

1.1 The "One Country, Two Systems" Regime

2.02 To resume the exercise of sovereignty over Hong Kong³⁵ and Macao³⁶ after their colonial relationships fell due³⁷, the Mainland³⁸ has adopted the "One Country, Two Systems" policy, which was decided as the basic policy in the Sino-British Joint Declaration³⁹ and Sino-Portuguese Joint Declaration.⁴⁰

2.03 The policy has created a special political regime. First of all, "one country" is the prerequisite for "two systems". The central government of P.R.C. is the sole authority governing the Mainland and the SARs. Secondly, the degree of

³⁵ Hong Kong SAR, at the south-eastern China, covers 1,104 square kilometers, including Hong Kong Island, Lantau Island, the Kowloon Peninsula and the New Territories. Hong Kong SAR's population was approximately 7.15 million in 2012. People of Chinese descent comprise the vast majority of the population, with foreign nationals comprising 5%. For more information about HKSAR, please visit: <http://www.gov.hk/en/about/abouthk/facts.htm> (last visited on 14 June 2016)

³⁶ Macao SAR consists of the Macao peninsula and the two islands of Taipa and Coloane and covers an area of 29.2 square kilometers. The population of Macao is estimated to be around 607,500 in 2013. More than 95% of the population speaks Chinese. Portuguese is spoken by about 0.6% and the remainder speaks English, Filipino or other languages. For more information, please visit: <http://www.gcs.gov.mo/files/factsheet/geography.php?PageLang=E> (last visited on 14 June 2016)

³⁷ Under The Convention for the Extension of Hong Kong Territory, which was a lease signed between Qing Dynasty and the United Kingdom in 1898, the territories north of Boundary Street and south of the Sham Chun River, and the surrounding islands, later known as the "New Territories" were leased to the United Kingdom for 99 years, expiring on 30 June 1997 and became part of the crown colony of Hong Kong. For more information, see Ghai, Yash P., *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law*, Hong Kong: HK University press, 1999.

³⁸ In this whole dissertation the Mainland (China) purely serves as a geographic term to describe the geopolitical area under the jurisdiction of the People's Republic of China (P.R.C.), generally excluding the P.R.C. Special Administrative Regions of Hong Kong and Macao. The Mainland is located in the east of the Asian continent covering 9,600,000 square kilometers. The population is over 1.33 billion in 2010 according to the sixth national population census, which is the latest population census so far. For more general information, please visit: <http://www.gov.cn/english> & <http://www.stats.gov.cn> (Last visited on 14 June 2016)

³⁹ For full text of Sino-British Joint Declaration, please visit http://english.gov.cn/2007-06/14/content_649468.htm (Last visited on 14 June 2016)

⁴⁰ For full text of Sino-Portuguese Joint Declaration, please visit <http://bo.io.gov.mo/bo/i/88/23/dc/en/> (Last visited on 14 June 2016)

autonomy enjoyed by the SARs is even higher than the states under a federal model, like the United State, in particular involving independent judicial power including that of final adjudication.⁴¹ Thirdly, the Mainland and the SARs are mutually restrained by the Basic Law, the constitutional document, which can only be enforced within the SARs, whereas not every article of the Constitution of P.R.C has the effect in the SARs.⁴²

1.2 The Legal Foundation: the Basic Law

2.04 The policy of “One Country, Two Systems” is well defined by the Basic Law⁴³ which functions as a treaty signed between the central government and the SARs as a result of political integration. The mainline of the Basic Law is to keep everything unchanged as much as possible after the reunification. First of all, although China still has its unitary political system, China’s central government cannot interfere with the affairs in those two regions except for foreign and defense affairs as well as other matters outside the limits of the autonomy of SARs.⁴⁴ Secondly, the laws in force in the SARs will basically remain the same and most of the laws in the Mainland will not be enforced in the SARs.⁴⁵ Thirdly, the SARs shall be vested with executive power, legislative power and independent judicial power, including that of final adjudication.⁴⁶ Fourthly, the social and economic systems in the Mainland and the SARs operate in the same way respectively as they used to be.⁴⁷

⁴¹ Attention should be paid to the word “independent” that only occurs in front of the judicial power under both Basic Laws (art.19 HK Basic Law & art.19 Macao Basic Law). The independency of the courts in SARs is mainly reflected in establishment of the Court of Final Appeal in both SARs, which is vested with the power of final adjudication in the SARs. (art. 81 HK Basic Law & art.84 Macao Basic Law) Besides, the courts of the Special Administrative Region may also interpret other provisions of the Basic Law in adjudicating cases, except for the affairs that are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region. (HK Basic Law, article158 & Macao Basic Law, article143)

⁴² The effect of the constitution of P.R.C in the SARs was in debate when drafting the Hong Kong SAR Basic law and is still controversial in China. See Wang Shuwen, Introduction to the Hong Kong SAR Basic Law (in Chinese), Beijing: Central Committee of the CCP Party School Press, 1997; Jiao Hongchang, Studies of Macao SAR Basic Law (in Chinese), in 1 Tribune of Political Science and Law, 1999; Wang Zhenmin, The Analysis of the Constitutional Issues in the Implementation of the “One Country, Two Systems” Policy (in Chinese), in: 4 Studies in Law and Business, 2000, 3; Xiao Weiyun, The Relationship of the Constitution of P.R.C. and the HKSAR Basic Law (in Chinese), in: Xiao Weiyun, Theories of Hong Kong Basic Law, Beijing: Peking University Press, 2003.

⁴³ Both SARs (HK and Macao) have their own Basic Law, which are generally the same in structure and contents.

⁴⁴ The expression “outside the autonomy of SAR (which occurs in Article 18 in both Basic Laws) is troublesome, because the Basic Laws do not specify clearly the limits of SAR’s autonomy.

⁴⁵ The Basic Law of HKSAR, article 8, 18; the Basic Law of Macao SAR, article 8, 18

⁴⁶ The Basic Law of HKSAR, article16, 17,19; the Basic Law of Macao SAR, article 16, 17, 19

⁴⁷ The high degree of autonomy has been maintained by the Basic Law in a comprehensive way. For example, the SAR has its own independent finances. The Central People’s Government shall not levy taxes from the SAR. Furthermore, the SAR shall use its financial revenues exclusively for its own purposes. The SAR is still allowed to issue its own currency, the HK dollar or Macao Pataca. The HKSAR remains the status of a free port and a separate customs territory. As for Macao, gambling and tourism are both the pillar industries of the Macao SAR. Therefore, special provisions, have been made to keep the promise that the previous way of life will remain

2.05 However, the Basic Law is different from the treaties establishing the European Union. First of all, the EU is not built upon a single plan but through concrete and continuous development,⁴⁸ whereas the Basic Law is a primary attempt between the Mainland and the SARs, which is tentatively conducted for 50 years.⁴⁹ Secondly, the treaties gradually set up a political union in competition with the nation-state,⁵⁰ which requires the latter to limit its sovereign rights for the benefit of the union. The Basic Law set the tone for “one country” as the ultimate goal,⁵¹ according to which the Mainland as Central Authority has to restrain its sovereign rights from interfering the high degree autonomy enjoyed by the SARs. Thirdly, the treaties constitute a new legal order of international law, which not only binds the government but also the peoples of Europe.⁵² The Basic Law is only applicable within the SARs.⁵³ As for the regional legal order that addresses the issues arising from the interplay between the Mainland and the SARs, it is mainly established on the basis of bilateral arrangements, which is to be discussed in the Ch.3.

Ch.2 Economic Integration

2.1 Closer Economic Partnership Arrangement (CEPA)

2.06 To strengthen the inter-regional economic cooperation, the Mainland and the SARs signed the CEPA respectively in 2003. Each CEPA contains a main text, six annexes, and annually signed supplementary agreements⁵⁴. The cooperation covers trade in goods, trade in services and trade and investment facilitation.

unchanged in Macao SAR. In addition, the unique consultative co-ordination organizations composed of representatives from the government, the employers’ organizations and the employees’ organizations, which were set up in 1987, have been maintained in the Macao SAR. These kinds of organizations aim at reducing friction, improving mutual understanding and finally reaching the agreement through the reconciliation between the employers and the employees. They also help to promote the substantial improvement of the labor legislation and the economy in Macao. Fourthly, SAR may on its own, using the name “Hong Kong, China” or “Macao, China”, conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields. Please refer to the Basic Law of HKSAR, article 106, 111,114,116,151; the Basic Law of Macao SAR, article 104, 106, 108, 115, 118.

⁴⁸ The Treaty of Paris (European Coal and Steel Community, 1951); the Treaties of Rome (Euratom, EEC, 1957); the Treaty of Maastricht (the EU Treaty, 1992); the Treaty of Amsterdam (1997); the Constitutional Treaty (not entered into force, 2004); the Lisbon Treaty (TEU, TFEU, Charter, Euratom, 2007)

⁴⁹ Basic Law of HKSAR, article 5; Basic Law of Macao SAR, article 5

⁵⁰ Chalmers, Damian, Davies, Gareth & Monti, Giorgio, *European Union Law* (2nd ed.), Cambridge University Press, 2010, p.9

⁵¹ Basic Law of HKSAR, article 1; Basic Law of Macao SAR, article 1

⁵² Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] ECR 1

⁵³ Basic Law of HKSAR, article 2; Basic Law of Macao SAR, article 2

⁵⁴ The supplementary agreements of CEPA are signed annually by the Mainland with each SAR. The texts of CEPA between the Mainland and HKSAR (in English), please visit <http://www.tid.gov.hk/english/cepa/> ((Last visited on 14 June 2016); the text of CEPA between the Mainland and the Macao (in English), please visit http://www.cepa.gov.mo/cepaweb/front/eng/index_en.htm (Last visited on 14 June 2016)

The most substantial part of the cooperation in trade in goods is that by January 1, 2006, the Mainland shall apply a zero import tariff to all imports from Hong Kong SAR and Macao SAR. With regard to trade in service, according to Article 11 of each arrangement, the Mainland has promised to gradually ease and ultimately eliminate restrictions on the services provided by Hong Kong SAR and Macao SAR businessmen. Upon the request of either side, the Mainland and the SARs may, through consultation, pursue further liberalization of trade in services between them.⁵⁵ Besides, the Mainland, Hong Kong SAR, and Macao SAR have agreed to further promote their investment facilitation in various areas, such as trade and investment promotion, especially including transparency in laws and regulations.

2.2 Cross-strait Economic Cooperation Framework Agreement (ECFA)

2.07 Regardless of the divergent opinions on sovereign issues, an active tie between the Mainland and Taiwan, which is the cross-strait economic interaction, is growing. In 2010, the conclusion of the Cross-strait Economic Cooperation Framework Agreement (ECFA) embarked on a new era of the economic interaction between the two sides. This agreement is a preferential trade agreement between the governments of the Mainland China and Taiwan that aims to reduce tariffs and commercial barriers between the two sides. With accession to the ECFA, it can be noticed that more investment flows across the strait from each side. (Please refer to Table I below)

Table I

Table of Outflow and Inflow between Taiwan and the Mainland				
Statistics on Approved Taiwan Investment in the Mainland			Statistics on Approved Mainland Investment in Taiwan	
Year	Case	Amount (unit: \$1000)	Case	Amount (unit: \$1000)
2009	249	6,058,497	23	37,486
2010	518	12,230,146	79	94,345
2011	575	13,100,871	102	43,736
2012	454	10,924,406	138	328,067
2013	440	8,684,904	141	360,884
2014	388	9,829,805	136	334,631
2015	321	10,398,224	170	244,067

(Data collected from <http://www.moeaic.gov.tw>)

2.08 However, the further cross-strait economic relationship is not developed without controversies. It is reported that dozens of activists, mostly students broke in the debating chamber of the Legislative Yuan, Taiwan's parliament, in Taipei on 18 March 2014 in order to resist an agreement on opening up services trade with the Mainland. The students continued to occupy the chamber till 10 April 2014.⁵⁶

⁵⁵ These services, around 38 in total, include law, accounting, insurance, banking, securities, construction and real estate, medical and dental, advertising, trade mark agents, patent agents, employment agencies, personnel intermediary and tourism etc.

⁵⁶ Banyan, Students in the House, in: the Economist, 20. Mar. 2014.

2.3 Dispute Settlement Mechanisms under the Economic Arrangements

2.3.1 CEPA

2.09 In order to solve the possible legal conflicts generated from the CEPA framework, a dispute settlement mechanism, the Joint Steering Committee, has been set up. This committee aims at settling disputes arising from the interpretation or implementation of the “CEPA”.⁵⁷ This committee will comprise senior representatives or officials designated by the Mainland and SAR. Liaison Offices is to be set up under the Steering Committee. Besides, working groups may be set up as the need arises. The way the committee will utilize to solve the conflicts is the consultation in the spirit of friendship and cooperation.⁵⁸ The Steering Committee should make its decisions upon consensus. CEPA is an experiment in developing China’s regional economic cooperation. Its legal status is still under debate.⁵⁹ The existing dispute settlement mechanism of CEPA is not mature enough and merely intergovernmental. However, it is a growing-up arrangement, which can be traced from its annually refreshed supplementary agreements to solve the new problems out of the practice of the cross-border trade contact. It is possible that CEPA may give birth to a dispute settlement mechanism of the cross-border commercial conflicts.

2.3.2 ECFA

2.10 In accordance with the article 10 of the ECFA, an appropriate dispute settlement mechanism, the Cross-strait Economic Cooperation Committee, shall be set up, which serves as the organ to deal with the disputes through consultancy and negotiation.⁶⁰ The duty of the Committee also includes promotion of continuous economic cooperation between the two sides on the basis of ECFA.⁶¹ Pursuant to ECFA, the Committee will convene a regular meeting on a semi-annual basis.⁶² Till April 2012, three regular meetings have been held,

<http://www.economist.com/blogs/banyan/2014/03/politics-taiwan> (Last visited on 14 June 2016)

⁵⁷ CEPA, article 19, the functions of the Steering Committee include: (1) supervising the implementation of the “CEPA”; (2) interpreting the provisions of the “CEPA”; (3) resolving disputes that may arise during the implementation of the “CEPA”; (4) drafting additions and amendments to the content of the “CEPA”; (5) providing steer on the work of the working groups; (6) dealing with any other business relating to the implementation of the “CEPA”.

⁵⁸ CEPA HK, article 19 (5); CEPA Macao, article 19 (5)

⁵⁹ Most people hold that CEPA is a regional free trade agreement. Someone, however, has doubt in CEPA’s legitimacy and argued that CEPA, if it was a treaty or agreement, should be concluded between the mainland and other foreign states pursuant to the laws of the mainland and the Basic Law of HKSAR also failed to provide the legal basis that the mainland and HKSAR could sign a trade agreement with each other. The legal vacuum makes the CEPA de jure invalid, although it is de facto effective. See Wang Wei, CEPA: A Lawful Free Trade Agreement under “One Country, Two Customs Territories?”, in: 10 Law & Bus. Rev. Am. 647, 2004, 649

⁶⁰ The Cross-strait Economic Cooperation Committee has been set up on 6 January, 2011.

⁶¹ ECFA, article 11: The Committee shall be responsible for handling matters relating to this Agreement, including but not limited to (1) concluding consultations necessary for the attainment of the objectives of this agreement.

⁶² ECFA, article 11

in which negotiation with respect to trade of goods, services and dispute settlement was carried out. After the third regular meeting, the economic and trade organizations from each side are allowed to set up offices across the Taiwan Strait.⁶³

Ch.3 The Current Legal Cooperation within the Four Regions

2.11 The current regional legal cooperation in civil and commercial matters is conducted by means of bilateral arrangements. As for issues that fall outside of the scopes of those bilateral arrangements, they are governed by the local rules of each region.

3.1 The Mainland and SARs

3.1.1 Bilateral Arrangements

2.12 After reunification, the Mainland and SARs have entered into a set of legal cooperation arrangements in matters of service of documents, recognition and enforcement of arbitral awards as well as recognition and enforcements of judgments in civil and commercial matters. (Please refer to Annex I) In this section, I will discuss about the arrangements concerning recognition and enforcements of judgments in civil and commercial matters in detail. I will get back to the rest of the arrangements later in Recommendation 6 of Part V.

2.13 In 2006, the Mainland and HKSAR entered into 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 between Parties Concerned (hereinafter, the Mainland-HK Arrangement).⁶⁴ In line with the Mainland-HK Arrangement, it applies to an enforceable final judgment requiring payment of money in a civil and commercial case pursuant to a choice of court agreement in writing.⁶⁵ The payment of money requirement entails that the Mainland-HK Arrangement only governs a particular legal relationship for commercial purposes. That means, employment contracts and contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party will be excluded.⁶⁶ Besides, there must be a contract in the written form, in which parties concerned expressly agree that the court in the

⁶³ On 18 April 2012, Ministry of Commerce of P.R.C. and Ministry of Economic Affairs of Taiwan declared the implementation measures of establishment of offices across the Taiwan Strait, http://www.moeaic.gov.tw/system_external/ctrl?PRO=PrintFriendlyNews&id=823 (Last visited on 14 June 2016)

⁶⁴ The Mainland-HK Arrangement is incorporated into the Mainland legal system in the form of judicial interpretation, which is the 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 Choice of Court Agreements between Parties Concerned. Meanwhile, the Mainland-HK Arrangement is adopted by HKSAR through the Mainland Judgments (Reciprocal Enforcement) Ordinance of Hong Kong (the Mainland Judgments Ordinance).

⁶⁵ The Mainland-HK Arrangement, article 1

⁶⁶ The Mainland-HK Arrangement, article 3

Mainland or the court in HKSAR has the exclusive jurisdiction over the disputes of a specific legal relation.⁶⁷ In addition, the judgment seeks recognition and enforcement should be final and conclusive. It is noteworthy that the court of HKSAR holds quite different criteria of finality from the Mainland court. It is stipulated under the Civil Procedure Law of P.R.C.⁶⁸ that all judgments and written orders of the Supreme People's Court, as well as judgments and written orders that may not be appealed against according to the law or that have not been appealed against within the prescribed time limit, shall be legally effective.⁶⁹ The procedure of trial supervision is also stipulated in the Civil Procedure Law, which allowing the original judgment with the legal effect to be reheard all over again under certain circumstances.⁷⁰ Accordingly, a Mainland judgment may not be considered final because of the procedure of trial supervision.⁷¹ Nevertheless, that holding was overturned later in *Lee Yau Wing v. Lee Shui Kwan*.⁷²

2.14 In *Lee Yau Wing v. Lee Shui Kwan*, the defendant failed at first instance and on appeal to a People's Courts in the Mainland, and the plaintiff sought summary judgment against the defendant in a Hong Kong court based on the Mainland appeal judgment. The defendant argued that the Mainland judgment was not final and conclusive due to the existence of the Mainland "trial supervision" system and therefore not enforceable in Hong Kong. After consulting the opinions of legal experts, the Court of Appeal held that a Mainland judgment cannot be deemed as inconclusive and not final simply because of the existence of the "trial supervision" system under PRC law *per se*.⁷³ Later in *Shenzhen City Liangzi Jingshun Investment Management Co., Ltd. v. Huang Binghuang and Another*,⁷⁴ the Plaintiff was a Mainland company, who filed the petition against Huang and HK Zhongxing (a Hong Kong company) to resolve contract disputes. Meanwhile, there were also parallel proceedings between the Plaintiff and the defendants in the Mainland and the Plaintiff petitioned to the High People's Court of Guangdong Province for re-trial of the Mainland appeal, who thus claimed that the Mainland judgment was not final and conclusive and therefore

⁶⁷ The Mainland-HK Arrangement, article 3

applies when the judgments meet the following requirements: (a) require payment of money in business-to-business cases. That is, employment contracts and contracts to which a natural person acting for personal consumption, family or other non-commercial purposes is a party will be excluded; (b) relate to disputes in which the parties concerned have agreed in written form to designate a people's court of the Mainland or a court of the HKSAR as the forum to have sole jurisdiction for resolving such dispute; and (c) are final, conclusive and enforceable. (see CAP 597, s5 of the Mainland Judgments Ordinance)

⁶⁸ Please note that the Civil Procedure Law of the P.R.C. has been revised in 2007 and 2012. The version in effect at that time was Civil Procedure Law of the P.R.C. (1991).

⁶⁹ Civil Procedure Law of the P.R.C. (1991), article 141

⁷⁰ Civil Procedure Law of the P.R.C. (1991), Chapter 16, article 177,178,185

⁷¹ *Chiyu Banking Corporation Ltd. v Chan Tin Kwun* [1966] 1 HKLR 395; *Tan Tay Cuan v Ng Chi Hung*, unrep. HCA 5477/2000 (5/2/2001) ; *Wu Wei v. Liu Yi Ping* HCA 1452/2004

⁷² *Lee Yau Wing v. Lee Shui Kwan* [2005] HKCA 657, at 77

⁷³ *Lee Yau Wing v. Lee Shui Kwan* [2005] HKCA 657, at 75

⁷⁴ *Shenzhen City Liangzi Jingshun Investment Management Co., Ltd. v. Huang Binghuang and Another* [2011] HKCFI 70

not enforceable in Hong Kong. Her Honour Judge Marlene NG referred to the judgment in *Lee Yau Wing v. Lee Shui Kwan*, holding

“[I]n my view, the legal effect of the PRC Judgment is not a simple matter and should not be dealt with in summary way. Given (a) PRC law is a matter of fact to be proved by PRC legal experts, (b) there is fundamental conflict between the PRC expert opinion adduced by the Plaintiff and that by HK Zhongxing as to the effect of re-trial on the PRC Judgment and on the assignment of the HK Zhongxing Debt, (c) the guidance in the above authorities that such issue should be resolved at trial, (d) the dissenting judgment of Chung J in *Lee Yau Wing* to the effect that the trial supervision or re-trial system under PRC law did not undermine the final and conclusive nature of any PRC appeal judgment under the two-tier court system, I am convinced that HK Zhongxing’s assertion of there being a valid and effective assignment of the HK Zhongxing Debt in its favour to buttress the defence of set-off has real prospect of success and should be left to trial.”

2.15 It seems that from the judicial points of view in Hong Kong, the “trial supervision” system under the Mainland law *per se* should not render a Mainland judgment inconclusive and not final. Furthermore, given the fact that the discrepancy of the concept of finality between the two sides is crucial to the system of recognition of cross-border judgment, a compromise has been made in signing the Mainland-HK Arrangement, in which the term “final and conclusive” is avoided; instead the concept of “final judgment with enforceability” is used. In the Mainland Judgments Ordinance,⁷⁵ instead of applying the term “final judgment with enforceability”, being final and conclusive is still set out as a compulsory condition for enforcing Mainland judgments. Although some scholars cast some doubts,⁷⁶ Ms. Tsang of the Department of Justice took the view that “under the Ordinance a Mainland judgment is final and conclusive if it falls into the enumerated list where no appeal is allowed or the time limit for appeal has expired or it is the decision of the second instance”.⁷⁷ Accordingly as for civil and commercial disputes covered by the Mainland-HK Arrangement, the existence of the trial supervisory system will not prevent Mainland judgments from being recognized and enforced in Hong Kong, although they may not strictly fit the common law concept of finality. As for the judgments stay out of the regime, uncertainty is still awaiting.

2.16 In 2006, the Mainland and Macao SAR also entered into Arrangement Between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments (hereinafter, the Mainland-Macao Arrangement). Compared to the Mainland-HK Arrangement, the Mainland-Macao Arrangement improves cooperation of mutual recognition and enforcement of the civil and commercial judgments in a

⁷⁵ The Mainland-HK Arrangement is incorporated was voted and passed by the Legislative Council of HKSAR in the form of ordinance, i.e. the Mainland Judgments (Reciprocal Enforcement) Ordinance of Hong Kong (hereinafter the Mainland Judgments Ordinance).

⁷⁶ Smart, Philip, Finality and the Enforcement of Foreign Judgments under the Common Law in Hong Kong, 5 Oxford University Commonwealth Law Journal, 2005, p.315; Zhang Xianchu, A New Stage of Regional Judicial Assistance in Civil and Commercial Matters: Implementation of the Mainland Judgments Ordinance and Certain Issues Beyond, in: 39 HKLJ 3, 2009, p.9

⁷⁷ Tsang, Michelle, A New Chapter in Reciprocal Enforcement of Judgments between the Mainland and Hong Kong, Hong Kong Lawyer, July 2008, p.61.

more advanced way. First of all, the scope of the mutual recognition and enforcement between the Macao SAR and the Mainland is much wider, which is not limited to commercial purposes, including the labor disputes and the compensation judgments or verdicts of the criminal cases.⁷⁸ Secondly, there is no choice of court agreement requirement. The courts of Macao SAR and the Mainland with competent jurisdictions can recognize and enforce the judgments in civil and commercial matters of each other upon the request of the applicant.⁷⁹ As for the trial supervision system in the Mainland, it did not cause any problem with respect to the finality requirement under the Mainland-Macao Arrangement. Moreover, in a case handed down by the Court of Final Appeal of Macao SAR, a Mainland judgment was granted recognition although it was being subject to the supervision trial procedure in the Mainland.⁸⁰

3.1.2 Recognition in Accordance with the Local Rules

2.17 Given the limited scopes of the bilateral legal cooperation arrangements, each region still has its own local rules concerning recognition and enforcement of inter-regional civil and commercial judgments.

3.1.2.1 The Mainland

2.18 In 2008, the Supreme People's Court released a judicial interpretation, Notice of the Supreme People's Court on Issuing the Minutes of the Symposium on the Trial of Commercial Cases involving Hong Kong or Macao by Courts Nationwide.⁸¹ In accordance with that judicial interpretation, adjudication of civil and commercial cases involving HKSAR and Macao SAR should refer to Part IV of Civil Procedure Law of the P.R.C., which deals with special rules on foreign-related civil proceedings, and Provisions of the Supreme People's Court Concerning the Jurisdiction Problems of Foreign-related Civil and Commercial Cases. Nevertheless, after the reunification, it is a bit ironic to continue to apply foreign-related rules to SARs, which reflects a continuing dilemma regarding the status of SARs in the area of cross-border civil and commercial judicial interaction in China. Despite of the political and economic integration, a corresponding legislative and judicial approach is still lacking, which incurs uncertainty in the course of legal cooperation.

3.1.2.2 Hong Kong SAR

2.19 Before July 1st 1997, the legal system of Hong Kong was characteristic of British style. It had been transplanted with the common law system, which has deeply rooted in Hong Kong over 150 years. From 1 July 1997, the legal framework of HKSAR has been rebuilt on the ground of the Basic Law. Pursuant to the Basic Law, the previous common law system has been preserved.⁸² Like

⁷⁸ The Mainland-Macao Arrangement, article 1, 3

⁷⁹ The Mainland-Macao Arrangement, article 3

⁸⁰ Case 6/2010 of CFA, Macao SAR

⁸¹ [2008] Judicial Interpretation No.8

⁸² The Basic Law of HKSAR, art.8: The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained

Ghai once said, the common law system has developed into the cornerstone of the entire legal and judicial system of Hong Kong. The courts of the HKSAR may refer to precedents of other common law jurisdictions in adjudication of cases⁸³. Judges and other members of the judiciary of the HKSAR may be recruited from other common law jurisdictions.⁸⁴

2.20 The scope of the Mainland-HK Arrangement is limited and shall be applied with restrictive conditions. Therefore, recognition of most of the civil and commercial Mainland judgments, including the insolvency proceedings, which fall out of the ambit of the Mainland-HK Arrangement, is subject to the common law as also applicable to recognition of the foreign judgments. To enforce the judgment under common law, the judgment creditor may commence an action by writ, pleading the “foreign” judgment, as long as the “foreign” court was a court of competent jurisdiction, the judgment is final and for a definite sum of money.⁸⁵ Since a new proceeding has to be opened, uncertainties probably rise when dealing with a “foreign” jurisdiction with very different substantive and procedural rules. Moreover, it could be a rather cumbersome and expensive procedure under common law and there is no guarantee for enforcement. It’s difficult to conclude what kind of specific requirements have to be satisfied for a foreign judgment to be given binding effect under the common law because it shall depend on the individual cases.

2.21 For instance, there was a HK matrimonial case, *ML v. YJ*, which is beyond the scope of the Mainland-HK Arrangement and involved parallel proceedings in the Mainland and HKSAR.⁸⁶ The husband and wife are Chinese nationals from the Mainland. They have acquired the right of abode as permanent residents in Hong Kong and kept matrimonial homes and assets in the Mainland and in Hong Kong. On 18 May 2006, the wife filed a petition for divorce in Hong Kong and the husband participated in the Hong Kong proceedings. On 23 October 2006, the Husband initiated the divorce proceedings in the Mainland. Prior to the Hong Kong proceedings, the Mainland court handed down its decision on 14 November 2007 and the husband applied for striking out the Hong Kong

has been mentioned before, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region; also see the Basic Law of HKSAR, art.160 and the Decision of the Standing Committee of the National People’s Congress Concerning the Handling of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the P.R.C., http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383899.htm (Last visited on 14 June 2016)

⁸³ The Basic Law of HKSAR, article 84

⁸⁴ The Basic Law of HKSAR, article 92

⁸⁵ Smart, Philip, “Enforcement of Foreign Judgments” (Ch. 13) in Christine N Booth (ed), *Enforcing Judgments in Hong Kong*, Hong Kong: LexisNexis, 2004, p.357. See also Dicey, Morris & Collins, *The Conflict of Laws*, (14th Ed), UK: Sweet & Maxwell, 2010, p. 618. “A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 42 to 45 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either of fact or of law...Closely parallel to this rule is the rule that the party must take all available defenses in the foreign court, and that if he does not do so, he cannot be allowed to rely on them subsequently in the domestic court.”

⁸⁶ *ML v. YJ* [2010] HKCFA 85; (2010) 13 HKCFAR 794; [2011] 1 HKC 447; FACV20/2009 (13 December 2010)

proceedings. The reason of opening the Mainland proceedings given by the husband was that he needed a divorce decision rendered by the Mainland court in any event given the lack of recognition of a Hong Kong divorce in the Mainland.⁸⁷ In accordance with the matrimonial law of HK at that time, recognition of an overseas divorce judgment would prevent a decree absolute divorce and thus the HK court could not make any relevant ancillary relief orders. The preliminary issue arose whether the husband manipulated the proceedings to his unfair advantage against the fundamental notions of justice. The majority of the Court of Final Appeal of HKSAR (3:2) considered that

“It is difficult to see how these views can be reconciled with the conclusion that the husband had “manipulated” the court’s procedures such that recognition of the Shenzhen divorce would be manifestly contrary to public policy.”⁸⁸

2.22 Further, the majority agreed with the Court of Appeal that the husband had legitimate reason to litigate in the Mainland.⁸⁹

“The husband chose Shenzhen because of the doubt whether a Hong Kong divorce would be recognized there. The Judge accepted that the husband cannot be criticized for applying for the Shenzhen divorce because of such a doubt.”⁹⁰

2.23 Without a regional cross-border legal cooperation arrangement, it is observed that the uncertainty about recognition can influence both sides, in particular the interests of the parties concerned since the uncertainty can even be deemed as the legitimate reason for opening parallel civil proceedings.

3.1.2.3 Macao SAR

2.24 Before reunification, Macao had a dual legal system in the style of civil law. One part contained the laws made by the Portugal government.⁹¹ The other part was the laws made by the local legislative council and the Governor of Macao after 1974,⁹² which was relatively in a small proportion. All the laws were made and promulgated exclusively in the Portuguese language, which greatly weakened the impact of the laws since most of the local people are only able to

⁸⁷ *ML v. YJ* [2008] HKCFI 367; [2008] 3 HKLRD 412; [2008] 3 HKC 362; HCMC13/2006 (20 March 2008),

⁸⁸ *ML v. YJ* [2010] HKCFA 85; (2010) 13 HKCFAR 794; [2011] 1 HKC 447; FACV20/2009 (13 December 2010), para.155

⁸⁹ *ML v. YJ* [2010] HKCFA 85; (2010) 13 HKCFAR 794; [2011] 1 HKC 447; FACV20/2009 (13 December 2010), para.157

⁹⁰ *ML v. YJ* [2009] HKCA 230; [2010] 1 HKLRD 1; CACV89/2008 (17 June 2009), para.140

⁹¹ They were mainly the Civil Code, the Criminal Code, the Commercial Code, the Criminal Procedure Code and the Civil Procedure Code.

⁹² A major reversal of Portuguese policies occurred in 1974 when the Portuguese Military Forces Movement exploded. A constitutional amendment in 1974 proclaimed the right of self-determination, with the consequent independence, of all Portuguese colonies. As a result, in 1976 the Governor of Macao and the legislative council (the former legislative committee) were authorized the independent legislative power, besides the legislative power of the Portugal government.

speak Cantonese (a kind of dialect, the same in Hong Kong) and write Chinese.⁹³ After the reunification, the Macao SAR has reorganized its judicial system according to its civil pattern and the provisions of the Basic Law. It formally established a three-level court system, the primary courts, intermediate courts and one Court of Final Appeal. Nevertheless, owing to the late independency of the local judicial system and the monopoly of the Portuguese in the judicial system, the efficiency problem of the judicial system in Macao has been complained for a long time and Macao is short of the local legal professions.⁹⁴

2.25 In practice, it has been observed by one scholar that Macao courts usually do not refuse to recognize the judgments rendered in the Mainland but usually not on the basis of the Mainland-Macao Arrangement.⁹⁵ According to Tu, “the Mainland-Macao Arrangement has been totally ignored by some judges and largely not applied by Macao courts as a whole.”⁹⁶ Recognition of the civil judgments is regularly governed by the article 1200-I of Civil Procedure Code of Macao (CPCM). The challenge a foreign judgment could meet when seeking recognition in Macao SAR is that the possibility of substantial review of the judgment, which involving the review of the merits of a foreign judgment. The substantial review shall be initiated by a proper objection if a new critical evidence refers to one that was unknown to parties or has not been used in the judgment-rendering proceeding but can change the existing judgment into one more favorable to the losing party.⁹⁷ However, it rarely happens in practice. This is probably because the respondent has to respond to a judgment recognition and enforcement application within fifteen days,⁹⁸ who might not have sufficient time to find some critical new evidence. The other possibility to cause substantial review is when a judgment is against a Macao resident, according to Macao conflict of laws, Macao substantive law should have been applied to solve the dispute, and the application of Macao substantive law leads to a judgment more favorable to the Macao resident compared to the foreign judgment.⁹⁹ This article reflects Macao’s protectionism towards its residents. The underlying policy is that, the Macao resident, who is the losing party, should receive the same treatment in the judgment-rendering court as he or she would receive in the Macao court if the action took place in Macao.

⁹³ The population of Macao SAR can be divided into: Portuguese at the senior levels; Mekanese (descendants principally of marriages or liaisons between Portuguese and Chinese) at the middle level; these two groups make up around 3% of the total population in Macao and the rest are the local Chinese, who had been excluded from any role in policy or administration.

⁹⁴ For instance, there are 29 judges in the primary courts, 10 in the intermediate courts, and 3 in the Court of Final Appeal. Piles of cases were waiting for these judges to make decisions, especially after the reunification. In 1999, there were over 300 cases heard by the intermediate courts. In 2014, there were about 19,535 cases. Source: from the annual report made by the director of the Court of Final Appeal, <http://www.court.gov.mo/zh/subpage/annual> (Last visited on 14 June 2016)

⁹⁵ Tu Guangjian, Recognition and Enforcement of Non-local Judgments in Civil and Commercial Matters in Macau - A Critical Review, 42 HKLJ 2012, p.633

⁹⁶ Tu Guangjian, Arrangement on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between China and Macau: Inherent Problems, Six Years' Experience and the Way Forward, 43 HKLJ, 2013, p 361

⁹⁷ Macao Civil Procedure Code, article 1202-I

⁹⁸ Macao Civil Procedure Code, article 1202-I

⁹⁹ Macao Civil Procedure Code, article 1202-II

3.2 The Mainland and Taiwan

3.2.1 Bilateral Arrangement

2.26 In 2009, the Mainland and Taiwan entered into Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance (the Mainland-Taiwan Agreement). The Mainland-Taiwan Agreement contains 24 articles and lays more emphasis on cooperation related to criminal cases. It merely provides one article (Article 10) with respect to recognition and enforcement of civil judgments and arbitral awards, which shall be granted based on the principle of reciprocity without violating the public order or good morals.

3.2.2 Recognition in Accordance with the Local Rules

3.2.2.1 The Mainland

2.27 On 29 June 2015, the Supreme People's Court issued a judicial interpretation concerning recognition and enforcement of civil judgments rendered by Taiwan courts.¹⁰⁰ That judicial interpretation replaced the former four related judicial interpretation in matters of cross-strait legal cooperation.¹⁰¹ The current judicial interpretation has more extensive scope concerning the judgments that can request for recognition before the Mainland court, including the effective judgments, verdicts, mediation agreements and orders to pay as well as the judgments and the verdicts of civil damages compensation involved in criminal cases.¹⁰² To facilitate the applicant to file a petition, the current judicial interpretation also allows more competent Mainland courts to seize the request, including the intermediate courts or specialized courts either at the domicile or habitual residence of the respondent or at the place where the asset is located.¹⁰³ The civil judgments that request for recognition should be verified as genuine and effective. The current judicial interpretation provides two means of verification. The applicant can request the Mainland court to verify the Taiwan judgment through the channel of cross-strait mutual judicial assistance in terms of serving legal documents, investigation and evidence collection. The Mainland court can ex officio verify the Taiwan judgment through the same channel.¹⁰⁴ If recognition of the civil judgments will violate the fundamental principles of the

¹⁰⁰ [2015] Judicial Interpretation No.13

¹⁰¹ The repealed four judicial interpretations are: the Provisions of the Supreme People's Court on the People's Court's Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan [1998] Judicial Interpretation No.11; the Reply of the Supreme People's Court on whether the People's Court should Accept the Application for Recognition of Mediation Agreement Rendered by the Taiwan Court or the Authorities Concerned [1999] Judicial Interpretation No.10; the Reply of the Supreme People's Court on whether the People's Court should Accept the Application for Recognition of Orders to Pay Rendered by the Taiwan Court [2001] Judicial Interpretation No.13; Supplementary Provisions of the Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region [2009] Judicial Interpretation No.4

¹⁰² [2015] Judicial Interpretation No.13, article 2

¹⁰³ [2015] Judicial Interpretation No.13, article 4

¹⁰⁴ [2015] Judicial Interpretation No.13, article 9

national laws, including the one country principle, or be detrimental to socio public interests, the people's courts shall refuse to grant recognition.¹⁰⁵

3.2.2.2 Taiwan

2.28 The main components of the current Taiwan legal system are the basic codes of laws,¹⁰⁶ bylaws,¹⁰⁷ the legal precedents and the interpretation of the Judicial Yuan¹⁰⁸, which is the supreme judiciary in Taiwan¹⁰⁹. Against the aforementioned complicated historical, political and economic background, diverse legal arrangements were established in Taiwan for recognition of the civil judgments of different origins. The Mainland judgments shall be recognized pursuant to the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (the Mainland Act),¹¹⁰ whereas the judgments of HKSAR and Macao SAR shall be recognized in accordance with the Act Governing Relations with Hong Kong and Macao (the HK and Macao Act)¹¹¹.

¹⁰⁵ [2015] Judicial Interpretation No.13, article 15

¹⁰⁶ The codes of laws, known as "the Complete Literatures on Six Laws" or "Six Codes", which are the constitution law, the civil law, the criminal law, the civil procedure law, the criminal procedure law.

¹⁰⁷ The related bylaws are made in the form of regulations, orders etc., to supplement their respective codes of laws.

¹⁰⁸ The precedents of the Supreme Court in accordance with the constitution law, the court organization act and the law of the Council of Grand Justice etc., could be recognized as the ground of the decision after certified by the Judicial Yuan. On the ground of the Court Organization Act (art. 57), the Supreme Court of Taiwan has made the Main Points of the Selection and Modification of the Legal Precedents, which later helped to foster the legal precedent system in Taiwan. To be a legal precedent, there are several requirements. Firstly, it must be the judgment from the Supreme Court. Secondly, it is just the legal opinion of the Supreme Court, instead of the entire content of the judgment. Thirdly, the cases must go through certain procedures for selection. Therefore, not all of the judgments from the Supreme Court can become the legal precedent.

¹⁰⁹ The Judicial Yuan is a rare phenomenon and also an inheritance. In 1928 the former government of the Republic of China established five governmental departments, including the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan, the Control Yuan, also known as "Five Yuans" structure. Taiwan keeps the former governmental organizations till now. The status of the Judicial Yuan, whether it is a court or a judicial executive organ, is still under debate. Pursuant to the Constitution Code (art. 77), the Judicial Yuan is the supreme judiciary, in charge of the civil, criminal and administrative trials and the civil service disciplinary. However, in accordance with the Organization Law of the Judicial Yuan, there is no direct access for the Judicial Yuan to these trials. In 2008, the Judicial Yuan assembly passed the draft of the amendment of the Organization Law of the Judicial Yuan to promote the reform. But till now, the Judicial Yuan still does not interfere with the civil or criminal trials of courts at different levels. The internal agencies of Judicial Yuan mainly including the Council of Grand Justices, which has the power of judicial interpretation and the establishment of the constitutional tribunal to commit the constitutional examination. The agencies subject to the Judicial Yuan are mainly composed of the courts of all levels.

¹¹⁰ In order to make up for the legal blank generated in the process of the cross-strait economic cooperation, in July 1992, the Legislative Yuan of Taiwan (the legislature of Taiwan) after the third reading, passed the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (hereinafter the Mainland Act). Due to the political uncertainty, frequent economic interaction and legal difference, till 2015 the Mainland Act has been amended for 16 times.

¹¹¹ The return of Hong Kong and Macao to China also influenced the lawmaking of Taiwan. The shift of the political status of the two regions resulted in the reconsideration of the Taiwan-Hong Kong and Taiwan-Macao relationship by the Taiwan government. One of the important problems

3.2.2.2.1 The Mainland Approach

2.29 Pursuant to the article 74 of the Mainland Act¹¹², an application must be filed to a Taiwan court for a ruling to recognize the Mainland judgment. Meanwhile, two principles shall be applied for recognition, one is the reservation of public order or good morals (art. 74-1) and the other is the principle of reciprocity (art 74-3).

2.30 The public order or good morals is a vague concept. Someone fears that its flexibility and the uncertain relationship between the Mainland and Taiwan will probably bring unpredictability to the recognition and enforcement of the court judgment from the Mainland.¹¹³ In practice, however, the reservation of the public order or good morals seems to have been rarely applied.¹¹⁴ Amounts of recognition application submitted to Taiwan's courts are related to the divorce judgments. The courts tend to recognize a divorce judgment even though the parties concerned filed against the Mainland decisions based on "fraud marriage",¹¹⁵ "not in accordance with Taiwan's Civil Code",¹¹⁶ "protectionism of the Mainland courts"¹¹⁷ and etc. On the contrary, if the parties concerned have not been given the opportunity to take part in the proceeding and failed in the Mainland cases, the court will probably refuse to recognize the divorce judgments. For example, the party concerned was in prison and not able to attend the hearing in the Mainland court or the address of the party concerned was not absolutely unclear, therefore the Mainland court could not inform him

was whether to apply the Mainland Act to those two regions due to its reunification with China. To solve this problem, on April 2, 1997 the Act Governing Relations with Hong Kong and Macao (hereinafter the Hong Kong and Macao Act) was promulgated by Presidential Order and the provisions pertaining to Hong Kong Implemented by Order of the Executive Yuan on 19 June 1997 to take effect on 1 July 1997.

¹¹² The Mainland Act, article 74 states:

To the extent that an irrevocable civil ruling or judgment, or arbitral award rendered in the Mainland Area is not contrary to the public order or good morals of the Taiwan Area, an application may be filed with a court for a ruling to recognize it.

Where any ruling or judgment, or award recognized by a court's ruling as referred to in the preceding paragraph requires performance, it may serve as a writ of execution.

The preceding two paragraphs shall not apply until the time when for any irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area, an application may be filed with a court of the Mainland Area for a ruling to recognize it, or it may serve as a writ of execution in the Mainland Area.

¹¹³ Chen Li, Mutual Recognition and Enforcement of the Cross-Strait Civil Judgments: Difficulty and Solution (in Chinese), in: The Rule of Law Forum, Vol. 17, issue 5, p. 63, 2002; Liu Renshan, Current Situation, Problems and Thinking regarding the Recognition and Enforcement of the Commercial Judgments between the Mainland and Taiwan (in Chinese), in: Wuhan University Journal (Philosophy & Social Sciences), vol. 62, issue 6, p. 737, 2009; Yu Fei, The Appropriate Application of the Reservation of Public Order (in Chinese), in: Taiwan Research Journal, p.11, issue 3, 2010.

¹¹⁴ Huang Kuo-Chang, A Beautiful Mistake: Has the Recognized Mainland Judgment Res Judicata? (in Chinese), in: Taiwan Law Review, issue 167, 2009, p. 193.

¹¹⁵ Taiwan High Court Family Appeal from Ruling No.316 [2003]; Taiwan High Court Family Appeal from Ruling No.268 [2001]; Taiwan High Court Family Appeal from Ruling No.179 [2001]

¹¹⁶ Taiwan High Court Tainan Branch Court Family Appeal from Ruling No. 63 [2004]

¹¹⁷ Taiwan High Court Tainan Branch Court Family Appeal from Ruling No. 31 [2001]

via service of notice by publication.¹¹⁸ It can be concluded from the aforementioned cases that in general the Taiwan's courts follow the formal examination on the Mainland judgment recognition. In practice the courts in Taiwan incline to utilize the reservation of public order or good morals as the shield to safeguard the due process rather than interfering with the substantial controversies.

2.31 The principle of reciprocity (article 74-3) was amended into the article 74 of the Mainland Act on May 14, 1997 and was implemented from July 1, 1997 by the Order of the Executive Yuan.¹¹⁹ In the Supreme Court judgment No. 2644 (1997), Taiwan Supreme Court partly reversed the original judgment and remanded the case back to the original court, holding that besides the check of the public order or good morals, before giving recognition to a Mainland civil judgment, the lower court shall also take into necessary consideration on whether the judgment made by a court in Taiwan may be recognized by the Mainland court in accordance with article 74-3 of the Mainland Act. This is a typical mode of "you scratch my back and I scratch yours" reciprocity, which has been criticized even by the local scholars for a long time.¹²⁰ However, it's not hard to understand because in the year of 1997, the cross-strait judicial interaction was still in its childhood. The reason of the amendment was written in the Order of the Executive Yuan, in which it clear stated that the irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area still failed to receive recognition from the Mainland courts and it was unfair to grant recognition to the Mainland judgments on the basis of mutual benefit. Therefore, the item 74-3 was amended into the Mainland Act in order to make the Chinese Authority aware of the issues of the cross-strait judicial assistance, find out the solutions in good faith and protect the legal systems from both sides in favor of the individuals' interests.¹²¹

2.32 Later on the Mainland government began to make efforts on the cross-strait judicial cooperation. In 1998, the Supreme People's Court issued the Provisions on the People's Court's Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region. The Several Provisions of the Supreme People's Court on the Service of Litigation Documents in Taiwan-related Civil Matters (hereinafter the Several Provisions) came into effect in 2008. The Several Provisions applies to the service of documents to the litigant whose domicile is in Taiwan, or upon the request of the relevant courts of the Taiwan region, to the litigant whose domicile is in the Mainland. There are several ways to commit the service of litigation documents, some of which are first time applied in cooperation of the

¹¹⁸ Huang Kuo-Chang, A Beautiful Mistake: Has the Recognized Mainland Judgment Res Judicata? (in Chinese), in: Taiwan Law Review, issue 167, 2009, p. 193-194.

¹¹⁹ For detailed information, please visit <http://www.mac.gov.tw/ct.asp?xItem=90541&ctNode=5914&mp=3> (Last visited on 14 June 2016)

¹²⁰ Chen Rongzong, Legal Issues of International Civil Procedural Law (in Chinese), in: China Law Journal, issue 162, 1996, p.10; Chen Qichui, Recognition and Enforcement of the Foreign Judgments (in Chinese), in: Journal of New Perspectives on Law, issue 75, 2001, p.156,

¹²¹ For the reason for the amendment article 74-3, please visit: <http://www.rootlaw.com.tw/lawsystem/showmaster.aspx?LawID=A040310000000600-19970514> (Last visited on 14 June 2016)

trans-regional service of documents. The People's Court is allowed to commit the service by leaving the documents at the place of the litigant or the agent entrusted to accept the documents¹²², if they refuse to sign or seal on the service receipt. In addition, due to the three direct links,¹²³ if the litigant has a definite address in Taiwan, now the documents can be served directly to Taiwan by mail. Furthermore, if the litigant has a definite fax number or e-mail address, the documents can be served by fax or by e-mail. In 2009, the Supreme People's Court promulgated the Supplementary Provisions of the Supreme People's Court on the People's Courts' Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region (hereinafter the Supplementary Provisions). The Supplementary Provisions firstly states that the civil judgments rendered in Taiwan which have been recognized by the People's Courts have the same effect as those made by the People's Courts. If the execution applicant applies for the enforcement of the recognized civil judgment, the People's Court should accept the application, which means, from then on, the civil judgments made by the courts of Taiwan can be enforced in the Mainland.

2.33 With efforts made by both sides, the cross-strait judicial assistance is promoted to move forward. In the case of Taiwan Taipei District Court Application No. 2507 (2005), the court held that the judgment made by the High People's Court of Beijing Municipal did not violate the public order or good morals and irrevocable civil ruling or judgment, or arbitral award rendered in the Taiwan Area were already able to be accepted for the recognition to the Mainland courts. Therefore, the court finally recognized the judgment. Later the same parties concerned in the case got involved in the rehearing procedure of the former case in Beijing. After the High People's Court of Beijing Municipal reheard the case, the litigant came back to the Taipei District Court again and applied for recognition of the Mainland judgment. The court recognized the judgment for the same reason.¹²⁴ The case was appealed to the Taiwan High Court. High Court agreed with the lower court and turned down the appeal.¹²⁵

2.34 Nevertheless, article 74 of the Mainland Act does not clarify what kind of effect will be generated after an irrevocable judgment rendered in the Mainland Area has been recognized in Taiwan, which resulted in controversies in theory in Taiwan. Someone argued that *res judicata* was not stimulated in the People's Civil Procedural Law promulgated on April 9, 1991 in the Mainland. Therefore, it was questionable whether the courts of Taiwan should recognize *res judicata* of

¹²² They are (a) the litigant, if the litigant is living in the Mainland; (b) to the lawsuit agent; (c) the person designated to receive the documents; (d) the representative agent, or the branch, the person entrusted to do the business in the Mainland who has been authorized to receive the service.

¹²³ Taiwan used to allow limited postal, transportation, and trade links between the Fujian province cities of Xiamen, Mawei and Quanzhou of P.R.C, and the islands of Kinmen and Matsu, which are administered by Taiwan (known as the three mini-links). On December 15, 2008, the Mainland and Taiwan, giving in due to the economic benefits and the actual needs of their peoples, agreed to enforce the "three direct links", including the opening up of the direct flights, direct shipping and direct post to each other.

¹²⁴ Taiwan Taipei District Court Application No. 2146 [2007]

¹²⁵ Taiwan High Court Non-Ruling Appeal No. 76 [2008]

the Mainland judgment.¹²⁶ Someone held the positive opinion, which is, if the parties concerned have been given complete procedural guarantee in the Mainland Area, the related judgment shall have the legitimacy to be recognized as *res judicata*.¹²⁷ In practice the point was made clear in 2007 when Taiwan Supreme Court made decisions regarding this issue in the case between Zhejiang Textiles Import & Export Group Co., Ltd. (Zhejiang Textiles) v. Evergreen International Storage and Transport Corp. (Evergreen) Zhejiang Textiles filed petition against Uniglory Marine Corporation (which was later merged into Evergreen) in Shanghai. Zhejiang Textiles won after the second instance and received the irrevocable judgments in Shanghai and came to Taiwan for recognition. There were a series of judgments regarding the same dispute between the same parties concerned made by the Taiwan courts.¹²⁸ It is noteworthy that the Supreme Court clearly held that

“In accordance with the article 74 of the Mainland Act, where an irrevocable civil ruling or judgment rendered in the Mainland Area recognized by a court's ruling requires performance, it may merely serve as a writ of execution, whereas it is not specified in the article that the irrevocable civil ruling or judgment rendered in the Mainland Area shall be considered the same validity as irrevocable civil ruling or judgment rendered in Taiwan... However, the irrevocable civil ruling or judgment rendered in the Mainland Area shall only be recognized by the way of the ruling of Taiwan courts and shall only have the effect of execution instead of the same validity as irrevocable civil ruling or judgment rendered in Taiwan.”¹²⁹ (Underlines added by the author)

2.35 After this Supreme Court decision, this case was turned all over again. Without recognition of the validity of the Mainland judgments, the Mainland party concerned failed to receive the recognition in Taiwan after having experienced the six tortuous rounds of civil actions. The judgment of Taiwan Supreme Court No. 2531 (2007) is indeed a turning point of the cross-strait legal cooperation. *Res judicata* is the fundamental element of the judgment recognition. If *res judicata* of the judgment is denied, that judgment could hardly be considered as recognized. The denial of *res judicata* of the Mainland judgments in Taiwan could probably leave the effect of the Mainland judgments in uncertainty and its side effect on the cross-strait legal cooperation can be anticipated.

2.36 In 2009 the Mainland and Taiwan entered into Agreement between Both Sides of the Taiwan Strait on Jointly Fighting against Crimes and Mutual Judicial Assistance (the Mainland-Taiwan Agreement). The Mainland-Taiwan Agreement contains 24 articles and lays more emphasis on cooperation related to criminal cases. Article 10 of the Mainland-Taiwan Agreement provides that recognition

¹²⁶ Chen Qi-chui, Recognition and Enforcement of the Foreign Judgments (in Chinese), in: Journal of New Perspectives on Law, issue 75, 2001, p.164

¹²⁷ Jiang Shi-ming, Recognition and Enforcement of the Irrevocable Civil Judgments Rendered in the Mainland Area, in: Taiwan Law Journal (in Chinese), issue 123, 2009, p.45

¹²⁸ Taiwan Taoyuan District Court Application No. 1032 (2004); Taiwan Taoyuan District Court Re-Action No. 208 [2005]; Taiwan High Court Re-Appeal No. 175 [2007]; Taiwan Supreme Court No. 2531 [2007]; Taiwan High Court Retrial No. 210 [2007]; Taiwan Supreme Court No. 2376 [2008].

¹²⁹ Taiwan Supreme Court Appeal No. 2531 [2007]

and enforcement of civil judgments and arbitral awards shall be granted based on the principle of reciprocity without violating the public order or good morals, which is identical to article 74 of the Mainland Act. So far no relevant decision has been rendered on the basis of the Mainland-Taiwan Agreement.

3.2.2.2.2 Treatment of the SARs

2.37 Parallel to the Mainland civil and commercial judgment recognition system provided for in the Mainland Act, it is stated in article 42 of the HK and Macao Act that

“In determining the conditions for the validity, jurisdiction, and enforceability of civil judgments made in Hong Kong or Macao, Article 402 of the Code of Civil Procedure and Article 4-1 of the Compulsory Execution Law shall apply mutatis mutandis.”

2.38 The article 56 of the Hong Kong Act also stimulates that

“Mutual judicial assistance between the Taiwan Area and Hong Kong or Macao shall be conducted on a reciprocal basis.”

2.39 The article 402 of the Taiwan Code of Civil Procedure¹³⁰ stipulates recognition of the final and binding judgment rendered by a foreign court and the article 4-1 of the Compulsory Execution Law¹³¹ deals with the application for the writ of execution to enforce the foreign judgment or ruling. Therefore, it is obvious that the rules applied to recognition of the decisions made by the Hong Kong and Macao courts are almost the same as those employed in foreign judgments in Taiwan. The different rules of the parallel judgments recognition result in different procedures. A preliminary proceeding should be initiated for recognition of the Mainland judgments, whereas the irrevocable judgments rendered in SARs enjoy the same automatic recognition procedure as the foreign decisions.¹³² It is also clearly stated that the judgments rendered in the SARs

¹³⁰ Taiwan Code of Civil Procedure, article 402:

A final and binding judgment rendered by a foreign court shall be recognized, except in case of any of the following circumstances:

1. Where the foreign court lacks jurisdiction pursuant to the R.O.C. laws;
2. Where a default judgment is rendered against the losing defendant, except in the case where the notice or summons of the initiation of action had been legally served in a reasonable time in the foreign country or had been served through judicial assistance provided under the R.O.C. laws;
3. Where the performance ordered by such judgment or its litigation procedure is contrary to R.O.C. public policy or morals;
4. Where there exists no mutual recognition between the foreign country and the R.O.C.

The provision of the preceding paragraph shall apply *mutatis mutandis* to a final and binding ruling rendered by a foreign court.

¹³¹ The Taiwan Compulsory Execution Law, article 11:

When a final and binding judgment rendered by a foreign court, not contrary to the article 402 of the Code of Civil Procedure, applies for the compulsory enforcement, the Taiwan court shall declare the permission of execution in the form of a judgment.

¹³² Chen Qi-chui, Recognition and Enforcement of the Foreign Judgments (in Chinese), in: Journal of New Perspectives on Law, issue 75, p.156, 164, 2001; See also Jiang Shi-ming, Recognition and Enforcement of the Irrevocable Civil Judgments Rendered in the Mainland Area, in: Taiwan Law Journal, issue 123, 2009, p.37

shall be considered as the same validity in Taiwan. In the aforementioned judgment of the Taiwan Supreme Court Appeal No. 2531 (2007), the Supreme Court decided that:

Pursuant to article 402 of the Code of Civil Procedure, an irrevocable civil ruling or judgment rendered in foreign countries or in Hong Kong, Macao shall follow the mode of automatic recognition, i.e. once meeting the requirement of recognition, the validity of the irrevocable civil ruling or judgment shall be automatically recognized without the recognition ruling. However, the irrevocable civil ruling or judgment rendered in the Mainland Area shall only be recognized by the way of the ruling of Taiwan courts and shall only have the effect of execution instead of the same validity as irrevocable civil ruling or judgment rendered in Taiwan...

2.40 Taiwan's parallel judgment recognition system and its denial of *res judicata* of the Mainland judgments result in the uneven treatment towards the Mainland, HKSAR and Macao SAR, which now belong to one sovereignty. That kind of differentiated arrangement may increase the difficulty of the inter-regional legal cooperation.

Conclusion

2.41 The "one country, two systems" policy enabled China to resume its sovereignty over Hong Kong and Macao. Meanwhile, the two regions are also vested with a high degree of autonomy, which means the SARs, in accordance with the Basic Law, shall be vested with executive power, legislative power and independent judicial power, including that of final adjudication. At the same time, due to the implementation of CEPA, a regional common market in China is emerging. In addition, there is also a politically disputed region, Taiwan, which has its own executive power, legislative power and judicial power but has close economic contacts with the Mainland China.

2.42 After the reunification, China becomes a country with mixed jurisdictions, including both the civil law and the common law, and diverse legal characteristics are also guaranteed by the Basic Law. *A cross-border legal cooperation framework in matters of civil and commercial disputes came into existence. However,* compared to the active economic interaction among the four regions, the legal cooperation system is relatively insufficient. It lacks comprehensive rules concerning recognition and enforcement of the civil and commercial cases throughout the whole regions. *Instead, the cooperation* is conducted in the form of bilateral arrangements. Moreover, those arrangements merely provide cooperation in some selected areas, such as service of documents, recognition and enforcement of arbitral awards as well as civil and commercial judgments. With respect to recognition and enforcement of judgments, the scope is not open to all kinds of civil and commercial cases. As for the civil and commercial matters not covered by the mutual arrangements, the local rules shall apply, which result in uncertainty in the course of cooperation. In particular in Taiwan, the local rules provide different treatment to the civil and commercial judgments rendered in different places.

2.43 Consequently, without a comprehensive regional cross-border legal cooperation regime, in particular, a regional cross-border insolvency system, the cross-border economic participants among the four regions will not be able to assess the possible market risks on a predictable, equitable, and transparent manner,¹³³ which could jeopardize the long-term economic stability and cooperative relationship.¹³⁴

¹³³ According to the general objectives set by the IMF, the insolvency proceedings shall be the allocation of risk among participants in a market economy in a predictable, equitable, and transparent manner. IMF Legal Department, *Orderly & Effective Insolvency Procedures: Key Issues*, 1999, available at <http://www.imf.org/external/pubs/ft/orderly/#genobj> (Last visited on 14 June 2016)

¹³⁴ In January 2015, the Legislative Council released the summary of views and Government's responses on the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015. In matters of whether or not to adopt the UNCITRAL Model Law, the Government indicated, "At present, many major trading partners of Hong Kong, have not signed and adopted the UNCITRAL Model Law... We will closely monitor the international development and the attitude of our major trading partners in this regard and will consider how best to take forward the matter." Legislative Council Paper No CB(1)481/15-16(04), 22 January 2016, p.17. In June 2015, the Judicial Yuan of Taiwan issued the Summary Clarification of Amended Draft Taiwan Bankruptcy Act (renamed as Debt Clearance Act, in Chinese), "Due to the internationalization of economic activities and the need of close cross-strait trade relations, in order to guarantee equal treatment among the creditors from all countries and promote cross-border trade and investment, strengthen the timely judicial assistance and cooperation, it is explicitly stipulated that the debt clearance proceedings opened in the foreign countries, the Mainland, Hong Kong and Macao can be applied for recognition." Judicial Yuan of Taiwan, Summary Clarification of Amended Draft Taiwan Bankruptcy Act (renamed as Debt Clearance Act, in Chinese), 2 June 2015, para.19

