Using the Hong Kong system for your dispute resolution

China’s dispute resolution systems (Courts and arbitral bodies) can be used effectively to determine domestic disputes. Where there is an international element, however, many project participants wish to turn to other jurisdictions for dispute adjudication. Hong Kong is an obvious and well-placed jurisdiction for determination of China oriented disputes because of:

• its renowned systems upholding the rule of law
• the ready availability of judges, arbitrators and lawyers fluent in the Chinese language
• its geographical proximity
• arrangements for the mutual enforceability of judgments and arbitral awards
• the fact that many Chinese businesses are listed on the Hong Kong Stock Exchange.

Can I have my commercial dispute adjudicated in Hong Kong?
In the absence of agreement between the parties to the contrary, the choice of jurisdiction, form of dispute resolution (usually court or arbitration) and applicable law, will be governed by the relevant contract. The starting point for Hong Kong dispute resolution therefore comes at the contract drafting stage (i.e. before a dispute is in contemplation).

However, unless a jurisdiction other than Hong Kong is stated to have “exclusive jurisdiction” over a contract’s disputes, it may well be possible to use the Hong Kong courts for China oriented disputes. The Hong Kong Court of First Instance will accept cases with an adequate connection to Hong Kong, which can include where:

• the person is served with legal process whilst physically within Hong Kong
• the claim is brought against a person duly served in Hong Kong and a person out of the jurisdiction is a necessary or proper party
• the subject contract was made in Hong Kong or governed by Hong Kong law
• the subject contract was breached, or in a tort case damage was sustained, in Hong Kong.

Even if the defendant is not physically present in Hong Kong, the Court will permit service outside Hong Kong where an adequate connection is shown.

Collecting debts owed by individuals and companies in Hong Kong
In cases where Hong Kong jurisdiction is established, creditors need to choose between seeking a court or arbitral award (“dispute resolution”) or pursuing the debtor through winding up proceedings (in the case of a company) or bankruptcy proceedings (in the case of an individual) (“insolvency proceedings”). Insolvency proceedings should only be used where the debt is effectively unarguable.

There are different ways to enforce a judgment in Hong Kong depending on the type of assets involved.

Does the judgment debtor have any assets?
• A judgment creditor (i.e. the winning party) can make an application to the Court for oral examination of the judgment debtor (i.e. the paying party). If the judgment debtor is a company, the judgment creditor can examine its officers. Oral examination is done at the Court when the judgment creditor can cross-examine the judgment debtor (or its officer), under oath, on the assets and means he has to satisfy the judgment.
• The judgment debtor will also be required to produce relevant books or records. If a judgment debtor chooses to ignore the request under oral examination, he may be fined or found to be in contempt of the court, which may result in imprisonment.
• A judgment creditor may also apply to the court for a prohibition order prohibiting the judgment debtor from leaving Hong Kong in order to facilitate enforcement.
• Information obtained from the oral examination can help to shed light on the best means of enforcement.

Where the judgment debtor has property in Hong Kong
A judgment creditor may apply to the court for a charging order. A charge will be made in favour of the judgment creditor on the property (i.e. land, securities) of the judgment debtor.

Where the judgment debtor has a bank account or debts due
A judgment creditor may commence garnishee proceedings, where debts due to the judgment debtor may be ordered to be paid directly to the judgment creditor to satisfy the judgment.

Where the judgment debtor is a company or an individual
A judgment creditor may present a winding up petition to wind up the company or to declare an individual bankrupt. The Court will appoint liquidators or trustees whose duty is to obtain and preserve the assets of the judgment debtor. The creditors of the company or the individual will be paid out from the assets discovered, subject to preferred creditors, equally amongst remaining creditors.

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Reciprocal enforcement of judgments between mainland China and Hong Kong

The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) and the “Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters” provide for mutual enforcement of final judgments in Hong Kong and China.

The Hong Kong and China courts can mutually enforce:
• Final monetary judgments by a designated court of China or Hong Kong
• For disputes arising from civil or commercial contracts where the parties concerned have made an agreement in writing, specifying the China or Hong Kong court has the sole jurisdiction to resolve any dispute arising out of the contract. This arrangement excludes employment, family or other non-commercial matters.

In general, in order to register a China judgment for enforcement in Hong Kong, the judgment must be from the courts at the Intermediate People’s Court level or above and specified Basic Level People’s Court and be certified as final and conclusive as being enforceable in China. The registration must also be made within two years from the date of the judgment.

What if I have an arbitration award from China?
The Arbitration Ordinance (Cap 609) and the “Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region” provide for mutual enforcement of arbitration awards in Hong Kong and China.

A Mainland award is defined as “an arbitral award made in the Mainland by a recognised Mainland arbitral authority in accordance with the Arbitration Law of the People’s Republic of China”. Accordingly, not all arbitral awards from China are eligible for enforcement in Hong Kong. However, awards issued by the CIETAC, CMAC and most domestic arbitration commissions in major cities are generally recognised.

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Handling regulatory investigations in Hong Kong

In addition to disputes with contracting parties, companies and individuals carrying out business which is either regulated in Hong Kong or otherwise connected with Hong Kong can find themselves involved in regulatory investigations or subject to scrutiny by Hong Kong public bodies. Examples include:
• Investigations into stock market abuse by the Securities and Futures Commission (SFC)
• Investigations into alleged corruption by the Independent Commission Against corruption (ICAC)
• Ad hoc commissions of inquiry relating to issues of public importance and investigations by the Office of The Ombudsmans.

All of these investigators have wide powers of investigation and it is most important that those approached by these authorities, or by the Hong Kong Police, seek immediate legal advice.

How can Pinsent Masons help you?

We can advise on the best way to enforce judgments or awards in Hong Kong or in other foreign jurisdiction.

We can assist in making the relevant application to the Court in Hong Kong, China or a recognised foreign court to enforce the judgment or award.

In support or furtherance of the above, we can:
• Arrange for an asset search on the judgment (or award) debtor in Hong Kong
• Commence enforcement proceedings in Hong Kong to secure assets of a judgment (or award) debtor
• Commence winding up or bankruptcy proceedings.

This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

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