

19th Conference of Chief Justices of Asia and the Pacific

Keynote Speech by

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Cross-border Judicial Co-operation and Exchanges in Hong Kong

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Fellow Chief Justices, fellow Judges, Honoured Guests, Ladies and Gentlemen,

Introduction

1. I would like to take this opportunity to share with you an overview of Hong Kong's cross-border experience in judicial co-operation and exchanges. The distinctive position of Hong Kong within the People's Republic of China, and its role as a bridge between common law and civil law jurisdictions, makes its experience a particularly interesting one for jurisdictions engaged in or contemplating similar co-operative ventures.

The Continuation of the Common Law System in Hong Kong

2. It will not be unfamiliar to many of you that Hong Kong has a long-established common law tradition. Some background on this point will help provide context for what I am about to share today.

3. When the People's Republic of China was to resume the exercise of sovereignty over Hong Kong in 1997, a central question arose: how would Hong Kong's common law system continue, given that the Mainland operates under a civil law system? This issue was addressed by the constitutional principle of 'One Country, Two Systems', which allows Hong Kong to maintain its own economic, administrative, and legal systems while remaining an inseparable part of China. This principle is enshrined in Hong Kong's constitutional framework, the Basic Law.

4. The Basic Law of the Hong Kong Special Administrative Region, promulgated in 1990 and entered into force on 1 July 1997, serves as the constitutional blueprint for Hong Kong. Under Articles 2 and 19, the independence of Hong Kong's judiciary and its common law system are expressly safeguarded. Articles 80 and 85 further provide that the courts of the Hong Kong Special

Administrative Region shall exercise judicial power independently, free from interference. Moreover, Articles 8 and 81 preserve the pre-existing judicial system of Hong Kong, save for the establishment of the Court of Final Appeal, which replaced the Judicial Committee of the Privy Council as Hong Kong's highest court.

5. Under the 'One Country, Two Systems' framework, the Hong Kong Special Administrative Region is the only common law jurisdiction within the People's Republic of China. This innovative approach, allowing for the co-existence of multiple legal systems within one sovereign state, positions Hong Kong uniquely as a jurisdiction with deep-rooted connections to both the Mainland and the international community. Hong Kong, therefore, acts as a bridge between East and West, leveraging its common law system to facilitate cross-border co-operation.

6. One notable feature of Hong Kong's connection to other common law jurisdictions is the panel of overseas Non-permanent Judges who sit on the Court of Final Appeal. Under the Basic Law, the Court of Final Appeal may invite judges from other common law jurisdictions to sit as part of the court when required. This

arrangement ensures that Hong Kong's apex court remains firmly connected to the broader common law world. Currently, the Court of Final Appeal benefits from the wisdom of six Non-permanent Judges drawn from other common law jurisdictions.

Judicial Cooperation between Hong Kong and Other Jurisdictions

7. The co-existence of two legal systems within one country naturally gives rise to complex operational questions. Although the Mainland and the Hong Kong Special Administrative Region operate under distinct legal systems, these systems do not exist in isolation from one another. Indeed, for the welfare and livelihood of those living in both the Mainland and Hong Kong, it is imperative that the two legal systems interact and co-operate.

8. To this end, Articles 95 and 96 of the Basic Law provide the constitutional framework for such co-operation. Under these provisions, the Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the Country, and they may render assistance to each other. With the assistance or authorisation of the Central People's Government, the

Government of the Hong Kong Special Administrative Region may also make appropriate arrangements with foreign jurisdictions for reciprocal juridical assistance. These constitutional provisions enable judicial cooperation between Hong Kong and other jurisdictions, including the Mainland.

Judicial Co-operation between Hong Kong and the Mainland in Civil and Commercial Matters

9. Since 1 July 1997, the Government of the Hong Kong Special Administrative Region has entered into a total of nine arrangements with Mainland authorities on matters related to mutual legal assistance, covering a wide range of areas.

10. The first of these arrangements, which entered into force on 30 March 1999, concerned the service of judicial documents in civil and commercial proceedings taking place in Mainland or Hong Kong courts.¹ The following year, an important arrangement was reached for the mutual enforcement of arbitral awards between the

¹ 《關於內地與香港特別行政區法院相互委托送達民商事司法文書的安排》 (courtesy English translation: ‘Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region’).

courts of the Mainland and Hong Kong,² as the New York ‘Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ does not apply to these awards given that Hong Kong is part of the People’s Republic of China.

11. In 2008, an arrangement was concluded and came into force on 1 August concerning the reciprocal recognition and enforcement of judgments on disputes arising from business-to-business agreements where the parties have agreed in writing to designate a Mainland court or Hong Kong court as the exclusive forum to resolve disputes. This arrangement, though limited in its scope of application, was nonetheless a landmark development, given the potential complexity in enforcing judgments between common law and civil law courts. Under common law principles, foreign judgments are enforceable if they are for a definite sum of money, and are final and conclusive. However, the enforcement of foreign judgments is rarely straightforward and often open to dispute. To simplify the enforcement process of foreign judgements, legislation has been passed in Hong Kong allowing parties to bypass the

² 《關於內地與香港特別行政區相互執行仲裁裁決的安排》(courtesy English translation: ‘Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region’).

common law route.³ Yet, judgments from Mainland courts do not fall within the definition of ‘foreign judgments’ in the legislation, thereby raising the question of how such judgments might be enforced in Hong Kong. The reciprocal recognition and enforcement of judgments arrangement which entered into force in 2008 addresses this issue,⁴ demonstrating the complexities of applying the ‘One Country, Two Systems’ principle.

12. Following the 2008 arrangement, another arrangement was entered into for the mutual taking of evidence in civil and commercial matters, which took effect on 1 March 2017.⁵

13. On 1 October 2019, an arrangement on mutual assistance in court-ordered interim measures in support of arbitral proceedings came into force.⁶ This was followed by a supplemental arrangement

³ Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

⁴ 《關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排》 (courtesy English translation: ‘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’).

⁵ 《關於內地與香港特別行政區法院就民商事案件相互委託提取證據的安排》 (courtesy English translation: ‘The Arrangement on Mutual Taking of Evidence in Civil and Commercial matters between the Courts of the Mainland and the Hong Kong Special Administrative Region’).

⁶ 《關於內地與香港特別行政區法院就仲裁程序相互協助保全的安排》 (courtesy English translation: ‘Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region’).

concerning the mutual enforcement of arbitral awards, parts of which entered into force on 27 November 2020 and 19 May 2021.⁷

14. On 15 February 2022, an arrangement was implemented concerning the reciprocal recognition and enforcement of judgments in matrimonial and family cases.⁸ This arrangement is of particular importance in safeguarding the interests of parties to cross-boundary marriages, as well as their families and children. By minimising the need for re-litigation in both the Mainland and Hong Kong courts, this arrangement allows for the timely provision of judicial relief, reducing the time, cost, and emotional strain on the parties involved.

15. As for the reciprocal recognition and enforcement of judgments in civil and commercial matters, a new arrangement became law in January this year,⁹ expanding the scope of mutual

⁷ 《關於內地與香港特別行政區相互執行仲裁裁決的補充安排》 (Courtesy English Translation: ‘Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region’).

⁸ 《關於內地與香港特別行政區法院相互認可和執行婚姻家庭民事案件判決的安排》 (courtesy English translation: ‘Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region’).

⁹ Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645).

recognition and enforcement between the Mainland and Hong Kong. Unlike the 2008 arrangement, this new arrangement does not require the presence of a choice of forum agreement, and, more importantly, covers all matters which are considered to be of a ‘civil and commercial’ nature under both Hong Kong and Mainland law. It excludes administrative or regulatory matters, personal bankruptcy, corporate insolvency and debt restructuring, to which I will shortly return. In drafting this arrangement, reference was made to the draft version of the ‘Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters’, further integrating Hong Kong’s judicial practices with international standards.

16. This arrangement is part of an evolving series, and its smooth implementation has allowed for incremental expansion. The success of these arrangements rests on an in-depth understanding of both legal systems, as well as careful observation and caution in addressing cross-border issues. Through these arrangements, significant cross-border legal issues have been resolved, ensuring the effective operation of the ‘One Country, Two Systems’ principle.

Judicial Cooperation in Cross-Border Insolvency Matters

17. Another area in which Hong Kong has played a key role in cross-border judicial cooperation is in insolvency matters. Although Hong Kong has not adopted the ‘UNCITRAL Model Law on Cross-Border Insolvency’ as part of its winding-up procedures, many of the Model Law’s provisions have been applied in practice by the courts. These provisions include (1) access to the courts, (2) recognition of foreign insolvency proceedings, and (3) the provision of assistance in foreign winding-up proceedings.

18. Foreign companies and creditors may commence winding-up proceedings in Hong Kong. The courts will exercise jurisdiction on such proceedings if the three threshold requirements established by the Court of Final Appeal¹⁰ are satisfied. These requirements are: (1) the company must have a sufficient connection to Hong Kong; (2) there must be a reasonable possibility of benefit to the applicant if the company is wound-up in Hong Kong; and (3) the company must have creditors in Hong Kong.

¹⁰ *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501; *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd* (2022) 25 HKCFAR 98, [2022] HKCFA 11.

19. The requirement of a ‘sufficient connection’ is similar to, though arguably less stringent than, the ‘Centre of Main Interests’ (COMI) test and the ‘Establishment’ requirement under the Model Law. In Hong Kong, the mere presence of assets—particularly if they are significant—can satisfy the ‘sufficient connection’ requirement, whereas COMI or ‘Establishment’ under the Model Law demands a more substantial connection.

20. For restructuring proposals, liquidators seeking the court’s sanction to bind creditors in Hong Kong must satisfy the same three threshold requirements as those applicable to winding-up proceedings.

21. In terms of recognition and assistance, Hong Kong courts will assist foreign liquidators in the spirit of ‘modified universalism’. Common forms of assistance include orders requiring individuals in Hong Kong to provide information and documents or to hand over the books, records, and assets of the company in liquidation.

22. Hong Kong courts apply the same approach to applications for recognition and assistance under both common law and the arrangement on mutual recognition of and assistance to insolvency proceedings’, promulgated in May 2021.¹¹ Under this arrangement, courts in three pilot areas on the Mainland—Shanghai, Shenzhen, and Xiamen—will recognise Hong Kong insolvency proceedings if (1) Hong Kong has been the company’s COMI for at least six months, and (2) the company’s principal assets or place of business are located in one of the three pilot areas. The relevant proceedings include compulsory winding-up, voluntary winding-up, and schemes of arrangement promoted by a liquidator or provisional liquidator and sanctioned by the Hong Kong courts. Notably, the recognition and assistance provided by Hong Kong courts extend beyond these three pilot areas to all insolvency proceedings in the Mainland.

Judicial Cooperation in Criminal Matters

23. Turning now to the criminal sphere, Hong Kong provides and seeks mutual legal assistance in criminal matters under the Mutual

¹¹ 《最高人民法院與香港特別行政區政府關於內地與香港特別行政區法院相互認可和協助破產程序的會談紀要》 (courtesy English translation: ‘The Record of Meeting of the Supreme People’s Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region’).

Legal Assistance Ordinance (Cap 525). This assistance is sought and provided on the basis of (1) bilateral mutual legal assistance agreements, (2) multilateral conventions containing mutual legal assistance provisions, and (3) reciprocity undertakings.

24. While mutual legal assistance requests are made on a government-to-government basis, many types of assistance provided by Hong Kong require the sanction of the courts. These include obtaining documentary evidence from witnesses in Hong Kong (such as bank records), taking evidence before a magistrate, restraining and confiscating the proceeds of crime, and search and seizure.

25. As the Mainland and the Macao Special Administrative Region are of course not ‘other countries’ under this statutory regime, mutual legal assistance in criminal matters between Hong Kong and the Mainland, or Hong Kong and Macao, is provided through court-to-court letters of request. This regime is governed by Parts VIII and VIIIA of the Evidence Ordinance (Cap 8), with assistance sought and rendered on the principle of judicial comity. Requests are processed on a case-by-case basis, and section 77B of the Ordinance provides that the assistance rendered or sought may

involve the taking of both oral and documentary evidence, either by way of written deposition or live television link.

Judicial Exchanges

26. In addition to formal judicial co-operation, Hong Kong maintains regular exchanges with jurisdictions around the world, both common law and civil law. Earlier this year, for example, Hong Kong, in collaboration with the Supreme Court of New South Wales and the Supreme Court of Singapore, hosted the Eighth Judicial Seminar on Commercial Litigation, which was attended by approximately 30 senior judges from 10 jurisdictions across the Asia-Pacific region. In April 2024, we participated in the Fifth Full Meeting of the Standing International Forum of Commercial Courts in Qatar, where we shared our experiences in transnational judicial co-operation. Many of the jurisdictions with which we have exchanged views are represented here today, and we welcome the opportunity for further exchanges in the future.

Observations

27. From Hong Kong's experiences in judicial co-operation and exchanges, several observations may be made.

28. First, while the arrangements for reciprocal enforcement of judgments and other forms of co-operation may appear to be domestic law, the latest arrangements have drawn on international standards, such as the draft 'Hague Convention on the Recognition and Enforcement of Foreign Judgments'. These international agreements form the basis of judicial co-operation between jurisdictions, particularly when bridging the divide between common law and civil law systems.

29. Second, the development of these arrangements requires time. The arrangements between the Mainland and Hong Kong, for example, have been reached incrementally, with careful observation of their operation. The ultimate aim is to ensure that the rights of the parties in both jurisdictions are respected and enforced equally by the courts of both systems. This is particularly important in areas such as family law, where the re-litigation of sensitive issues can cause undue hardship to the parties involved.

30. Third, successful judicial co-operation requires a foundation of common ground. In the case of Hong Kong and the Mainland, arbitration provided a useful starting point for cooperation, but other areas of mutual concern—such as commercial law, financial regulation, and family law—have also proved fertile ground for collaboration.

31. Finally, training and education are essential to fostering mutual understanding and bridging the gaps between legal systems. In developing cross-border judicial cooperation, it is crucial that judges and legal professionals are equipped with the knowledge and skills necessary to navigate different legal traditions.

Conclusion

32. In conclusion, I am grateful for the opportunity to share with you some of Hong Kong's experiences in judicial co-operation and exchanges. Hong Kong has been fortunate to benefit from exchanges with both common law and civil law jurisdictions, and we are indebted to the many judges and legal professionals from around the world who have shared their wisdom with us. As always, the greatest challenge we face is time, and it is imperative that we

use the time available for co-operation, exchanges, and training as effectively as possible. Thank you for your attention.