



# Cross-Border Co-operation in Employment Judgments

**A new reciprocal arrangement between Hong Kong and mainland China means final effective judgments in some employment matters can be recognised and enforced in both areas.** – By Johnny Choi and Helen Colquhoun

Following the cancellation of work permits in August 2018 for Hong Kong, Macau and Taiwan residents working in mainland China, there has been a further development in the employment law space that moves in the direction of cross-border integration between Hong Kong and the mainland.

On 18 January 2019, PRC Supreme People’s Court and the Government of the Hong Kong Special Administrative Region signed 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* (Arrangement), which will take effect on a date to be announced after

both jurisdictions have completed all necessary procedures to enable implementation.

This arrangement expands upon previous reciprocal arrangements between mainland China and Hong Kong courts. Importantly, it removes the exception on employment matters that applies under previous reciprocal arrangements. As a result, final effective judgments on certain labour and employment matters made by mainland courts can be recognised and enforced in Hong Kong, and vice versa judgments on claims by Hong Kong courts and labour tribunals may also be recognised and enforced in the mainland.

## Expansion of court judgments that can be enforced cross-border

Under previous reciprocal rules, if a party to a civil proceeding in relation to a civil and commercial dispute would like to apply for judgments issued by courts in the mainland to be recognised and enforced in Hong Kong (or vice versa in Hong Kong to be recognised and enforced in the mainland), certain preconditions must be met including:

- The parties involved in the judgment must have reached a prior written agreement to designate a court of Hong Kong or mainland to have exclusive jurisdiction for resolving the dispute, and
- The judgments made in these cases shall be the final judgments related to monetary payment, and shall be made by designated courts or higher courts (for instance, in the mainland, judgments by the Supreme People's Court, a Higher or Intermediate People's Court or above or certain designated Basic People's Courts, and in Hong Kong, judgments by District Court or above)

The previous reciprocal rules clearly exclude court judgments related to "employment contracts", and notably for Hong Kong, exclude judgments and orders made by the labour tribunal where most labour disputes are heard.

The new arrangement has either revised or deleted the preconditions above and expanded the case types able to be recognised and enforced by each side's courts to almost all traditional civil and commercial cases (subject to certain limitations). In particular, with the removal of the exception of "employment contracts", employment matters will potentially fall within the scope of the new arrangement. Some significant changes include that the exclusive jurisdiction requirement is no longer a precondition and the parties only need to establish a jurisdictional basis on the part of the court of the requesting jurisdiction (e.g. by showing that the defendant has a place of residence, representative office, branch or office etc. in the requesting jurisdiction or by showing that it is where the contract is performed). Level of courts covered has also been expanded to include

judgments made by lower courts and certain tribunals. In addition, given there is no requirement that the judgment to be enforced needs to be related to monetary payment any more, recognition to confirm certain relationship or facts ruled by court becomes achievable.

## Types of court judgments that can be enforced cross-border and limitations

Mainland and Hong Kong are under different legal systems. The arrangement tries to cover all the substantial judgments to be recognised and enforced. This includes:

- On the mainland side: judgment, ruling, conciliatory statement and order of payment made by the courts, and
- On the Hong Kong side: judgment, order, decree and allocator made by District Court or above and also certain tribunals including the labour tribunal.

Notably, the arrangement does not mention decisions made by the labour arbitration committee, which is the first forum for resolving most

labour and employment disputes in the mainland. Thus, such arbitration decisions cannot be recognised and enforced in Hong Kong. If one employer would like to enforce certain content in the arbitration decision in Hong Kong, it needs to get a further confirmation by a court judgment. On the other hand, for Hong Kong, the arrangement expressly includes labour tribunals, which renders cross-border enforcement of employment-related tribunal orders viable in the coming future.

In addition, the arrangement provides that "judgment" excludes preservative measures ruled in mainland and anti-suit injunction and interim relief ruled in Hong Kong (by way of example, an interim injunction granted by a Hong Kong court to prohibit an employee from joining a competitor in the mainland cannot be enforced in the mainland through this new arrangement). It means only substantial judgments can be recognised and enforced in the courts of the other side, and the procedural measures are still excluded from the arrangement's scope.

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## How to apply for reciprocal recognition and enforcement

*Applying to enforce a mainland judgment in Hong Kong:* The application should be submitted to the High Court.

*Applying to enforce a Hong Kong judgment in the mainland:* The applicant should file the application for recognition and enforcement of a judgment to an Intermediate Court of the place of residence of the applicant or the respondent, or the place where the property of the respondent is located.

If the application is submitted to two or more courts having jurisdiction, the court which accepts the case first shall exercise jurisdiction.

Some or all of the below materials need to be prepared for purposes of cross-border enforcement of a judgment:

- An application for recognition and enforcement of a judgment
- A copy of the effective judgment affixed with the seal of the court which issues the judgment
- A certificate issued by the court clarifying the judgment is a legally effective judgment and, if the judgment has content which can be enforced, proving the judgment is able to be enforced in the place where the judgment is made
- Where the judgment is a default judgment, a document proving that the counter party concerned has been legally summoned is required, unless the judgment expressly states the same, or the absent party is the party applying for recognition and enforcement, and
- Identity certificate.

## What this means for employers

This latest development allows employers to enforce judgments cross-border such as in cases where an employee has moved or has assets across the border in Hong Kong or mainland. Although there are certain limits (e.g. interim injunctions in Hong Kong and decisions by labour arbitration commission in the mainland are excluded), it opens up more options for employers to pursue employees for violation of their obligations. For example, even if an employee or former employee permanently relocated or returned to the mainland, a Hong Kong employer can now

pursue him/her for any training bond or valuable asset owed or any damages he/she caused by obtaining a judgment in Hong Kong and enforcing it in the mainland. As for mainland employers, they can now for example enforce judgments for breach of non-compete or restrictive covenants with the award of damages even if the former employee has permanently relocated or returned to Hong Kong. This may potentially reduce the need to sign restrictive covenant agreements in both Hong Kong and mainland which is the practice some multinational companies adopt for key employees with regional responsibilities.

However, the arrangement also creates more potential for employees to bring claims against employers. For example, in some cases where a company in Hong Kong hired an employee in mainland China without setting up an entity in mainland China, it may become possible for the employee to obtain a judgment in the mainland and then seek to enforce it in Hong Kong. Previously, it would have been difficult for an employee in such situation to enforce their rights across the border in Hong Kong. **B**



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