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我国内地和香港相互承认与执行
民商事判决制度研究

Studies on the Recognition & Enforcement of Civil &
Commercial Judgments between Mainland China & HKSAR

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内容摘要

本文以我国内地和香港民商事判决的相互承认与执行为研究对象，从一般理论着手，以英美国家和主要的国际条约制度为出发点，对两地相互承认与执行民商事判决的制度进行了深入研究。除引言和结语外，全文共七章：

第一章从区际民商事判决承认与执行的概念入手，明确了“区际”、“民商事”、“判决”、“承认”与“执行”等基本概念的含义，分析了区际民商事判决承认与执行的特征和理论学说，接着对我国区际民商事判决承认与执行的主要模式进行了简要评述。

第二章对英国和美国这两个典型复合法域国家的区际民商事判决承认与执行制度进行了详细和深入的介绍与分析，这两个国家的成功经验可以为我国内地与香港在解决类似问题上提供一定的参考。

第三章主要研究欧盟布鲁塞尔体系和海牙公约体系中的民商事判决承认与执行制度，同时对两大体系中的相关制度进行评介总结，以推动我国相关制度的完善。

第四章主要研究《安排》的产生和规则。本章简要分析了两地民商事判决相互承认与执行制度的现状，并对《安排》的产生过程、内容及其在两地的具体落实进行了回顾总结，最后对《安排》做了简要评析。

第五章为《安排》适用范围内内地和香港相互承认与执行民商事判决的条件研究，本章对每一条件进行分析研究，并在此基础上，对完善《安排》的相关规定提出了建议。

第六章着重研究《安排》适用范围内内地和香港相互承认与执行民商事判决的程序条件。本章在介绍了世界各国承认与执行民商事判决的程序类型之后，分别从“申请的提出”和“对申请的审查”两方面介绍了《安排》规定的程序条件。

第七章对于非《安排》适用范围内的民商事判决在内地与香港两地的相互承认与执行进行了研究。本章分别从“非《安排》适用范围内的香港民商事判决在

内地的承认与执行”和“非《安排》适用范围内的内地民商事判决在香港的承认与执行”两个方面进行了分析，并在此基础上提出了完善建议。

关键词：内地和香港；民商事判决；承认与执行

厦门大学博硕

ABSTRACT

This dissertation chooses the recognition & enforcement of civil and commercial judgments between Mainland China and HKSAR as its research topic. Based on the general theory & relevant systems of the United Kingdom, United States and some important international treaties in this field, it presents an in-depth study on the topic. The paper consists of seven chapters besides the introduction and the conclusion.

Chapter One starts with the general theory on the recognition & enforcement of interregional civil and commercial judgments. Firstly, introduces the definition, characteristic and the theory of the recognition & enforcement of interregional civil and commercial judgments, then analyzes the three modes on the reciprocal recognition & enforcement of Chinese interregional civil and commercial judgments.

Chapter Two gives a detailed and in-depth introduction and analysis on the recognition & enforcement of interregional civil and commercial judgments within the United Kingdom and the United States. They are two typical countries with compound legal regions in the world, they own promethean system in this field. Analysing them will be helpful for HKSAR and Mainland China in dealing with the same problem.

Chapter Three studies some important international treaties on the recognition & enforcement of civil and commercial judgments. The chapter focus on the rules on the recognition & enforcement of civil and commercial judgments within Brussels and Hague system, so that China can learn from their experiences in perfecting its own system.

Chapter Four discusses the drawing up process and contents of The Arrangement concluded by Mainland China and HKSAR. The chapter firstly reviews the drawing up process of the Arrangement, then introduces the main contents and its implementation in both sides.

Chapter Five deals with the substantive requirements stipulated in the

Arrangement for both sides on the issues related to reciprocal recognition & enforcement of civil and commercial judgments. This chapter discusses the substantive requirements one by one, and make suggestions for improvement on the Arrangement respectively.

Chapter Six is on the procedural requirements stipulated in the Arrangement between HKSAR and Mainland China on issues relating to reciprocal recognition & enforcement of civil and commercial judgments. This chapter explores the procedural types of the reciprocal recognition & enforcement of civil and commercial judgments in the world. And then it analyses the detailed procedure in the process of “application” and “examination”.

Chapter Seven is about the reciprocal recognition & enforcement of the civil and commercial judgements outside the Arrangement between HKSAR and Mainland China. This chapter examines “the recognition & enforcement of Hongkong civil and commercial judgments outside the Arrangement in Mainland China” and “the recognition & enforcement of the Mainland China’s civil and commercial judgments outside the Arrangement in HKSAR”. Based on the examination, this chapter makes suggestions for perfection on these systems.

Key words: Mainland China and Hong Kong; Civil and Commercial Judgement; Recognition & Enforcement.

Abbreviations 缩略语表

《安排》	《关于内地与香港特别行政区法院相互认可和执行当事人协议管辖的民商事案件判决的安排》
《澳门安排》	《关于内地与澳门特别行政区关于相互认可和执行民商事判决的安排》
《香港基本法》	《中华人民共和国香港特别行政区基本法》
《中国民事诉讼法》	《中华人民共和国民事诉讼法》(1991年颁布, 2007年修订)
《建议安排》	《香港特别行政区与内地相互执行商事判决》(香港立法会文件)
《1999年海牙公约草案》	1999年海牙国际私法会议《关于民商事案件的管辖权和外国判决公约草案》
《布鲁塞尔公约》	1968年《关于民商事事件管辖权及判决执行的公约》
《布鲁塞尔条例》	2000年欧盟理事会《关于民商事案件管辖权及判决的承认与执行规则》
《卢迦诺公约》	1988年《关于民商事事件管辖权及判决执行的卢迦诺公约》

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导 言

一、选题的研究背景

中国内地与香港民商事判决的相互承认与执行问题是自香港回归以来至今尚未彻底解决的问题。依据《中华人民共和国香港特别行政区基本法》(以下简称《香港基本法》)的规定,香港原有的法律制度不变,享有立法权、独立的司法权和终审权。这意味着香港沿袭原有的英国法,成为中国主权国家内的一个英美法系法域。而回归后的香港与祖国内地同属一个主权国家内的两个平等法域,两地民商事判决的相互承认与执行不能再按照回归前的方式和途径进行。回归后的两地判决能否在两地现行法律体制下得到承认与执行一直是一个争论不休的问题。在香港,回归后的内地民商事判决不能根据香港法例《外地判决(交互强制执行)条例》中的登记制度在香港登记和执行,只能依据香港普通法规则通过重新起诉的方式在香港承认与执行。但是由于香港对内地民商事判决终局性等问题的疑虑,内地判决因“不具有终局性”而被香港法院拒绝承认与执行。香港回归十多年以来,香港没有任何根据普通法承认与执行内地民商事判决的先例。在内地,由于《中华人民共和国民事诉讼法》(该法经过了 2007 年的修订,以下简称《中国民事诉讼法》)中只有对外国法院民商事判决的承认与执行机制,香港判决不能顺利依据《中国民事诉讼法》在内地得以承认与执行。

与两地判决的相互承认与执行制度长期停滞没有进展的情况形成鲜明对比的是,在香港回归十多年以来,内地和香港的经贸关系却日益密切。2003 年 6 月 29 日《内地与香港关于建立更紧密经贸关系的安排》及到目前为止六份补充协议的出台更进一步推动了两地在货物贸易、服务贸易和贸易投资便利化等方面的合作和融合。民商事判决的承认与执行制度作为诉讼程序的归宿,也作为保护当事人合法权益,维护两地司法权威,促进双方民商事交往的最重要途径,两地之间缺少一套双方可以共同遵循的协议机制,造成了大量涉及对方法域的民商事判决无法顺利得以承认与执行。这不仅直接影响到特定案件中当事人实体权利义务的实现,更给两地民商事交往造成极大阻碍。内地与香港之间法院民商事判决

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