THE EXTRATERRITORIAL SERVICE OF JUDICIAL DOCUMENTS FROM HONG KONG*

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The return of Hong Kong to Chinese sovereignty brings new development opportunities to the newly established Special Administrative Region (SAR) and, at the same time, poses many challenges. A legal vacuum currently exists in the service of judicial documents in civil and commercial matters and this has disrupted service arrangements between the mainland and Hong Kong since 1988.[1] Indeed, this problem and other related issues have been studied by scholars, government officials, and practitioners for a number of years.[2] However, thus far no formal arrangements have been made to resolve the matter although Art 95 of the Basic Law does allow Hong Kong and the judicial organs of other parts of the country, through consultation and in accordance with the law, to maintain judicial relations and to render mutual assistance.

Following the recent discussions on judicial assistance between the Central Government and the Hong Kong SAR, this article examines the legal issues involved, and proposes some practical solutions to this uncertainty between the two sides, as well as between Hong Kong and other jurisdictions. The first section presents an introduction to the issues, the next discusses the current legal scheme and the conflicts therein; the following section addresses some suggestions advanced by scholars and practitioners. The remaining sections identify certain principles on which future solutions should be based, present proposals to resolve some current problems, and make some concluding remarks.

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1 According to staff of the judicial branch in Beijing and the Administrative Office of the Chief Secretary's Office in Hong Kong, judicial documents have been kept on hold awaiting the introduction of the new service procedure rules. These interviews were conducted in Beijing in August 1997 and in Hong Kong during October 1997. Since the handover, several rounds of negotiation between the two sides have been conducted. According to the latest information, an agreement on assistance regarding judicial documents is being finalised and is expected to be signed by the end of 1998. See the report in Da Kong Pao, 21 October 1998, p A11.

2 For example, a book compiled by the Bureau of Judicial Assistance of the Ministry of Justice and the Study Group of Private International Law of China in 1989 includes fourteen articles written by mainland scholars and government officials: *Guoji Sifa Xiezhu He Quji Falu Chongtu Lunwen Ji* (A Collection of Essays on International Judicial Assistance and Regional Conflict of Laws) (Wuhan: Wuhan University Press, 1989). Several Hong Kong practitioners have also expressed their views. For example, see Liu Yiu-chu, 'Conflict of Laws' (ch 20) and 'Gradual Process of Legal Unification' (ch 21) in Byron S J Weng and Chang Hsin (eds), *Introduction to Chinese Law* (bilingual) (Hong Kong: Ming Pao Press, 1987), pp 280-301; Edward Epstein, 'Judicial Assistance between Hong Kong and China: Service of Documents,' a paper presented to the Symposium on Legal Interaction between Hong Kong and China on 29 June 1991.

Introduction

Judicial assistance is a subject of growing international importance and has therefore become a very essential part of the mechanism that safeguards the stable and smooth development of civil and commercial relations between Hong Kong and mainland China. Since 1978, Hong Kong has been the mainland's biggest investor and its most important trading partner.[3] At the same time, mainland companies' investments in Hong Kong have also increased at an astonishing speed, surpassing all other countries or regions except the United Kingdom.[4] In addition, geographical adjacency and family ties have generated many civil relations such as marriage, succession, and adoption.[5] As a result of such extensive economic co-operation and close civil connections, legal disputes and litigation are inevitable. The people's courts of Guangdong Province alone, for example, heard 2,534 civil and commercial cases involving Hong Kong or Macau parties in the period 1980-94.[6]

According to the latest statistics of the Supreme People's Court, the people's courts of all levels in the mainland tried 17,368 civil and commercial cases in the period 1993-7 with an annual increase rate of 8.1 per cent, involving parties from Hong Kong and Macau. 2,706 judicial documents have been accepted and delivered between China and foreign jurisdictions.[7]

Today, judicial assistance among the different jurisdictions comprises not only co-operation in civil and commercial proceedings, but also criminal matters such as investigation, prosecution, or extradition.[8] Traditionally, judicial assistance has been focused on the former, including the service of

3 In 1995, the territory's total unitised investment in the mainland stood at $140.4 billion, representing some 42.4 percent of the mainland's total foreign investment. Also, in the period between 1979 and 1996, bilateral trade expanded at an annual average rate of 27.4 %. Today, Hong Kong and the mainland are each other's largest trading partners, accounting for 36% of total trade for the territory and 47% for the mainland in 1996: 'Report: China: Hong Kong's Competitive Edge,' Hong Kong Business, August 1997, pp 38-9.

4 In terms of non-manufacturing direct investment in Hong Kong, the mainland ranks second after the UK with its investment stock valued at $104.6 billion, or 21.5% of the total. In the manufacturing sector, China is the third-largest investor after Japan and USA: ibid, p 39.

5 According to the 1990 national census, 97%of Hong Kong and Macau's 6.13 million population were Chinese and most of them had their ancestral homes in the mainland: Huang Shoudeng (ed), *Guangdong Sheng Qing* (Conditions of Guangdong Province) (Guangzhou: People's Publishing House of Guangdong, 1993), p 339. The marriages and divorces in 1995 alone between mainlanders and compatriots in Hong Kong and Macau numbered 16,769 and 970 respectively: Renkuo Yanjiu Suo (The Population Research Institute, CASS), *Zhongguo Renkuo Nianjian* (Almanac of China's Population) (Beijing: CAAC Press, 1996), pp 321-2.

6 Guangdong Gaoji Renmin Fayuan (The Higher People's Court of Guangdong), 'Guangdong Sheng She Gang Ao Jingji Shenpan Gongzuo de Jingyan Yiji Mian Lin de Kuen Nan' (The Experience and Difficulties of Trials of Economic Cases Concerning Parties from Hong Kong and Macau) in Economic Trial Division of the Supreme People's Court of China, *Jingji Shenpan Canyue Zi Liao Yu Xing Liexin Anjian Ping Xi* (Consultancy and Reading Materials and Analysis of New Type Cases) (Beijing: People's Court Publishing House, 1994), p 34.

7 Ren Jianxin, *Zui Gao Renmin Fayuan Gongzuo Baogao* (The Working Report of the Supreme People's Court to the First Session of the Ninth National People's Congress (NPC)); Fazhi Ribao (Legal Daily), 24 March 1998, p 2.

8 David McClean, *International Judicial Assistance* (Oxford: Clarendon Press, 1992), pp 1-2.

judicial documents, taking evidence abroad, and the enforcement of foreign judgments or arbitral awards. This article addresses only issues concerning service in civil and commercial matters because: (a) the issues involved are different in nature from criminal cases which may be more politically sensitive; (b) other matters of judicial assistance in civil and commercial proceedings are governed by different international conventions[9] where different legal principles may be applied;[10] (c) in comparison, the service of judicial documents seems a relatively easy issue for the two sides to agree upon and this could serve as a break-through in the search for a practical solution as regards judicial co-operation between Hong Kong and the mainland; and (d) since the service issue involves minimal political implications and conflict of law problems, the solution may even be proposed as a successful model applicable to future judicial co-operation between the mainland, Hong Kong, and Macau.

Service assistance in civil and commercial matters between Hong Kong and the mainland did not exist before 1988 when, after many years of negotiation, the Higher People's Court of Guangdong and the Supreme Court of Hong Kong reached an agreement stipulating that each region should provide service assistance to the other.[11] In 1991 China joined the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention).[12] Its participation provided a common legal basis for future dealings since the Convention was also applicable to Hong Kong by virtue of the United Kingdom's signature to it.[13]

However, the 1 July 1997 handover has rendered this basis inapplicable. Currently, the Convention may not be applied to service assistance between Hong Kong and the mainland because there has been a fundamental change in the nature of their relationship: from a situation where they were governed under different sovereignties, to the present situation of 'one country, two systems.' Moreover, some technical revisions to the Rules of the Supreme Court of Hong Kong may be necessary in order to reflect these political

9 Several international conventions cover the field of judicial assistance, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965; the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970; the Hague Convention on the Recognition and Execution of Foreign Judgments on Civil and Commercial Matters of 1971; the Hague Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968; and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

10 For example, both the Convention on Taking Evidence Abroad and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards have provisions dealing with the use of compulsory means whereas the Hague Convention on service includes no such provision.

11 See the report in Ren Min Ri Bao (People's Daily), 18 June 1988.

12 The Convention was concluded at the 10th Hague Private International Law Conference on 15 November 1965, and is registered with the United Nations under UN Treaty Series No I: 9432.

13 The UK joined the Convention in 1986 with a declaration that, in accordance with Art 39, it would notify the depository in due course of the territories for the international relations of which it was responsible and to which the Convention was to be extended: Bruno A Ristau (ed), *International Judicial Assistance: Civil and Commercial* (Washington: International Law Institution, 1990 Revision), vol I, appendix I, A-213.

changes.[14] On the other hand, as guaranteed by the Sino-British Joint Declaration and the Basic Law, Hong Kong will continue to enjoy a high degree of autonomy[15] and the current legal system shall remain basically unchanged.[16] Consequently, the laws of the mainland may not be applied or transplanted to Hong Kong, except in matters of national defence, foreign affairs, and other matters specified by the Basic Law.[17]

In addition to service issues between the mainland and the Hong Kong SAR, the question of how judicial assistance in service is conducted between Hong Kong and foreign countries or places also needs to be answered. Recently, China notified the Netherlands government, the depository state of the Hague Convention, that after the handover the Convention would continue to be applicable to Hong Kong by virtue of China's ratification. At the same time, the Administrative Office of the Chief Secretary's Office was named as the regional authority to undertake service requests from, or to, Hong Kong.[18] As a consequence, legally speaking, Britain's ratification of the Hague Convention no longer applies to Hong Kong; and technically, China's accession does not cover some of Hong Kong's current practice under the common law tradition either, such as postal service to a foreign defendant, due to China's declared reservations.[19]

This unique situation poses a challenge to both sides to find an acceptable solution where single state sovereignty, the principle of 'one country, two systems,' and judicial efficiency can be maintained. The following part examines the current legal schemes of the mainland and Hong Kong concerning service assistance.

[14] According to Ord 11, r 6 of the High Court Rules, serving a writ abroad basically depends on whether the foreign state is a contracting member of the Hague Convention. However, sub-r (1) states that the rule may not apply to service in the UK, any independent Commonwealth country, any British protectorate, any British colony, or the Republic of Ireland due to Hong Kong's status as a member under the British Government at that time. On 20 June 1997, China notified the United Nations that the Hague Convention would continue to be applied to Hong Kong SAR after 1 July 1997. See Item 36 of Group 4, Appendix 1 of the Note presented by Qin Huasun, the Chinese Ambassador to the United Nations, to the Secretary General of the United Nations Concerning Application of Multinational Treaties to Hong Kong SAR, *Zhonghua Renmin Gong He Guo Guowuyuan Gongbao* (Gazette of the State Council of the PRC), Issue 39 of 1997, p 1703.

[15] Art 2 of the Basic Law of Hong Kong (BL2).

[16] Section 3(3) of the Joint Declaration of 1984 and BL2, 5, and 19.

[17] BL18.

[18] Source: the reply of the staff of the Administrative Office, Government Secretariat to the author's inquiry on 14 October 1997.

[19] China objected to the means of service by postal channels or judicial officers as provided in Art 10 of the Convention when the national legislature ratified it. Point 3 of the Decision on the Ratification of Accession to the Hague Convention by the Standing Committee of the NPC on 2 March 1991: Zhonghua Renmin Gong He Guo Guowuyuan Gongbao (Gazette of the State Council of the PRC), issue 7 of 1991, p 213.

Current legal schemes in service assistance in the mainland and Hong Kong

The last decade has witnessed a rapid development of the law of civil procedure in China as a part of its modernisation of the entire legal system and its efforts to provide effective legal protection to the country's economic reform.[20] As far as judicial assistance is concerned, legal rules have been formulated based on the closeness of judicial co-operation and diplomatic relations between China and the foreign country concerned.

Since China signed its first service assistance agreement with Japan in 1982, it has used this bilateral form to establish judicial co-operation with another 24 countries.[21] However, such schemes vary in their content and institutional structure. Most merely address judicial assistance in civil and commercial matters although a few include criminal matters.[22] The agreement concluded between China and Canada in 1995 dealt only with co-operation in criminal matters.

China's original practice allowed the judicial branches of formerly socialist countries to work directly with their Chinese counterparts[23] whereas requests from capitalist countries had to be processed through the Ministry of Justice.[24] However, this differential practice ended in the early 1990s. For example, the Sino-Russian agreement designated that only the Ministry of Justice could handle judicial assistance in civil and commercial matters[25] and the latest agreement with Hungary in 1996 provides likewise.[26] As a result, a dual track

20 In addition to the Hague Service Convention, China has also joined the Hague Convention on Taking Evidence Abroad in 1997 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1986. Most of the bilateral judicial assistance agreements mentioned below provide procedures to recognise the judgments of other countries.

21 They are Japan, France, Poland, Belgium, Mongolia, Italy, Romania, Russia, Kazakhstan, Ukraine, Thailand, Egypt, Bulgaria, Cuba, Canada, Belarus, Turkey, Greece, Cyprus, Spain, Hungary, Morocco, Kyrghyzstan, and Tadzhikistan. This number is a result of the author's personal count from the Gazette of the State Council from 1982 to 1997. See also Ren (note 7 above).

22 Such as the Sino-Polish (1987), Sino-Mongolian (1989), and Sino-Russian (1992) agreements.

23 For example, Art 6(1) of the Sino-Polish Judicial Assistance Agreement stipulates that the courts and other organs shall provide judicial assistance to each other: see Gazette of the State Council, issue 8 of 1988, p 261. Art 2 of the Sino-Mongolian agreement defined the institutions in charge of judicial assistance as including the courts, procuracy, and other organs handling civil and criminal cases: ibid, issue 17 of 1990, p 653. Also see the Sino-Romanian agreement: ibid, issue 21 of 1992, p 799. According to a notice issued by the General Office of the Supreme People's Court on 5 July 1994, the Supreme People's Court, upon receiving a request from a foreign court for judicial assistance, shall conduct its examination first and then transfer the matter to an intermediate people's court designated by the Higher People's Court concerned. With respect to the service of judicial documents, the service certificate shall be returned to the Foreign Affairs Department of the Supreme People's Court. See Zui Gao Renmin Fayuan Yanjiu Shi (Research Office of the Supreme People's Court), *Zhongguo Renmin Gong He Guo Zui Gao Renmin Fayuan Sifa Jieshi Quan Ji* (Collection of Judicial Interpretations of the Supreme People's Court) (Beijing: People's Court Publishing House, 1997), vol 2 (July 1993-June 1996), p 642.

24 As a comparison, the pattern was established by the first judicial assistance agreement signed by China with a capitalist country, France, in 1987, which later practice consistently followed: ibid, issue 8 of 1988, p 227.

25 See Art 2 of the agreement: ibid, issue 33 of 1992, p 1471.

26 See Art 4 of the Sino-Hungarian agreement: ibid, issue 6 of 1996, p 177.

system of 'court to court' and 'the Ministry of Justice to its counterpart' has existed in China's judicial assistance practice. Nevertheless, thus far China has not concluded any agreements of this type with common law countries in civil and commercial matters.

To extend further a legal environment corresponding to its new open-door policy[27] China joined the Hague Convention in 1991, albeit with several declarations and reservations. These include the restriction of consular service to a foreign country's own nationals within China;[28] objection to the application of postal service and direct delivery by foreign judicial officers in China;[29] recognition of the validity of a judgment upon certain conditions being met notwithstanding no reception of service by, or no return of delivery certificates from, the defendant;[30] and a statute limitation of one year for defendants who do not appear before the court to file appeals.[31] The national legislature, for the purpose of implementing the Convention, has designated the Ministry of Justice as the central authority which undertakes to receive requests for service assistance from other contracting states for further processing according to Art 2 of the Convention.[32]

Soon afterwards, the Supreme People's Court, the Ministry of Foreign Affairs, and the Ministry of Justice issued two joint notices to the local people's courts, Chinese diplomatic and consular missions, and local justice bureaux to implement the provisions of the Convention.[33] According to these, a judicial document to be served from a foreign jurisdiction should be sent through its diplomatic office in China or other authorised officers to the Ministry of Justice, who will forward them to the Supreme People's Court[34] within five to seven days of receipt depending whether a Chinese translation is attached to the original request.[35] Next, the Supreme Court shall transfer the document within five days to the Higher People's Court of the particular province where the party concerned resides with an allowance of three days to further deliver it to the intermediate people's court concerned, which will be responsible for its execution within ten days of receipt.[36] A certificate of service or delivery

27 The purpose of China's accession was stated in the Proposal of the State Council to Submit the Hague Convention for Ratification to the Standing Committee of the NPC on 31 January 1991: see note 19 above, p 214.

28 Point 2 of the Decision made in accordance with Art 8 (2) of the Convention: see note 19 above.

29 Ibid (point 3 of the Decision made pursuant to Art 10 of the Convention).

30 Ibid (point 4 of the Decision made by virtue of Art 15(2) of the Convention).

31 Ibid (point 5 of the Decision made on the basis of Art 16(3) of the Convention).

32 Ibid (point 1 of the Decision).

33 The Notice Concerning the Procedures of Implementation of the Hague Convention on 4 March 1992; and the Notice Concerning the Issues of Implementing Measures of the Hague Convention on 19 September 1992. See note 23 above; *Collection of the Judicial Interpretations of the Supreme People's Court* (Beijing: People's Court Publishing House, 1994), vol 1 (October 1949-June 1993), p 1940, and pp 1941-2.

34 Ibid (points 1 and 2 of the Notice of 4 March 1992).

35 Ibid, p 1942 (point 1 of the Notice of 19 September 1992).

36 Ibid (point 2 of the Notice).

shall be returned to the foreign requesting authority through an opposite direction procedure,[37] which is also the route for a domestic court to request service assistance from a foreign jurisdiction.[38]

Point 4 of the Notice of 19 September 1992, however, allows a domestic party to refuse service on the grounds that a Chinese translation was not attached to the original judicial document, unless it is in English or French which are deemed acceptable languages according to the bilateral agreements between China and the foreign countries concerned. By an internal notice, the General Office of the Supreme People's Court has instructed the lower courts that the rules stated in the two notices above might be followed in matters of judicial assistance between Hong Kong and the mainland.[39] Since Canada, the United States, and the United Kingdom have joined the Convention, the rules described above should be the ones applicable to service assistance with these common law countries.

In the same year, the Law of Civil Procedure (for trial implementation) of 1982 was replaced with the final version of the Law of Civil Procedure 1991. Article 247 specifies seven methods of extraterritorial service:

(a) procedures provided by international treaties or agreements of which both China and the foreign country concerned are contracting parties;
(b) diplomatic channels;
(c) consular channels for its own nationals abroad;
(d) service to an authorised agent;
(e) service to business establishments or agents within the territory of China;
(f) postal service if allowed by the law of the foreign country concerned; and
(g) publication for six months if the previous methods prove unfeasible.

The law also stipulates that international judicial assistance shall be conducted in accordance with the treaties concerned; otherwise it should be achieved through diplomatic channels under the reciprocal principle.[40]

Thus, institutionally, the Supreme People's Court, the Ministry of Justice, and the Ministry of Foreign Affairs are all involved in international judicial assistance. The Ministry of Justice as the designated central authority channels service co-operation with both member states of the Hague Convention and those states that have signed judicial assistance agreements with China. The

37 Ibid.
38 Note 33 above, p 1940 (point 4 of the Notice of 4 March 1992).
39 The Notice by the General Office of the Supreme People's Court Concerning the Application of the Hague Convention to Hong Kong dated 15 July 1992 with series number (1992)86: note 33 above, p 1901.
40 Arts 262 and 263 of the Law of Civil Procedure 1991.

functions of the Ministry of Foreign Affairs are to negotiate judicial assistance agreements with foreign countries and to deal with requests from countries that are neither contracting states of the Hague Convention nor party to any bilateral agreements with China.

The Supreme People's Court, in addition to acting as the executive branch for requests from, or to, the two Ministries, may itself directly receive or send requests for service assistance under certain judicial assistance agreements. Thus, the Hague Convention, bilateral agreements, and the reciprocal principle comprise three different sets of rules governing the assistance process which will be applicable to different states depending on their status. However, regardless of the nature of the channels used, the domestic law of civil procedure shall govern the means of service.[41]

Service assistance is also a concern of domestic civil and commercial proceedings. The Law of Civil Procedure allows the people's courts of other locations to be entrusted to deliver judicial documents if direct service proves difficult.[42] Rules on domestic service assistance are further articulated in a Supreme People's Court's document which determines that certificates of trust must be issued by the requesting court with the judicial document and the return certificate.[43] The entrusted local court must then complete the delivery within seven days of receipt.[44] The upper level people's court is empowered to supervise and discipline the lower court in conducting this service. In cases of serious violations, legal liabilities may even be imposed.[45]

In Hong Kong before the handover, where a writ needed to be served in a contracting state of the Hague Convention, it could have been served through the designated central authority of that country, or if that country's law permitted, through its judicial authority, or through a British consular authority.[46] Alternatively, if service was to be effected in the United Kingdom, a territory under British government, any independent Commonwealth country, or the Republic of Ireland, official assistance would not have been available and service must have been effected by the plaintiff or his agent;[47] if service was to be effected in a country with which the United Kingdom had a bilateral civil procedure agreement (other than the Hague Convention), the writ could have been served through the judicial authority of that country, or through a British consular authority there;[48] if service was to be effected in a country not falling

41 Ibid, Art 265.
42 Ibid, Art 80.
43 The Provisions on Handling Entrusted Matters Between People's Courts dated 25 September 1992: *Zhongguo Falu Nian Jia* (Yearbook of Chinese Law) 1993, pp 808-10.
44 Ibid, p 808 (point 7 of the Provisions).
45 Ibid, p 810 (point 31 of the Provisions).
46 The Rules of the High Court, Ord 11, r 6(2A), which is an exact copy of the UK Rules of the Supreme Court 1965, Ord 11, r 6(2A). The following rules are in the same situation.
47 Ibid, Ord 11, r 6(1).
48 Ibid, Ord 11, r 6(2).

within any of the above categories, the writ may only have been delivered subject to the concerned government's approval, or through the appropriate British consular authority if local law so permitted.[49]

On the Note of the Chinese Government to the United Nations it has been declared that the method to serve judicial documents under Art 8(6) of the Convention upon persons abroad through its diplomatic or consular agents may not be used in the Hong Kong SAR unless the service is made to nationals of the origin state. With regard to service effected under Art 10(b) and (c), the Chinese declaration states that requests of service to persons abroad from official channels of a contracting state may only be made by its competent judicial officers, consulates, or embassies and may only be accepted by the Chief Secretary as the designated Central Authoity of the Region or other designated organs.[50] The Registrar of the High Court of the SAR is named as the regional organ to implement the serve requests through consular and diplomatic channels.[51]

So far these declarations have not signicantly changed the rules effective before the handover. However, a decision of the Standing Committee of the National People's Congress dealing with the laws in force before the handover may create some uncertainty.[52] Section 2 of Art 4 provides that any provision conferring privileges on the United Kingdom or other Commonwealth countries or territories, other than provisions relating to the reciprocal arrangements between the Hong Kong SAR and these countries or territories, shall not be retained. As a result, the current High Court Rules[53] concerning service practice with the United Kingdom and other Commonwealth countries or territories may have to be revised in order to reflect the new reality on a reciprocal basis, rather than on the old affirmative legal basis.

In 1988 an agreement concluded between the Higher People's Court of Guangdong (with the approval of the Supreme People's Court)[54] and the Supreme Court of Hong Kong came into force to govern service assistance between the two regions in civil and commercial matters. According to this agreement, the two courts shall entrust each other to provide service assistance of judicial documents, including copies of complaints, writs of appeal, writs of summons, judgments, mediation certificates, and rulings or decisions of the

49 Ibid, Ord 11, r 6(3).

50 Points 2 and 4 of the Declarations and Reservations of the Government of PRC Concerning Application of Multinational Treaties to Hong Kong SAR; the State Council (note 14 above), pp 1703-4.

51 Ibid (point 3).

52 Decision of the Standing Committee of the NPC on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Art 160 of the Basic Law of the Hong Kong SAR of the PRC, adopted on 23 February 1997. For an English translation, see (1997) 27 HKLJ 419.

53 In accordance with the same Decision, the name of the Supreme Court has been changed to the High Court after the handover.

54 The Reply and Approval of the Supreme People's Court Concerning the Tentative Service Assistance Agreement in Civil and Commercial Matters between Guangdong and Hong Kong: *Collection of Judicial Interpretations* (note 33 above), p 1900.

court, and court notifications.[55] Service shall be conducted by registered mail without charge; however, other specified methods may also be used subject to charge against the requesting side.[56]

Based on the above comparison, it can be concluded that the fundamental difference between the two sides' judicial practice in service and other procedural matters is that in the mainland these procedures are deemed to be exercises of the judicial powers of the state whereas in Hong Kong the power to deal with litigants' rights belongs to the parties concerned.[57]

Suggested options

From the previous examination, it can be seen that the main issues in extraterritorial service concern the applicable law and the organic structure. Although closely related, these two concepts also have their own technical focuses.

With respect to the former, since Art 95 of the Basic Law fails to mention which law governs judicial assistance between the mainland and Hong Kong, at least four possibilities have been studied by mainland scholars. The first is to create uniform legislation at the national level either by establishing general principles of judicial assistance in the Constitution, or by adopting a national law applicable to all regions of the country.[58] Although this could be a goal for the future, its present feasibility is debateable because of the many technical problems involved,[59] but more importantly because serious commitment to the principle of 'one country, two systems' would not and should not tolerate such hasty unification. As Liu Yiu-chu, a member of the Drafting Committee of the Basic Law, has pointed out:

> Indirect (conflict) rules can, just as well as direct [substantive] rules, introduce alien norms into the local system.

55 Ibid, p 1901 (Arts 1 and 6 of the Agreement).

56 Ibid (Art 7).

57 Lan Tian, *Yi Guo Liang Zhi Falu Wenti Yan Jiu* (A Study of the Legal Issues Concerning 'One Country, Two Systems') (Beijing: Legal Publishing House, 1997), p 283.

58 Hu Jinnan, 'Quji Sifa Xiezhu Fangfa Bi Jiao' (Comparison of Methods of Regional Judicial Assistance), and also Qian Hua, 'Dalu Xianggang Quji Sifa Xiezhu De Fangfa He Tujing' (The Methods and Channels of Judicial Assistance between the Mainland and Hong Kong) in Huang Jin and Huang Feng (eds), *Quji Sifa Xiezhu Yan Jiu* (Studies of Regional Judicial Assistance) (Beijing: Press of the China University of Political Science and Law, 1993), pp 33 and 80 respectively.

59 For example, the civil law and common law countries failed to make any progress in agreeing upon certain key definitions including judicial documents, extrajudicial documents, and civil or commercial matters in the Private International Conferences in 1977 and 1989. See Weng Xiaojian, 'Guanyu Songda Gong Yue Shiyong Yu Xianggang Tebie Xingzheng Qu De Sikao' (Thoughts Concerning Application of the Service Convention to the Hong Kong SAR) (1997) 5 Gang Ao Jing Ji (Economy of Hong Kong and Macau) 54. Also the issue of whether the word 'send' in Art 10(a) was intended to mean 'service' has divided the US courts in cases with parties in civil law jurisdictions. *Ackerman v Levine*, 788 F 2d 830 (2d Cir 1986) answered positively but this view was rejected in *Suzuki Motor Co v Superior Court*, 200 Cal App 3d 1476 (Cal CA 1988), and *Bankston v Toyota Motor Corp*, 889 F 2d 172 (8th Cir 1989).

And:

> Given the difference between the economic-social realities and the jurisprudence of the two law areas, it is doubtful whether unification of all the direct and indirect rules will be desirable; and even if it were desirable, it would not be feasible. The primary objection will most probably be the danger of causing internal disharmony in the law of each of the law areas by the introduction of norms alien to the legal system.[60]

This view is apparently shared by many mainland scholars. A book edited by Professor Han Depei, a leading authority on the conflict of laws, cautions against any hasty action in the unification of regional substantive laws as this could endanger the principle of 'one country, two systems.'[61]

The second option would be to allow Hong Kong to join the Hague Convention, thus maintaining the current schemes.[62] As the Convention was the applicable law to both sides in service assistance matters before the handover, this alternative would ensure a relatively stable transition to the new scheme. However, such an approach was strongly opposed by Dr Xu Hong of the Ministry of Foreign Affairs on the ground that it would undermine the principle of the single sovereignty of the state.[63]

The third choice is to employ rules relating to the conflict of laws. Using the Restatement of Conflict of Laws[64] as a reference, certain scholars have pointed to a movement in the United States to unify state legislation by the introduction of model laws.[65] Non-official organs in China, such as academic institutions, could also initiate a similar plan.[66]

Alternatively, the Hong Kong SAR could adopt its own rules on judicial assistance by exercising its legislative powers.[67] By focusing on judicial assist-

60 Weng and Chang (note 2 above), p 296.

61 Han Depei (ed), *Zhongguo Chongtu Fa Yanjiu* (Studies of Chinese Conflict of Laws) (Wuhan: Wuhan University Press, 1993), p 422.

62 Hu (note 56 above), p 34.

63 Xu Hong, 'Lun Yi Guo Liang Zhi Xia Xianggang Yu Neidi De Minshi Sifa Xiezhu' (Civil Judicial Assistance between Hong Kong and the Mainland under One Country, Two Systems) (1996) 6 Fa Xue Jia (Jurists' Review) 20.

64 The current Restatement (2d) of Conflict of Laws was promulgated in 1969. This sixteen-year project aimed to achieve certainty, predictability, and uniformity in the application of laws: s 6 of the Restatement (2d); see also James A Martin, *Conflict of Laws: Cases and Materials* (Boston: Little, Brown & Co, 1978), pp 185-6.

65 Uniform law is somewhat similar to reciprocity agreements. They are drafted by the American Law Institute and the National Conference of Commissions on Uniform State Laws in order to formulate model acts for states to adopt. The main uniform legislation thus far includes the Uniform Commercial Code, the Uniform Attendance of the Out-of-State Witness Act, and the Uniform Child Custody Jurisdiction Act: Lea Brilmater, *Conflict of Laws* (Boston: Little, Brown & Co, 2nd ed 1995), pp 187-93.

66 Liu Zhenjiang, 'Zhongguo Quji Sifa Xiezhu Tantao' (Probe of Regional Judicial Assistance within China) in the Bureau of Judicial Assistance of the Ministry of Justice and the Study Group of Private International Law (note 2 above), p 51.

67 BL17 and 18 provide that the Hong Kong SAR shall be vested with legislative power, except on matters of defence and foreign affairs as well as other matters outside the limits of the SAR's autonomy.

ance between Hong Kong and the mainland, this approach seeks a new basis of co-operation, rather than examining the possibilities of maintaining the status quo under the Hague Convention. Because Hong Kong is not an independent party to the Convention, different implementing measures under common law and Chinese law exist. Thus, the main difficulties with this approach lie between Hong Kong and other foreign jurisdictions especially if Hong Kong were to lose its status within the Hague Convention framework. Consequently, Hong Kong may have to deal with other jurisdictions on a reciprocal basis which would entail significant changes to its current law.

The fourth alternative is to conduct service assistance through local agreements. More specifically, it is recommended that Hong Kong either sign such agreements with domestic provinces individually, or conclude a model agreement with only one, but leave it open to other provinces to join.[68] The Hong Kong-Guangdong court agreement apparently provides an example to support this proposal. Nevertheless, it should be noted that this arrangement was effected as merely temporary for a region where close family ties[69] and extensive foreign investment[70] strongly demanded such a judicial facility before China's accession to the Convention. One could argue that extending this agreement to the other thirty provinces, autonomous regions, and municipalities directly under the Central Government would be burdensome and unmanageable to both Hong Kong and the representing municipalities. Moreover, other scholars have pointed out that the agreement between Hong Kong and Guangdong was executed unsatisfactorily.[71]

As far as organic structure is concerned, the proposals so far include introducing a ministry of the Central Government to deal with Hong Kong as its representative;[72] judicial co-operation between the Supreme People's Court and the Court of Final Appeal of Hong Kong;[73] allowing a provincial government or people's court as the representative of other domestic regions to handle

68 Huang Jin (ed), *Quji Sifa Xiezhu De Lilun Yu Shijian* (The Theories and Practice of Regional Judicial Assistance) (Wuhan: Wuhan University Press, 1994), p 37.

69 For example, in 1995, marriages and divorces between Guangdong residents and compatriots in Hong Kong and Macau were recorded as 8,060 and 368 respectively, making about half and one third of the national figures: the Population Research Institute CASS (note 5 above), p 322.

70 In national terms, Guangdong Province attracted 40% of all foreign investment in the country by the early 1990s, mostly from Hong Kong: John Fitzgerald, 'Autonomy and Growth in China: County Experience in Guangdong Province' (1996) 15:11 Journal of Contemporary China 7. A recent study found that, at the end of 1993, the number of foreign invested enterprises in the region, mostly from Hong Kong, amounted to 44,705, which represented 26.7% of the national total. Up to date, 3 to 5 million workers in Guangdong are working directly or indirectly for Hong Kong: Shu-ki Tsang and Yuk-shing Cheng, 'The Economic Link-up of Hong Kong and Guangdong: Structural and Development Problems,' Working Paper Series, No 54 (10/97) (Hong Kong: Centre for Asian Pacific Studies, Faculty of Social Sciences, Lingnan College, 1997).

71 Zhou Yang and Zhao Xudong, 'Yi Guo Liang Zhi Xia De Falu Chongtu Yu Xietiao' (The Conflicts and Coordination of Laws under One Country, Two Systems) (1997) 7 Zhong Guo Lu Shi (Chinese Lawyer) 18.

72 Li Yuquan (ed), *Guoji Minshi Susong Yu Guoji Shangwu Zhongcai* (International Civil Litigation and International Commercial Arbitration) (Wuhan: Wuhan University Press, 1994), p 207.

73 Weng (note 57 above), p 56.

service assistance with Hong Kong;[74] permitting Hong Kong and domestic regions to deal with each other directly;[75] or establishing a national centre with representatives from different regions to facilitate assistance.[76]

The Secretary for Justice has proposed the establishment of a special group within the Department of Justice to handle judicial assistance matters concerning both the mainland and foreign jurisdictions. Under the plan, a new Principal Government Counsel position would be created to head a group of thirteen lawyers. However, the areas of judicial assistance covered by this proposal only include extradition, the recovery of assets, taking evidence abroad, and the transfer of prisoners.[77] In other words, it seems to focus on criminal, rather than civil and commercial matters.[78]

Further clarification by the Standing Committee of the NPC[79] of Art 95 is therefore necessary, especially as regards the meaning of 'other parts of the country.' A literal reading of the term suggests at least two possibilities: (1) all parts of the mainland as a whole; or (2) all parts of the mainland as individual regions. Although a third reading may also be argued to mean only Macau and Taiwan as the parts independent from the mainland,[80] this justification appears very dubious given the context of the article[81] which deals with judicial functions and institutions as a whole, rather than special regional arrangements. Therefore, the co-operation structure may largely depend on the Standing Committee. Moreover, it should be noted that the term is elastic enough to include Macau and Taiwan at a later date.

Fundamental principles

Having examined various suggestions and options, I believe it is now necessary to establish certain fundamental principles in order to provide a solid theoretical ground for a solution.

74 The record of the conversation between Ma Yuan as the Vice President of the Supreme People's Court and Mr Chen Changwen from the Strait Exchange Foundation of Taiwan on 4 November 1991. See Fa Zhi Ri Bao (Legal Daily), 7 November 1997.

75 Yu Xianyu, 'Neidi Yu Gang Ao Diqu Sifa Xiezhu Fangshi De Xuanze' (The Selection of the Methods for Judicial Assistance between the Mainland and Hong Kong as well as Macau) in Huang and Huang (note 56 above), p 85.

76 Lan Tian (note 55 above), p 284.

77 See the report of Miss Leung's proposal on judicial assistance: Fa Zhi Ri Bao (Legal Daily), 19 October 1997, p (4).

78 This proposition is further affirmed by the recently published first report of the Department of Justice of the Hong Kong SAR. It is stated that action has been taken to establish a unit of mutual legal assistance for the matters of surrender of fugitive offenders, mutual legal assistance in criminal cases, and the transfer of prisoners.

79 BL158 stipulates that the power to interpret the Basic Law belongs to the Standing Committee of the NPC.

80 Yin Luxian and Xiong Dashen, 'Xianggang He Neidi Min Shang Shi Sifa Xiezhu Ruogan Wenti' (Certain Issues Concerning Judicial Assistance in Civil and Commercial Matters between Hong Kong and the Mainland) (1997) 7 Zhongguo Lushi (Chinese Lawyer) 16.

81 Chapter IV, Section 4 (the judiciary).

At first glance, the conflict of law issues between Hong Kong and the mainland might be considered different from international conflicts after the return of sovereignty of Hong Kong to China. Professor Yu Xianyu, for example, wrote in 1989 that, despite certain similarities, regional conflict of law issues were fundamentally different from international conflict of law issues because the former's main task was to promote unification of the country's laws. He further held that between the two sides, the public order rule, which is widely recognised in private international law, should either be disregarded or restricted to the least extent, and also that the judicial decisions of one jurisdiction should not be examined by the courts of the other, but simply be executed with full credit.[82]

In fact, conflict of law issues arising between the mainland and Hong Kong, Macau, and Taiwan are, in a sense, more complicated than normal international ones because of the four separate regions, three different legal systems,[83] and the two conflicting political regimes within one country, involved. These characteristics make the legal issues concerned distinct from those in federal states under a single social structure, such as the United States, Australia, and the former Soviet Union. Under the principle of 'one country, two systems,' the Constitution of China may not even be applied to these legal regions with the same effects. For instance, the Basic Law of Hong Kong is only linked with Art 31 of the national Constitution.[84] As a result, the luxury of a commonly accepted constitution by different legal regions (the United States being a prime example) is not available to China and cannot serve as the basis for a solution to the problem of judicial assistance.[85] Therefore, conflict of law issues in China are in a different context where an agreement does not exist on either mutual assistance among the independent jurisdictions, or the final authority to adjudicate disputes of this type.

Moreover, the judicial independence of different regions may also cause conflicts with international treaties and conventions. The Basic Laws of both Hong Kong and Macau provide that the two SAR governments may conclude

82 Yu Xianyu, 'Quji Chongtu Fa Yinggai Jin Zao Gongbu' (The Regional Conflict of Law Should Be Enacted As Early As Possible) in the Bureau of Judicial Assistance of the Ministry of Justice and the Study Group of Private International Law (note 2 above), pp 129-30. Professor Yu has obviously revised his early view (see Yu Xianyu (ed), *Guo (qu) Ji Min Shang Falu Shiyong Fa* (The Applicable Laws in International (Regional) Civil and Commercial Legal Matters) (Beijing, People's Daily Publishing House, 1995), pp 707-14.

83 Mainland China practices a socialist legal system whereas the legal system of Hong Kong has developed from common law. Although both Taiwan and Macau may be classified into civil law families, the former is based on the legal institutions of Germany, France, and Switzerland whereas the latter has closely followed Portugal's laws.

84 Art 31 of the Constitution stipulates that the state may establish special administrative regions (SARs) when necessary. The systems applicable to these SARs shall be provided in laws by the NPC in accordance with their concrete situations. The Basic Law of Hong Kong was adopted on the basis of this article. See BL11.

85 Art IV, s 2 of the US Constitution, also known as the full faith and credit clause, requires each state to give the decision of any other state the same effect that that decision would have in the state which rendered it.

or participate in agreements with other countries or international organisations in many economic and commercial areas.[86] The Central Government may not decide the application of an international treaty to the SAR regions without first consulting the SAR governments.[87] In this regard, implementing the 'one country, two systems' policy may create an exceptional situation to the implementation by China of Art 29 of the Vienna Convention on Treaties of 1969, which provides that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'[88] Based on these discussions and observations, it has been concluded that regional conflicts of law in China are virtually indistinguishable from those at international levels.[89]

According to these characteristics, certain fundamental principles should be established to guide judicial assistance and the co-operation of different legal regions. Thus far, it appears the following agreements have been reached:

(1) *Upholding unification of the nation.* Despite various differences, the legal regions of China are, after all, inseparable and any rules of judicial assistance should not violate this principle.[90] As such, any rules of judicial assistance and co-operation among the different regions should be mandatory, not optional. On the other hand, under the principle of 'one country, two systems' the disparate social, economic, and legal systems among the regions should not judged by the political concepts of any other region.

(2) *Equality of different legal regions.* Under the legal framework of 'one country, two systems,' the Supreme People's Court and the Courts of Final Appeal of Hong Kong and Macau are considered equal. As such, the lawful interests of litigants recognised by one legal region and the extraterritorial effects of its regional laws should, as far as possible, be respected in the others.

(3) *Promotion of judicial efficiency.* As the Great China region is one of the most dynamic economies in the world whose sovereignty barriers have been, or will soon be, knocked down, judicial assistance and co-operation among the regions should become more effective and efficient than the pre-handover arrangements.

(4) *Smooth transition.* In order to ensure that Hong Kong's legal system remains as stable as possible, the best solution regarding judicial assistance should be the one that has the least negative impact in terms

86 Section 3(10) of the Sino-British Joint Declaration and BL151.
87 Art 153 of the Basic Law of Hong Kong, and Art 183 of the Basic Law of Macau.
88 UN Doc A/Conf 39/27 (1969).
89 Han Depei, 'Lun Woguo De Quji Falu Chongtu Wenti' (On Issues of Regional Conflict of Laws in China) (1988) 6 Zhongguo Fa Xue (Chinese Legal Science) 6.
90 Yu (note 79 above), pp 706-7.

of changing current regional laws in co-operation both between the mainland and Hong Kong and between Hong Kong and other foreign jurisdictions.

(5) *One country, two systems*. This principle guarantees the long-term existence of the different legal regions and their systems. More specifically, it protects both the high autonomy of Hong Kong in its relations with the mainland[91] and its international personality including its common law characteristics.[92] Although the principle itself as a written law is beyond any dispute, how to implement it in judicial practice seems to require more careful study.

For example, legal scholars have different views on the application of the public policy rule to judicial assistance between Hong Kong and the mainland. Professor Ren Jisheng, the former President of the Lawyers' Association of China, believes that public policy should not be applied because the content of the rule mainly concerns the sovereignty of a state.[93] This proposition is partially supported by Dr Xu Hong of the Ministry of Foreign Affairs who argues that the service of judicial documents in a single country does not constitute any recognition of the judicial decisions to be made. Therefore, it is not related to state sovereignty, safety, and public interests.[94] Nevertheless, he agrees that in the recognition and enforcement of judicial decisions of other legal regions, public policy should be considered but only under certain restrictions.[95]

However, Professor Han Depei of Wuhan University does not agree with these contentions.[96] Mr Huang Feng, a division head of the Judicial Assistance Department of the Ministry of Justice,[97] and at least four judges from the Higher People's Courts of Guangdong and Hainan[98] also voiced their disagreement. According to them, legal conflict between Hong Kong and the mainland is often rooted in the disparities of their political and economic systems as well as in their differing social values. These may have to be protected by public policy in certain cases of conflict of laws.

91 BL2.

92 According to the Basic Law of Hong Kong, the Hong Kong SAR may conclude agreements with foreign countries in economic, trade, financial, and shipping areas. It may also participate in certain international organisations and conferences. See BL151 and 152. Also see the discussion in Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997), p 11.

93 Ren Jisheng, 'Guo Nei Butong Fayu Zi Jian De Sifa Xiezhu' (Judicial Assistance of Different Legal Regions) (1995) 4 Fa Xue Jia (Jurists' Review) 63.

94 Xu (note 61 above), pp 21-2.

95 Ibid, p 24.

96 Han (note 59 above), p 422.

97 Huang Feng, 'Shi Lun Zhongguo Weilai De Quji Sifa Xiezhu' (On Future Regional Judicial Assistance within China) (1995) 4 Fa Xue Jia (Jurists' Review) 76.

98 Ling Qiman and Wang Xiaoming, 'Zhongguo Dalu Yu Xianggang Min Shang Shi Falu Chongtu Yanjiu' (A Study of Conflict of Laws between the Mainland and Hong Kong on Civil and Commercial Matters) (1997) 7-8 Kai Fang Shi Dai (Open Times) 92; and Yin and Xiong (note 77 above), p 16.

The second view seems more convincing. As Lord Parker stated, 'private international law is really a branch of municipal law and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored.'[99] With respect to Dr Xu's argument that applying public policy ignores the sovereignty, national safety, and public interest of single states, some counter-arguments may be offered.

First, the Hague Convention explicitly allows the state addressed to refuse compliance with a service request if compliance would infringe its sovereignty or security.[100] Thus it is clear that the public policy rule does apply to service assistance between different jurisdictions.

Second, as discussed above, the legal framework of 'one country, two systems' does not intend to eliminate the fundamental differences between Hong Kong and the mainland during at least the next fifty years. As such, single sovereignty cannot unify the independence of judicial branches or political and social disparities. For instance, would a people's court on the mainland provide service assistance of a writ against the Central Government from Hong Kong or Taiwan on the ground that the service is deemed unacceptable under the domestic rules?

Third, Dr Xu overlooked the important connection between service assistance and the recognition of another regional jurisdiction's judgment when he argued that public policy rules should only be applied to the latter. It has been observed that the procedures applicable to service are particularly important under both civil and common law jurisdictions and are therefore closely connected to other key aspects of conflict of laws; not only to the fundamental issue of extraterritorial jurisdiction, but also to the enforceability of judgments outside the forum territory.[101]

In common law jurisdictions service is traditionally deemed not merely a prerequisite to the exercise of jurisdiction, but rather the very basis upon which jurisdiction comes to rest.[102] Even where Hong Kong law has conferred upon the courts discretionary power to allow service outside the jurisdiction, the plaintiff must establish the existence of one of the territorial factors enumerated in the relevant statute.[103] Thus, before dealing with enforcement matters, the jurisdiction that is requested to provide service assistance may simply decide to block the proceedings if the law suit is counter to regional public policy.

99 *Dynamit Akt v Rio Tinto Co* (1918) AC 292, 302.
100 Art 13 of the Convention.
101 Joseph M Lookofsky, *Transnational Litigation and Commercial Arbitration: A Comparative Analysis of American, European, and International Law* (Ardsley-on-Hudson: Transnational Jurist Publication Inc, 1992), p 445.
102 O'Malley and Layton, *European Civil Practice* (London: Sweet & Maxwell, 1989), p 80. Cited by Lookofsky: ibid, p 446.
103 Mushkat (note 92 above), pp 58-9.

In addition to these traditional theories, one could argue strongly that the application of public policy acts as a safety valve against political intrusion from another region. This viewpoint originates from a firm commitment to the 'one country, two systems' policy by both sides. It is indisputable that the capitalist system in Hong Kong is fundamentally contradictory to the socialist ideology and institutions of the mainland. Therefore, without the legal protection of public policy, a safe preservation of Hong Kong's current system is almost unthinkable; although for the sake of national unification, such a rule should only have a limited application where the violation of local policy is 'pernicious and detestable.'[104]

Personal suggestions

Based on the principles discussed above, I would now like to express some personal thoughts to the legislatures of the mainland and Hong Kong, suggesting a solution to their service assistance problem, as well as to service between Hong Kong and other jurisdictions.

The action taken by the Central Government to extend the application of the Hague Convention to Hong Kong should generally be welcomed, as urged by some local practitioners.[105] Since the Convention has been widely ratified, inter alia by the United States and by most of the EC member states, this extension would facilitate judicial co-operation between Hong Kong and foreign jurisdictions on an internationally accepted basis. It would also lead to only minor changes in the existing regional rules on service procedures concerning extraterritorial litigation.

However, the extension seems to have been solely initiated by the State Council without a review by the Standing Committee of the NPC. As such, the original declarations and reservations made by the Standing Committee remain unchanged.[106] Consequently, two issues appear to emerge.

First, conflicts exist between the declarations and reservations made on the basis of the mainland's practice and Hong Kong's practice under its common law tradition. For example, China has objected to postal service of judicial documents from foreign jurisdictions within its territory, whereas Hong Kong

[104] Goodrich, 'Foreign Facts and Local Fancies' (1938) 25 Vanderbilt Law Review 26, 33-4.

[105] In a paper presented by Edward Epstein to the Symposium on Legal Interaction between Hong Kong and China (held at the Faculty of Law, University of Hong Kong, on 29 June 1991), it was emphasised that the Convention was particularly designed to interface jurisdictions with just such instances of inconsistency and incompatibility as Hong Kong and the mainland of China: 'Judicial Assistance between Hong Kong and China: Service of Document' as quoted in Mushkat (note 89 above), p 84.

[106] According to the Law of Treaty Conclusion Procedure of China (1990), any treaties and agreements concerning judicial assistance must be approved by the Standing Committee of the NPC: Art 7(3). See the Gazette of the Standing Committee of the NPC, issue 6, p 28. Also Art 19 stipulates that any revision to, abrogation of, or withdrawal from a treaty or agreement shall follow the same procedure with which it was concluded: ibid, p 30.

does allow such a practice under the current law.[107] In 1985, a divorce judgment from the California Superior Court against a mainland party was turned back under the Supreme People's Court's instruction on the grounds that it had violated Chinese civil procedures.[108]

Second, how judicial documents are served between Hong Kong and the United Kingdom, or between Hong Kong and Commonwealth countries or United Kingdom territories, is still unclear. Whether the current Rule 6 of Order 11 of the High Court Rules will have to be revised because it grants privileges to those countries or places, therefore violating s 2 of Art 4 of the Decision of the Standing Committee Concerning the Laws in Force before the Handover, remains to be seen.[109] Or could reciprocity be argued if, since the laws of these countries or places remain unchanged, Hong Kong is granted the same treatment? However, it is my belief that, regardless of the latter argument, this matter may actually depend on the results of the examination by the Central and SAR governments of the consistency of application of the argument to many other similar existing rules.

With regard to service between Hong Kong and other common law countries, such as the United States, it is unclear whether Hong Kong courts should follow mainland practice or the reciprocity principle. If the latter, it may be difficult to find a legal basis to justify the mainland's deviation from its reservations to the Convention; if the answer is negative, then these countries may complain on grounds of discrimination as compared with the treatment given to the United Kingdom, other Commonwealth countries, or United Kingdom territories.

All the questions raised above seem to point to one issue: to what extent should current Hong Kong law and practice in this regard be changed? Unconditional extension of the mainland version of the Hague Convention to Hong Kong may not only cause practical difficulties, but could even undermine the guarantees set out in Arts 5 and 8 of the Basic Law to keep the present legal system unchanged for fifty years. In this circumstance, it would be better for the Central Government to limit the legal effects of its original declarations and reservations to the mainland. At the same time, China may specify the common law version applicable to Hong Kong in accordance with Convention provisions.[110]

[107] Ord 11, r 5(3)(a) of the Rules of the High Court provides that writs which are to be served out of the jurisdiction need not be served personally if they are served on the required person in accordance with the law of the country in which service is to be effected. Further, r 6(1) stipulates that Hague Convention rules do not apply to service in the UK, Commonwealth countries, or British territories.

[108] The Supreme People's Court's Reply Concerning Disposition of the Divorce Judgment Directly Sent in from a US Court on 26 December 1985. See Liu Yinquan, *Lushi Fa Quan Shu* (Encyclopaedia of Law of Lawyers) (Beijing: Red Flag Publishing House, 1996), p 737.

[109] Note 52 above.

[110] The Convention leaves the member states with sufficient flexibility to tailor their own suitable versions. Some key articles, such as 8 and 9 for instance, start with the sentences 'each contracting state shall be free to ...' Art 19 states that the Convention shall not affect internal provisions which differ from the Convention articles.

For those countries not yet parties to the Hague Convention, there may be other options. Given the fact that all existing judicial assistance agreements in civil and commercial matters are made by China with civil law countries, the Chinese government may, after consultation with the SAR government, attempt to negotiate with these states to extend their application to Hong Kong, and to add a Hong Kong government office as the regional authority in charge of service assistance in accordance with Art 153 of the Basic Law.[111] Consequently, Hong Kong would benefit from these agreements to link the region with civil law jurisdictions and to further improve its business environment. As for the other countries, judicial assistance could simply be conducted under the commonly accepted principle of reciprocity.

Since China has recognised the method of consular service to the extent that it may be practised with respect to its own nationals, Chinese diplomatic or consular missions may also be responsible for delivering judicial documents to residents of Hong Kong as they do to mainlanders abroad. But whether the method will be applied to foreign nationals in a foreign country as is currently permitted by Hong Kong law[112] may depend on the outcome of negotiations between the Central and SAR governments as well as between the Central and relevant foreign governments.

As far as service assistance between the mainland and Hong Kong is concerned, the ideal situation under the principles discussed above would be somewhere between the practice under the international treaties or agreements that China is a party to, and the procedures applicable to the mainland people's courts in domestic proceedings.

More specifically, I believe that service co-operation should be conducted directly between the courts of the two sides, rather than through the Ministry of Justice and the Chief Secretary of Hong Kong as intermediaries. Such an arrangement would correspond more closely to the reality of one unified country and would promote judicial efficiency. Further, in the aftermath of the handover, any retreat from the co-operation between the Higher People's Court of Guangdong and the Supreme Court of Hong Kong during the past ten years would hardly be justified.

Judicial co-operation could be established by an agreement between the Supreme People's Court and the Court of Final Appeal of Hong Kong as the top judicial authorities of both sides. Such a structure would not subject any local people's courts of the mainland to excessive administrative burden beyond its own region and, at the same time, it would allow the supervisory mechanism within the judicial hierarchy to function. However, the question of whether

[111] BL153 states that the Chinese government shall, as necessary, authorise or assist the SAR government to make appropriate arrangements for the application to the region of other relevant international agreements.

[112] Ord 11, r 6(2), (2A), and (3) of the Rules of the High Court allow such a practice as long as it is not contrary to the law of the country concerned.

the Supreme People's Court as the highest judicial organ in the country should be regarded equally with the top regional courts may cause some concern.[113] Many scholars do not believe this to be a problem at all, suggesting as they do that each legal region should enjoy equal status.[114] Thus, the equality of legal regions within a country would not in any aspect undermine the sovereignty of China in the international community.

In this regard, the new legal framework on avoidance of double taxation on income between the two sides should be noted. On 11 February 1998, the State Administration of Taxation of China and the Finance Bureau of the Hong Kong SAR through negotiation concluded an agreement dealing with the issues concerned, which would enter into force after the completion of the requisite approval procedures and notification being given to each other.[115] The arrangement effects an addition to s 49 of the Inland Revenue Ordinance.[116] Also, the 'competent authority' in charge of the implementation of the arrangement is defined to include the State Administration of Taxation in case of the mainland and the Commissioner of Inland Revenue in case of Hong Kong, or their authorised representatives.[117] The completion of such an arrangement between a state authority and a Hong Kong local authority does not consider the status of each side as a problem at all. The priority is apparently given to the practical needs and the equality of the two sides. As such, the arrangement as a model may be extended to facilitate judicial assistance between the two sides.

If this approach is deemed too politically sensitive, an alternative may be considered: to create a sub-department within the Supreme People's Court which would sign agreements with the top court of Hong Kong and assume the responsibility for handling judicial assistance in the mainland.

Ideally, the agreement should attempt to compromise the disparities between the two sides and be as practical as possible. For the sake of efficiency, formal equality may not be strictly required. For example, in addition to delivery through judicial channels as mentioned above, certain methods of service including postal service and agent delivery may be permitted in the

[113] It is stated that the Supreme People's Court is the highest judicial organ of the PRC and only one 'supreme' court should exist in a unified country. Although the Court of Final Appeal of Hong Kong enjoys the ultimate judicial power in the Hong Kong SAR, it is still considered a local court in the country as a whole: Ke Ti Zu (Study Group), 'Yi Guo Liang Zhi He Xianggang Jiben Fa' ('One Country, Two Systems' and the Basic Law of Hong Kong) (July 1997) Fa Xue Yan Jiu (CASS Journal of Law) 17.

[114] Weng (note 59 above), p 57.

[115] Memorandum between the State Administration of Taxation of the Mainland of China and the Finance Bureau of the Hong Kong SAR Concerning the Arrangement for Avoidance of Double Taxation on Income as the Schedule of the Specification of Arrangement (Arrangement with the Mainland of China for Avoidance of Double Taxation on Income) Order made by the Chief Executive in Council on 27 February 1998 (LN126/98).

[116] Ibid.

[117] Section 1(6) of Art 7, Arrangement between the Mainland of China and the Hong Kong SAR for the Avoidance of Double Taxation on Income (note 115 above).

mainland. Such a disposition by the parties concerned of their litigant rights is recognised by Hong Kong law.[118]

The advantages of flexibility are many. It would result in little change to existing Hong Kong law; the people's courts in the mainland would not be overly docketed as the number of legal disputes probably increase along with the closer economic and civil ties after the handover; it would signify the domestic nature of judicial co-operation between the mainland and Hong Kong; and the relaxed service rule may also provide the people's courts with the opportunity to promote the recent trend to 'privatise' civil litigation in China, for example by introducing the doctrine of litigant autonomy and by shifting the burden of proof from the state to the litigants.[119] Thus, in the agreement between the Guangdong Higher Court and the Hong Kong Supreme Court, postal service through the judicial branch has taken over personal delivery (by the judicial office as stipulated in the Civil Procedure Law) as the main method of service and this may also be used in civil proceedings conducted in the mainland if direct delivery proves difficult.[120]

Certain changes may also be required as regards the service of judicial documents from the mainland to Hong Kong to reflect post-handover reality. The existing rules, which treat cases involving parties in Hong Kong as international litigation as described above, were adopted when the sovereignty of Hong Kong was separated from the mainland. Thus, postal channel, transfer by the receiver's agent, or public notice have been the only service means available to litigants in the mainland.[121] Following the handover, it is reasonable to expect that the handling of civil and commercial proceedings in the mainland involving Hong Kong parties will be further improved. For example, the people's courts may specify alternative methods of service in addition to the existing procedures, such as delivery by judicial officers in important cases. This practice would not constitute any significant change to the law in Hong Kong since, to a limited extent, it could be applied as part of the obligations under a domestic agreement. Moreover, according to Hong Kong's agreement with Guangdong on service assistance, the instruction to use certain methods may be honoured as long as the entrusting party bears the expenses incurred.

[118] See Ord 10, r 1 of the Rules of the High Court.

[119] See the speech made by Tang Dehua, the Vice President of the Supreme People's Court, on the National Symposium on Reform of Civil and Economic Trial Style in Certain Trial Places on 16 April 1997: Zui Gao Renmin Fayuan Jingji Shenpan Ting (Economic Trial Division of the Supreme People's Court), *Jingji Shenpan Ziliao Xuan Du* (Selected Reading Materials on Economic Trials) (Beijing: People's Court Publishing House, 1997), issue 2, pp 1-14.

[120] Art 80 of the Civil Procedure Law 1991.

[121] In addition to Art 247 of the Law of Civil Procedure mentioned previously, the Supreme People's Court also affirmed the means in a circular entitled Replies to Certain Issues on Trials of Cases Concerning Parties or Interests of Hong Kong and Macau (19 October 1987): see *Collection of Judicial Interpretations* (note 33 above), p 1899.

As discussed previously, reservations should be made for public policy in these agreements to prevent undesired governmental intrusion, although certain restrictions must also be imposed against potential abuse.[122]

A permanent office to co-ordinate judicial assistance should be established by the judicial branches of different legal regions. Its missions would include: supervising the implementation of the agreement on judicial co-operation; resolving practical problems; further study of the rules applicable to the conflict of laws among the regions concerning judicial assistance; and probing into the possibilities of more co-operation between the mainland, Hong Kong, Macau, and Taiwan.

Conclusion

Service assistance between Hong Kong and the mainland of China is an important legal matter. Since the handover the problem of assistance has not only become urgent vis-à-vis judicial practice, it has also become significant for implementation of the 'one country, two systems' principle. Having examined the current legal rules of both sides, and the various options and theories provided by scholars and practitioners, I believe that, for the sake of smooth transition, domestic service assistance should be conducted between the courts by means of a judicial agreement.

The goal of an acceptable arrangement should be to improve judicial efficiency, preserve the current legal system of Hong Kong and its political and social values, and set up a convincing example for future expansion to other legal regions. With respect to service arrangements between Hong Kong and foreign jurisdictions, the extension of China's implementation of the Hague Convention to Hong Kong should enable the SAR to maintain most of its current service rules. However, to what extent the prevailing service practice in Hong Kong with other common law jurisdictions may be preserved may still need further clarification.