

**Consultation Paper on the  
Hague Convention on the Exclusive Choice of Court Agreements  
Submission of the Hong Kong Bar Association**

1. The Hong Kong Bar Association ("HKBA") has considered the contents of the Consultation Paper issued by the Department of Justice ("DOJ") dated 5<sup>th</sup> July 2007 ("**the 2007 Consultation Paper**") on the Hague Convention on the Exclusive Choice of Court Agreements ("**the Convention**").
2. Many of the problems highlighted by the HKBA in earlier submissions regarding the drafts of the Convention have now been addressed. However, several serious concerns remain, and in light of such concerns, the HKBA has some reservations regarding the application of the Convention to Hong Kong.

**Documents considered**

3. For the purposes of this Submission, the following documents have been considered:

The 2003 Draft Convention

- Draft Hague Convention on Exclusive Choice of Court Agreements dated December 2003 (Work. Doc. No. 49 of December 2003) ("**the 2003 Draft Convention**") ;
- Consultation Paper issued by the DOJ dated January 2004 on the 2003 Draft Convention ("**the 2004 Consultation Paper**") ;
- HKBA's Submission dated 13<sup>th</sup> February 2004 on the 2004 Consultation Paper and the 2003 Draft Convention ("**the 1<sup>st</sup> Submissions**") ;
- Mr Martin Liao's views dated 29<sup>th</sup> March 2004 on the 2004 Consultation Paper and the 2003 Draft Convention ("**Mr Liao's Comments**") ;

### The 2004 Draft Convention

- Draft Hague Convention on Exclusive Choice of Court Agreements dated December 2004 (Work Doc. No. 110 Revised; Annex II to Explanatory Report dated December 2004) (“**the 2004 Draft Convention**”);
- HKBA’s Comments on the 2004 Draft Convention (“**the 2<sup>nd</sup> Submissions**”);

### The Convention

- The Convention ;
- Explanatory Report by Professors Trevor Hartley & Masato Dogauchi, Rapporteurs to the Special Commission of the Hague Convention on Private International Law (“**the Explanatory Report**”); and
- The 2007 Consultation Paper.

### The Approach and Structure of this Submission

4. The areas which cause concern have already been comprehensively discussed by HKBA in the 1<sup>st</sup> and 2<sup>nd</sup> Submissions. Therefore, the approach that HKBA has taken is to review its concerns, which were in relation to earlier drafts of the Convention, and consider:-
  - whether such comments still apply to the final version of the Convention; and
  - whether such concerns are justified.
5. The comments below are arranged according to the Articles to which they relate. HKBA has chosen this arrangement in order not to disrupt the logical flow of the comments.
6. The issues which cause serious concern are as follows:
  - The definition of the term “preliminary question” is not settled and may therefore cause problems (paragraphs 15-16);

- The deeming provision under Article 3(b) of the Convention is artificial and unfair (paragraphs 19-22);
  - Article 4(1) of the Convention would require Hong Kong courts to enforce a foreign judgment granting remedies not conventionally granted under Hong Kong laws (paragraphs 25-27); and
  - where the Convention applies, Hong Kong courts will no longer be able to question the merits of a foreign judgment in relation to fraud (paragraphs 45-48).
7. Comments regarding the serious issues listed above, minor issues, and issues which had arose as a result of earlier drafts but have already resolved are arranged according to the Article to which they relate.

## **Chapter I – Scope and Definitions**

### *Matters excluded from the scope of the Convention*

8. HKBA expressed dissatisfaction regarding the definition of “consumer” under Article 1(2)(a) of the 2003 Draft Convention (adopted without revision as Article 2(1)(a) of the Convention), preferring the wider and more flexible definition under Hong Kong law (paragraph 5, 1<sup>st</sup> Submission). HKBA’s concern in this regard was not resolved.
9. HKBA stated that Article 1(3) of the 2003 Draft Convention was ambiguous because it focused on “proceedings” as opposed to the subject matter that the exclusive choice of court agreement seeks to cover (paragraph 6, 1<sup>st</sup> Submission). This Article was revised in accordance with the HKBA’s comment so that it no longer referred to “proceedings” (see Article 2(2) of the Convention).
10. HKBA stated it was not clear from Article 1(3)(e) of the 2003 Draft Convention whether “insolvency” covers both natural persons and legal or juridical persons (paragraph 7 of the 1<sup>st</sup>

Submission). This Article was not revised for the final draft of the Convention. However, paragraph 56 of the Explanatory Report clarifies that “insolvency” covers the bankruptcy of individuals as well as the winding-up or liquidation of corporations that are insolvent. Although the Explanatory Report is not binding, it should be given serious consideration when applying the Convention. Therefore, paragraph 56 should adequately satisfy the HKBA’s concerns in this respect.

11. HKBA stated that there were no reasons why contracts for the carriage of goods by sea should be excluded under Article 1(3)(f) of the 2003 Draft Convention (Article 2(2)(f) of the Convention) (paragraph 7 of the 1<sup>st</sup> Submission). This Article was not revised. However, paragraph 58 of the Explanatory Report explains that the international carriage of persons or goods is subject to a number of other international conventions. Such matters are therefore excluded from the Convention to avoid a conflict between the conventions.
12. HKBA stated that it should be made clear in Article 1(3)(i) of the 2003 Draft Convention that short term tenancies are also excluded from the remit of the Convention (paragraph 7 of the 1<sup>st</sup> Submission). This Article was revised in accordance with HKBA’s comments (see Article 2(2)(l) of the Convention).

#### *Intellectual Property*

13. Article 2(2)(n) of Convention excluded certain matters relating to the validity of intellectual property rights from the scope of the Convention, but states that “copyright and related rights” do not fall within the scope of this exception. When commenting on the equivalent provision in the 2004 Draft Convention, HKBA agreed that the Convention should not exclude matters relating to validity of intellectual property rights due to the *Mozambique Rule*. However, HKBA considered that the *Mozambique Rule* should apply to “copyright and related rights” and therefore that the same should fall within the scope of this exception (see the 2<sup>nd</sup> Submission). The Explanatory Report did not provide any explanation, and therefore this issue remains.
14. The comment at the bottom of page 2 of the 2<sup>nd</sup> Submission is in relation to the 2004 Draft Convention, which had included a provision numbered as Article 6 in the following terms: “Nothing in this Convention shall prevent the chosen court from suspending or dismissing the

*proceedings before it, in particular in order to allow the courts of the State or under the law of which an intellectual property right arose, to give a judgment on its validity, provided that such dismissal does not prevent the proceedings from being recommenced.”* This provision was not adopted in the final draft of the Convention.

*“Preliminary question”*

15. Article 2(3) of the Convention states that proceedings are not excluded from the scope of the Convention where a matter excluded under Article 2 arises only as a “preliminary question” and not as an object of the proceedings. In my view, the term “preliminary question” is ambiguous. The Explanatory Notes do not provide much assistance regarding the definition of the term “preliminary question”.
16. There is some reason for concern. HKBA is not aware that the term “preliminary question” has been adopted previously in the context of mutual enforcement of judgment between States. Since the State Parties to the Convention come from different systems of law, it may prove difficult achieve a workable definition for the term “preliminary question”.

*Immunity of states*

17. HKBA suggested that Article 1(7) of the 2003 Draft Convention be amended so that it would be clear that Article 1(7) does not have the effect of excluding from the scope of the Convention *acta jure gestionis* (acts of a State or international organisation which are of a private or commercial character) (paragraph 9 of the 1<sup>st</sup> Submission).
18. HKBA is of the view that no such clarification is necessary. States do not, under international law, have immunity for *acta jure gestionis*. Article 1(7) merely states that nothing in the Convention affects the privileges and immunities of sovereign states. Therefore, Article 1(7) will not have the effect of excluding the same from the scope of the Convention in any event. Article 1(7) of the 2003 Draft Convention was adopted without revision as Article 2(6) of the Convention.

*Deeming provision*

19. HKBA pointed out that the deeming provision in Article 2(2) of the 2003 Draft Convention (adopted without revision as Article 3(b) of the Convention) was too wide, because it does not allow a party to the agreement to satisfy the court chosen that the agreement is not an exclusive choice of court agreement (paragraph 11 of the 1<sup>st</sup> Submission).
20. The Explanatory Report provides more cause for concern. Paragraph 108 of the Explanatory Report states that the following would both be regarded as exclusive choice of court agreements:
- (a) "The courts of State X shall have jurisdiction to hear proceedings under this contract."
  - (b) "Proceedings under this contract shall be brought before the courts of State X."
21. HKBA considers that statement (b) clearly makes it imperative for the proceedings to be brought in State X. However, statement (a), on its face, leaves it open for courts other than State X to have jurisdiction under the contract. The deeming of statement (a) to be an exclusive choice of court agreement would be rather artificial and unfair.
22. The Convention sets up an international system to facilitate the mutual enforcement of judgments, and HKBA understands that in some cases, deeming provisions which are wide are accepted in order to achieve the goal of harmonization. However, HKBA is of the view that the deeming provision in Article 3(b) of the Convention goes too far.

*Authenticity of document evidencing Agreement*

23. HKBA expressed concern that Article 2(3)(b) of the 2003 Draft Convention did not require considerations of authenticity and integrity in the means of communication in question (paragraph 12 of the 1<sup>st</sup> Submission).
24. This Article was adopted without revision as Article 3(c)(ii) of the Convention. However, HKBA considers that any court, when determining whether a document evidences an

agreement, would take into account considerations of authenticity and integrity as a matter of course, and therefore it is not necessary to require such considerations expressly.

#### *Unconventional remedies*

25. HKBA considered that the effect of Article 3(1) of the 2003 Draft Convention is that the Convention would cover non-monetary judgments granting more unconventional or exotic remedies. HKBA expressed concern that the Convention would require Hong Kong courts to enforce a foreign judgment granting remedies not conventionally granted under Hong Kong laws.
26. Revisions adopted in the final version of the Convention (Article 4(1)) did not address HKBA's concerns.
27. This is a serious concern. However, HKBA understands that the Convention is not the first of its kind to require states to mutually enforce non-monetary judgments. The European Council's Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Brussels I**") does not contain any requirement that the foreign judgment to be enforced shall be for a fixed sum of money. Rather, a decree of specific performance or an injunction is as entitled to enforcement as a money judgment. HKBA is therefore of the preliminary view that it is possible for states to enforce judgments which are not money judgments, although HKBA has not considered Brussels I Regime in any great detail. It would be useful to conduct further research on this point to ascertain the nature and extent of the difficulties involved, as well as whether such an enforcement regime would be effective outside the context of the European Union.

#### *Interim orders of protection*

28. HKBA expressed concern that the definition of "judgment" under Article 3(1) of the 2003 Draft Convention did not contain any element of finality, and hence that orders granted after a provisional or interim determination on the merits would fall within the definition of "judgment" (paragraph 15, 1st Submission).

29. The final version of the Convention does not require a decision to have any element of “finality” in order to fall within the definition of “judgment”. However, it does address HKBA’s comments: Article 4(1) now contains an additional statement which states expressly that an interim measure of protection is not a judgment.
30. It should be noted that HKBA’s opinion at paragraph 13 of the 1st Submission that Mareva injunctions and Anton Piller Orders will qualify as “judgments” is no longer accurate because of the amendment of what is now Article 4(1), since such orders constitute “interim orders of protection”.

## Chapter II – Jurisdiction

### *Discrepancy between exceptions which apply to the rules in Articles 5 and 6 of the Convention (Articles 4 and 5 of the 2003 Draft Convention)*

31. At paragraph 19 of the 1<sup>st</sup> Submissions, HKBA stated that it did not understand why the rule requiring a court of a Contracting State chosen by the parties to exercise jurisdiction (Article 4, 2003 Draft Convention) was subject to only one exception (exclusive choice of court agreement determined to be null and void under the law of the State purportedly designated by the parties) while the rule requiring a court of a Contracting State not designated by the parties to decline jurisdiction (Article 5, 2003 Draft Convention) was subject to the following exceptions *in addition* to the “null and void” exception:

- a party lacked the capacity to enter into the agreement under the law of the State of the court seised (Article 5(b), 2003 Draft Agreement);
- giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy (Article 5(c), 2003 Draft Agreement);
- for exceptional reasons the agreement cannot reasonably be performed (Article 5(d), 2003 Draft Agreement);



- the chosen court has decided not to hear the case (Article 5(e), 2003 Draft Agreement); or
- the parties are habitually resident [only] in the State of the court seised, and the relationship of the parties and all other elements relevant to the dispute, other than the agreement, are connected with that State (Article 5(f), 2003 Draft Agreement).

32. Articles 4 and 5 of the 2003 Draft Convention were adopted as Articles 5 and 6 of the Convention without substantial amendment.

33. HKBA's concerns can be answered in the following ways:

- In paragraph 126 of the Explanatory Report, the learned authors clarify that the "null and void" exception under what was Article 4 of the 2003 Draft Convention (now Article 5 of the Convention) is intended to refer to generally recognized grounds like fraud, mistake, misrepresentation, duress and lack of capacity. In other words, the rule requiring a court of a Contracting State chosen by the parties to exercise jurisdiction was also subject to the exceptions listed in what was Article 5(b) and (c) of the 2003 Draft Convention (now Article 6(b) and (c) of the Convention). Therefore, although there is room for improving the drafting, HKBA considers that the Explanatory Report clarifies matters adequately.
- Article 5(d) of the 2003 Draft Convention (now Article 6(d) of the Convention) creates an exception for the rule that a court of a Contracting State other than the chosen court must decline jurisdiction where for exceptional reasons beyond the control of the parties the agreement cannot reasonably be performed. Paragraph 154 of the Explanatory Report states that this exception was intended to apply to cases where it would not be possible to bring proceedings before the chosen court. Therefore Article 5(d) of the 2003 Draft Convention (Article 6(d) of the Convention) by its very nature can only apply to the rule that a court of a Contracting State other than the chosen court must decline jurisdiction. It cannot apply as an exception to the rule that the court of a Contracting State designated by the parties must exercise jurisdiction, because it was not possible to bring proceedings before that chosen court in the first place. The same is true of Article 5(e) of the 2003 Draft Convention (Article 6(e) of the Convention).

34. HKBA notes that in passing that Article 5(f) of the 2003 Draft Convention has been deleted. HKBA's comments in paragraph 22 of the 1<sup>st</sup> Submission are therefore no longer relevant.

*The law applicable to determine the capacity of a party*

35. HKBA expressed concern that the court seised would apply its domestic law to determine the capacity of a party to enter into the agreement. Paragraph 150 of the Explanatory Report clarifies that it is the choice of law rules of the court seised, rather than its domestic law, which should be applied under Article 5(b) of the 2003 Draft Convention (adopted as Article 6(b) of the Convention without amendment).

*Potential abuse of Article 6(c) of the Convention*

36. HKBA and the 2004 Consultation Paper express concerns that the exception under Article 5(c) of the 2003 Draft Convention (adopted without substantial amendment as Article 6(c) of the Convention) would be abused so as to impair the object and usefulness of Article 5 of the 2003 Draft Convention (Article 6 of the Convention).
37. Such concerns deserve serious attention. However, it depends on the application of the Article by courts of the State Parties over time, and is not a matter which can be resolved by drafting. HKBA is of the view that such concerns should not weigh against the adoption of the Convention by Hong Kong.

**Chapter III – Recognition and Enforcement**

*Enforcement of purely "domestic" judgments*

38. HKBA points out the following discrepancy in the 2003 Draft Convention:-

- For jurisdictional purposes, a case is international unless the parties are resident in the same Contracting State and all relevant elements other than the location of the chosen court are connected only with that State.

- For the purpose of recognition and enforcement, a case is international if it was given by a foreign court (even if all elements of the case were connected with a single State).

39. The discrepancy was created by Articles 4(4) and 5(f) of the 2003 Draft Convention and still remains by virtue of Article 1(2) and 1(3) of the Convention.

40. HKBA considered that the exercise of jurisdiction by a “chosen court” pursuant to the “exclusive choice of court agreement” is not determined pursuant to the rules of the Convention, but by the municipal rules of jurisdiction. Therefore, it would not be appropriate to allow such a judgment to be recognized and enforced under the Convention. HKBA agrees with such comments.

41. The DOJ should therefore consider entering a declaration under Article 20 of the Convention, which would give Hong Kong courts the right to refuse to recognize or enforce a judgment given by a court of another Contracting State if all the elements of the case were connected with a single State.

*Matters to be considered when the court of a requested State determines whether it should recognize and enforce a judgment*

42. HKBA suggests that the same matters which are relevant when a court which is not the designated court determines whether it should decline jurisdiction (set out in Article 5 of the 2003 Draft Convention and Article 6 of the Convention) should also be relevant when the court of a requested State determines whether it should recognize and enforce the judgment (set out in Article 7 of the 2003 Draft Convention and Article 9 of the Convention).

43. There is no reason why the same matters should be considered at the jurisdiction and enforcement stages. In particular, it is not appropriate to consider matters set out in Article 5(c) and (d) when considering whether the requested Court should recognize and enforce the judgment.

*Concerns regarding the service of court documents*

44. HKBA notes in passing that the Third and Fourth Points raised in paragraph 27 of the 1<sup>st</sup> Submission are now academic. The reason is that Article 7(1)(c) of the 2003 Draft Convention was replaced by Article 9(c) of the Convention, which is differently worded and therefore does not give rise to the same problems.

*Objecting to enforcement on ground of fraud on merits*

45. HKBA stated its view that Article 7(1)(d) and Article 7(2) of the 2003 Draft Convention (adopted without substantial amendment respectively as Articles 9(d) and 8(2) of the Convention) would prevent a defendant from objecting to enforcement on the ground that there has been a fraud in connection with a matter of substance (paragraph 27 of the 1<sup>st</sup> Submission). The views of the HKBA on the effect of the above mentioned Articles are maintained.
46. The Convention contrasts with the existing conflict of law rules in Hong Kong. In *Owens Bank Ltd v Bracco* [1992] 2 AC 443, the House of Lords examined the evidence to consider whether or not the evidence given at the trial abroad was fraudulent. Technically, it can be argued that the House of Lords was not re-trying the case on merits, but testing whether, as a matter of procedure, whether the evidence was fraudulent. However, practically speaking, the decision effectively establishes that the English court will question the merits of the foreign judgment where the defence of fraud is involved.
47. The adoption of the Convention by Hong Kong will thus entail a shift from the rule in *Owens Bank Ltd v Bracco* to “judicial comity”.
48. This shift should not be entered into lightly. Although “judicial comity” is becoming more widely accepted internationally, it may still lead to injustice in certain cases. Judicial comity may not be appropriate unless most of the States concerned have mature judicial systems equipped with the necessary safeguards against fraud. In light of the fact that the Convention is open to accession by any State, HKBA would advise that the DOJ consider this issue seriously rather than follow the international trend towards “judicial comity” in as a matter of course.

### *Definition of "review" in Article 8(4) of the Convention*

49. The comments of HKBA on the ambiguity of the term "review" in Article 7(4) of the 2003 Draft Convention (now Article 8(4) of the Convention) (paragraph 30 of the 1<sup>st</sup> Submission) is noted. The Explanatory Report provides the following definition at paragraph 173: "This means that the court addressed may postpone or refuse recognition or enforcement if, and as long as, the judgment may be set aside or amended by another court in the State of origin."

### *Damages*

50. HKBA expressed concerns that Article 10 of the 2003 Draft Convention was not clear regarding whether damages would be limited to the amount which would have been awarded according to the law of the court of the requested State (paragraphs 31 – 32 of the 1<sup>st</sup> Submission). The Article has been substantially redrafted and now makes clear that damages must be compensatory (Article 11 of the Convention). Therefore, HKBA's concerns are no longer relevant.

### **Conclusion**

51. It should be noted that many of the issues were resolved by reference to the Explanatory Report. Although the Explanatory Report is the official report of the Convention, it is possible that a court of a State Party consider it appropriate in particular cases to follow the strict text of the Convention rather than the comments in the Explanatory Report, particularly since many of the comments in the Explanatory Report add to; rather than merely explain, the Convention.

52. Two of the "major issues" listed towards the beginning of this Submission can be resolved in time. For example, the definition of "preliminary question" may be clarified on a case-to-case basis. The method through which a State Party should adopt to enforce a foreign judgment granting remedies not conventionally granted under its own laws may also be clarified as a body of case law builds up. In my view, such concerns are not insurmountable.

53. However, a more serious concern remains. For reasons stated above, HKBA considers the deeming provision in Article 3(b) of the Convention somewhat unfair. In view of the fact that this deeming provision is an integral part of the Convention, HKBA would hesitate before recommending the adoption of the Convention by Hong Kong.

54. In addition, HKBA would recommend that the DOJ seriously consider whether it would be appropriate to disable Hong Kong courts from considering the merits of a case where an issue of fraud arises in relation to the merits of the case.

Dated 7 November 2007

Hong Kong Bar Association