

HONG KONG / JUDGMENT

CYM v. YML aka YMLJ

COURT

Court of Appeal

DECIDED

12 December 2012

CASE / FILE NUMBER

CACV14/2012

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bjbj CACV 14/2012 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL CIVIL APPEAL NO. 14 OF 2012 (ON APPEAL FROM FCMC NO. 8154 OF 1998) BETWEEN CYM Petitioner YML aka YMLJ Respondent Before : Hon Cheung, Lam JJA and Au J in Court Date of Hearing : 29 November 2012 Date of Judgment : 12 December 2012

JUDGMENT

Hon Cheung JA: I agree with the judgment of Lam JA. Hon Lam JA: This case concerns a couple who were married in 1987, separated in 1997 and divorced in 1999. During the marriage, they gave birth to three children, who are now 21, 19 and 14 years old. The children are still undergoing education with the two elder children studying in England. The Petitioner, who was the husband, had remarried. In this judgment, I shall refer to the couple by their surname Choi and Yung respectively. When they divorced in 1999, the financial aspect was dealt with by way of a consent order of 2 September 1999. Some provisions were made by way of undertakings given by the respective party to the court; some provisions were by way of court order. For the purpose of this appeal, we can focus on an undertaking by Choi to open an account for the establishment of an education fund and the following paragraphs in the consent order,

4. The Petitioner do pay or cause to be paid to the Respondent periodical payments at the rate of HK\$12,000.00 as maintenance for each of the three children of the family payable on the 1st day of month immediately after decree nisi to be made herein and thereafter on the 1st day of each succeeding month until they respectively attain the age of 18 years or cease to receive education at an educational establishment or undergo training for a trade, profession or vocation, whether or not they are also, or will also be, in gainful employment whichever is the later, the rate of the maintenance for the children of the family shall be increased annually by 5% per annum after the 3rd year from the date of decree nisi being granted;

7. The Petitioner do within 2 months after expiry of 6 years after the decree absolute to be made herein set up an educational fund (the Fund) for the purpose of discharging the educational expenses of the children of the family in the following manner:-
- (a) the Petitioner do deposit (the Initial Deposit) a sum equivalent to 10% of his personal income for the financial year immediately preceding the date of such deposit in a trust account with a subsidiary trustee company of a licensed bank in Hong Kong to be nominated by the Petitioner or a bank account in the joint names of the Petitioner of the Respondent (the Account);
 - (b) all expenses for maintaining the Account (if any) shall be paid out from the Account solely;
 - (c) the Notice of Assessment issued by the Inland Revenue Department in respect of the Petitioner s personal assessment shall be conclusive evidence for the purpose of determination of the Petitioner s income;
 - (d) the Petitioner do make further deposits calculated in the same manner as the initial Deposit in the Account annually after the Initial Deposit and such deposits shall be made within one month after the date of the Petitioner s salary Tax Return is issued by the Inland Revenue Department until all the children of the family cease to receive education at an educational establishment or undergo training for a trade, profession or vocation, whether or not they are also or will also be, in gainful employment;
 - (e) the Respondent shall be entitled to payment out from the Fund for the purpose of discharging the educational expenses of any of the children of the family, whether as advance payment or as reimbursement to the Respondent, from time to time;
 - (f) for avoidance of doubt, educational expenses shall include school fees, tuition fees, living expenses (in case of studying in overseas), expenses for extra-curriculum activities (such as sports, arts, music etc.) and other expenses incidental thereto; and
 - (g) any credit balance together with interest accrued thereon after completion of education or training (as the case may be) of all the children of the family as aforesaid shall be distributed to the children of the family in equal shares and the Fund should thereby be terminated or dissolved; Six years down the road, in 2005 when Choi should have set up the education fund in accordance with the 1999 order, he did not do so. According to Yung, Choi requested her to pay for the overseas education expenses of the children on his behalf for the time being because of the cash-flow need of his business. Yung acceded to such request. After several years, in view of this and other defaults, Yung decided to take action to enforce the 1999 order. Acting in person, Yung filed two summonses on 29 April 2010. The first summons was issued pursuant to Rule 87(4) of the Matrimonial Causes Rules Cap.179A []. I shall call this the Judgment Summons. It sought enforcement in respect of three sums of monies which Yung said Choi should have paid under the 1999 order, The children s insurance premium in the sum of \$88,380; Arrears of maintenance from Oct to Dec 2009 in the sum of \$53,189.13; Arrears of maintenance from Jan to Feb 2010 in the sum of \$70,920. The Judgment Summons

was in prescribed form , directing Choi to attend the hearing for examination on oath and providing for the possibility of commitment of Choi if he could not show cause why this should not be done. The second summons was an ordinary summons. I shall call this the Arrears Summons. It sought an order for the payment of the following sums, The insurance premium of the children for 2007 and 2008 in the sum of \$125,792; The English school fees of the two elder children for 2007 and 2008 in the sum of \$1,189,736.60. In addition, the second summons also sought other relief, of which only the setting up of the education fund is relevant for the purpose of this appeal. On 30 July 2010, Choi through his solicitors filed a Notice of Application for Ancillary Relief [the Notice] seeking variations of the 1999 order. It was amended on 24 October 2010. In its amended form, the relief sought in the Notice which are relevant for our purposes were,

1. an Order that paragraph 7 of the education fund Order dated 2nd September 1999 made by Deputy Judge Remedios be dispensed with.
2. an Order that the Petitioner do pay all the educational expenses (include school fees, tuition fees, living expenses (in case of studying in overseas), expenses for extra-curriculum activities (such as sports, arts, music etc.) and other expenses incidental thereto) of the children of the family, namely Choi Leah, Choi Lyman and Choi Landon until they cease to receive education at an educational establishment or undergo training for a trade professional or vocation, whether or not they are also, or will also be, in gainful employment, whichever is the later. On 29 November 2010, Yung s solicitor filed on her behalf a summons under section 12 of the Matrimonial Proceedings and Property Ordinance Cap 192 for leave to enforce arrears of maintenance due for more than 12 months. I shall call this the Leave Summons. Originally, all these applications were filed for hearing on 21 February 2011. On 18 February 2011, parties lodged a consent summons vacating the hearing date and adjourned the applications to a date to be fixed with 2 days reserved. On 18 March 2011, Choi s solicitors issued another summons seeking further variations of the 1999 order. The first paragraph basically asked for payment of maintenance of the children to be made directly to them. Paragraph 2 of the summons sought to amend the para 2 in the Notice to the following,
 2. an Order that the Petitioner do pay all the educational expenses (include school fees, tuition fees, living expenses (in case of studying in overseas), expenses for extra-curriculum activities (such as sports, arts, music etc.) and other expenses incidental thereto) of the children of the family, namely Choi Leah, Choi Lyman and Choi Landon until they cease to receive education at an educational establishment or undergo training for a trade professional or vocation, whether or not they are also, or will also be, in gainful employment, whichever is the later. The matter was heard by Judge Chan of the Family Court on 8-9 and 14 September 2011. Though Choi had been legally represented in the preparation of the Notice and the March 2011 summons and his affidavits made between 13 October 2010 and 9 March 2011, he chose to act in person at the hearing. The Judge first dealt with the variation application at the hearing. After hearing evidence and submissions,

the Judge ruled on 16 September 2011 that upon the undertaking of Choi on terms similar to those in the Notice, para 7 of the 1999 order was discharged. Further, in respect of the periodical maintenance for the children, the Judge varied it downwards to \$10,000 per child as from 1 October 2011 with an annual increment of 5%. As regards the Leave Summons, though the Judge did not explicitly refer to it in his ruling on 16 September 2011, he did refer to the application for leave at para 1(2) of his judgment in the context of his reference to the Arrears Summons. I shall need to come back to this aspect of the case later in view of Ms Yip's arguments. After delivery of his ruling on the variation application, the Judge proceeded to deal with the Judgment Summons. By that stage, counsel for Yung had asked for the amendment of the Judgment Summons to include the arrears set out in the Arrears Summons. The Judge dealt with them together. The Judge was of the view that Choi did not commit any intentional default in payment of maintenance and the non-payment on his part was due to disagreement on the interpretation of the 1999 order. Thus, the Judge did not make any order of commitment under Rule 87(5)(c) of the MCR. Instead he made an order on 16 September 2011 under Rule 87(5)(a). Choi was ordered to pay the total arrears of \$1,320,095.43 with interest calculated at 8% in the sum of \$105,607.63. The Judge ordered that they should be paid by Choi in two instalments: first instalment of \$650,000 on or before 1 April 2012 and second instalment of \$670,095.43 on or before 1 October 2012. The Judge also ordered Choi to pay 80% of the costs of Yung. Choi appealed against the orders of the Judge on the variation application as well as the enforcement proceedings. The grounds of appeal Choi is represented by Ms Yip on the appeal. Counsel raised several grounds for attacking the orders. Those grounds were set out by way of amendments to the notice of appeal. Whilst the original grounds of appeal challenged the reasoning of the Judge in his judgments, most of Ms Yip's new grounds do not attack the reasoning of the Judge. At the hearing of the appeal, Ms Yip did not make submissions on the original grounds. Instead she concentrated on her new grounds. As far as I can see, there is no merit in the original grounds and I shall, like Ms Yip, concentrate on the grounds that have been argued before us. Broadly speaking, the points taken by Ms Yip are as follows, Lack of jurisdiction in the making of an order in terms of para 7 of the 1999 order; Unfairness in granting leave to enforce arrears over 12 months; Lack of judgment summons for the arrears in education and overseas living expenses; Double-counting or overlapping between paras 4 and 7 payments. It should be noted that Choi's notice of appeal does not seek an order for the release of his undertaking regarding payment of the overseas education expenses including living expenses, boarding and all incidental expenses [the Undertaking] given to the Judge and accepted by the court. Ms Yip indicated that Choi would make further application in that respect at the Family Court. It should also be noted points (a) to (c) had not been taken at the court below. Proper construction of the 1999 order I would first deal with the point which had been taken below: the relationship between paras 4 and 7 in the 1999 order. Choi contended before the Judge that his obligation under para 4 was alternative to his obligation under para 7. So long as he had made the periodical payment in accordance with para 4, he did not have to observe para 7. That submission was considered and rejected by the Judge at paras 25 to 28 of the judgment on variation. The Judge held that the obligations under paras

4 and 7 were not alternative to each other. The periodical payments under para 4 did not cover overseas education and living expenses. Before us, Ms Yip attempted to advance a modified version of Choi's argument. She submitted that the construction of the Judge would result in payments by Choi far exceeding the actual needs of the children. As there was no verification and the withdrawals from the fund were not limited under para 7(f), there was a danger of overpayment. She also said there was no attempt to quantify the actual needs of the children. She therefore asked for the case to be remitted to the Family Court. It appears to us that Ms Yip has proceeded on the wrong assumption that para 7(f) of the 1999 order had the effect of making Choi liable to pay for all overseas expenses of the children including school fees, tuition fees, living expenses and expenses for extra-curriculum activities and other incidental expenses. To be fair to counsel, the Judge had also proceeded on that assumption. So did Yung and her counsel. But it is plain to us that para 7(f) did not have such effect. The purpose of that sub-paragraph was to define the scope of educational expenses covered by sub-paragraph (e). Sub-paragraph (e) enabled Yung to make withdrawals from the education fund for the purpose of discharging the educational expenses of the children. And the limit of the contribution by Choi in terms of the fund was set out at sub-paragraphs (a) and (d): 10% of his person income for each financial year. Sub-paragraph (c) provided that the tax assessments of Choi would be conclusive evidence for the purpose of determination of Choi's income. Thus, the extent of contribution by Choi was limited by sub-paras (a) and (d). As far as the terms of the 1999 order are concerned, Choi was not required to top-up the fund beyond that limit even though the fund might not be enough to cover all the costs of overseas education of the children. According to the evidence of Choi as set out at para 13 of the judgment on variation, the 10% of his personal income for 2007 and 2008 were \$100,000 and \$52,000 respectively. The actual overseas education expenses incurred by Yung for the two elder children for those two years, as found by the judge at para 32 of the variation judgment, was \$1,151,796.30. Even if one were to examine the position for other years, the average of the 10% of Choi's personal income was only \$128,400, see para 13 of the variation judgment. Mr Ng, appearing for Yung, told the court that Yung disputed the personal income of Choi. But counsel also told us that the figures set out at para 32 were based on the tax assessments of Choi. According to para 7(c) of the 1999 order, that would be conclusive in terms of obligation of Choi under that order. Viewed in the light of the above analysis, Ms Yip's contention about overlapping and double-counting is unrealistic and has no merit. I agree with the Judge's conclusion that Choi's obligation to make periodical payment under para 4 did not overlap with his obligation under para 7 in contributing to the education fund. Plainly, when the parties agreed to the terms of the 1999 order, it was envisaged that more expenses would be incurred for the education of the children as they grew older and for that purpose an additional fund would be necessary over and above the periodical payments provided under para 4. Also, for the reasons given by the Judge, there was still a need to provide for the maintenance of the children in terms of periodical payment under para 4 even when they went to study abroad. Actually, this need was an obvious one given my above analysis as to the effect of para 7(f). I do not think Ms Yip was correct in her submission that the Judge failed to take account of

the actual needs of the children. The expenses relating to the children were set out in the Form E of Yung dated 4 October 2010. The actual expenses with regard to the overseas education and related expenses were supported by actual receipts placed before the Judge. Contrary to her submission, exhibits R1 and R2 were put to Choi in cross-examination. Choi had the opportunity to respond and did respond by his P6, P7 and P8. In making the downward variation of the periodical payments for the maintenance of the children, the Judge took into account of the needs as well as their other sources of income, see para 47 of the variation judgment. Given my above analysis of para 7(f), the Judge was wrong in ordering Choi to pay the arrears under the Judgment Summons and the Arrears Summons on the basis that para 7(f) imposed an obligation on him to pay all overseas expenses of the children. To that extent, para 1 of the order dated 16 September 2011 must be set aside. Given that error on the part of the Judge, it is open to this court to exercise the discretion afresh. I am of the view that we should order Choi to pay the arrears in periodical maintenance for the children in the sum of \$124,109.13 plus interest at the rate of 8% per annum. I have also considered whether we should order Choi to pay the arrears of his contribution under para 7(a) and (d). Though initially I was attracted to that idea, on reflection I do not think this court should do so. First, there has not been any application to that effect whether by way of the Judgment Summons or Arrears Summons. As mentioned, Yung had all along proceeded on the basis that Choi was obliged by para 7(f) to pay for all the overseas expenses of the children. Thus, the summonses did not specify what the amount would be if arrears were to be calculated on the basis as provided for under para 7(a), (c) and (d). Though there is some evidence as regards Choi's personal income, we cannot tell whether we should adopt the figures for 2007 and 2008 or 2008 and 2009 for the purpose of substitution with the figures ordered by the Judge in respect of education expenses and insurance premium. It is also quite plain that Yung had not asked for relief along this line whether in the Judgment Summons or the Arrears Summons. Second, given the differences between the parties (and we were informed by counsel that the matter would have to go back to the Family Court anyway as there is another pending application to be heard in January in respect of other arrears), and given the substantial amount incurred by Yung for the overseas education of the children against the promise of Choi, it may be fairer to all concerned by leaving it to the parties to decide whether they could resolve between themselves or, if necessary, what further applications were to be made in respect of the education expenses in the past. Given my construction of para 7(f), I am of the view that it is not appropriate to proceed by way of judgment summons in respect of the insurance premium and education and overseas expenses. As I see it, the only potentially possible route for Yung to seek to recover those monies is not by means of the enforcement of the 1999 order but by means of an application for variation. Since the point has not been argued before us, I express no view in this judgment as to whether in the circumstances of the present case a variation of paras 4 or 7 should be ordered with regard to these past expenses. And I must stress that what application she would make is a matter for her and those advising her. The jurisdiction point Ms Yip submitted that the court had no jurisdiction to make an order in terms of para 7 of the 1999 order. That being the case, Ms Yip went on to

contend, the court had no jurisdiction to order the discharge of para 7. Counsel said the effect of para 7 is an order for settlement and under s6(1)(b) of the Matrimonial Proceedings and Property Ordinance Cap 192 [MPPO], the power of the court is confined to an order in respect of property to which a party to the marriage is so entitled . By reference to s6(1)(a), so entitled means entitled, either in possession or reversion , see Jackson s Matrimonial Finance and Taxation 8th Edn, para 6.16. Counsel submitted that the expression does not cover incomes which had yet to be earned at the time when the order was made. In short, she said it could not cover after-acquired property. Therefore, as para 7 purported to deal with income to be earned by Choi in the future (6 years after the decree absolute), they do not come within the scope of s6(1)(b). Given my above conclusion on the arrears that the court could order by way of enforcement proceedings, the discharge of para 7 by the Judge and given there is no application for the release of the Undertaking, this point has no practical significance. As I said, this is not a point taken before the Judge. Nor was it a point taken before the court when the 1999 order was made. Had the point been taken by Choi (or spotted by the court) in 1999, in view of the consensus between the parties, I am quite certain that the problem would have been addressed by modifying the terms of the 1999 order. Paragraph 7 could have been given by way of an undertaking by Choi. Alternatively, the court may order the increase of periodical payment to cater for the overseas expenses of the children as from 2005. As observed by Thorpe LJ in *Xydhias v Xydhias* [1999] 1 FCR 289, the court in the exercise of its family jurisdiction has a broad discretion to determine whether parties had agreed to settle, and if they had, to resolve the remaining issues as to the mechanics for finalizing the terms of the consent order. In such circumstances, I can be brief on this point. I do not accept Mr Ng s submission that the definition of property in s2 of the MPPO can assist. Section 6(1)(b) refers to property so entitled viz entitled in possession or reversion . The qualification restricts the scope of the property that an order can be made under that sub-section. Nor do I accept his submission that para 7 can be treated as an order under s5(2)(a) of the MPPO or an undertaking by Choi to that effect. Para 7 was not given as an undertaking and it provided for the setting up of an education fund for specified purpose, much narrower than the purpose of an order for periodical maintenance of the children. Though these alternatives could be regarded as means to achieve similar objectives and may equally be adopted by the parties if they had addressed their minds to the point argued by Ms Yip, they remain different. But I do not accept Ms Yip s submission that the order for variation should be disturbed. Even if the court does not have the power to make an order in terms of para 7 in the first place, the court certainly has jurisdiction to make an order in terms of para 4 and to vary the same. It was on Choi s application that the court varied para 4. In deciding how para 4 should be varied, the court has taken account of the undertaking offered by Choi which was given by him voluntarily. But for the undertaking, and if the true position with regard to para 7 were taken on board, the Judge may well take the view that there had to be substantial increase in the periodical payment for maintenance of the two elder children in the light of their overseas education expenses. I do not see any injustice in upholding the variation order notwithstanding the problem in respect of para 7. It does not matter in practical terms whether para 7 should have been discharged or declared to be null

and void. Leave for enforcement of arrears over 12 months Again, on my above conclusion as to the order that this court should make, the leave point is of no moment. The arrears of maintenance which I propose to order were within the 12 months period when the Judgment Summons was issued. For present purposes, it suffices to make three short points. First, as is common ground, the starting point is that arrears for over 12 months will not be enforced unless there are special circumstances, see *CSL v WWK* [2006] 3 HKFLR 518. Second, the Judge and the parties very much had the question of leave in mind. In substance, the question of leave had been addressed and in para 1 of the variation order as well as para 1 of the judgment summons order the Judge expressly granted leave. There is no merit in Ms Yip's submission that the leave application was not before the court. Third, I do not accept the submission of Ms Yip that the Judge had been unfair to Choi when asking him whether leave was opposed. As I said, Choi had the benefit of legal advice for most of time when preparations were made for these applications. One of the applications facing Choi when he was legally represented was the leave application. There is no evidence suggesting that Choi had not been properly apprised of the significance of leave. For all we know, it may very well be a case that Choi considered special circumstances existed. The Judge had no obligation to give him any legal advice and it would not be appropriate for the Judge to do so. No judgment summons for arrears of education expenses Again this point is academic. The arrears which I propose to order were set out in the Judgment Summons. Ms Yip criticised the Judge for permitting the arrears of education expenses to be added to the Judgment Summons by way of oral application and complained that it was unfair to Choi that the safeguards under Rule 87(2), (3) and (4) had been overlooked. I do not think it is accurate to describe the application for amendment as a mere oral application. On 15 September 2011, Yung made and filed an affidavit setting out her application for amendment. Though it was not made by summons, the parties were quite aware of the application as Mr Ng had been indicated amendment would be sought on the first day of hearing and the Judge directed that to be dealt with at the beginning of the hearing of the Judgment Summons. Be that as it may, Ms Yip is correct in pointing out that Rule 87(2), (3) and (4) has not been observed. If it is a case of commitment, I agree that the order for commitment cannot be allowed to stand in such circumstances. It has to be remembered that judgment summons is a draconian procedure. It may result in the imprisonment of the judgment debtor. We understand that judgment summons procedure has often been adopted by family practitioners in enforcement of arrears. Unfortunately, there is a tendency of using this as the primary means of enforcement without considering whether less draconian means is more appropriate. When I pointed out in the course of argument that it is possible to seek a court order for payment of a judgment sum by a certain date without using a judgment summons, Ms Yip's initial reaction was that this could not be done. When she was referred to Order 45 Rule 6 RHC, counsel agreed this could be done. In my view, like committal proceedings in other types of civil litigation, judgment summons should be a last resort. In cases where the parties have genuine bona fide disagreement on the interpretation of an order instead of a recalcitrant judgment debtor, or where the parties have bona fide dispute about the quantum of an item under an order for payment, such disputes should be resolved by a

summons taken out under Order 45 Rule 6 instead of a judgment summons. Likewise, in cases where there is genuine bona fide dispute on the judgment debtor's ability to pay (and very often such debtor would take out an application for variation), those representing a judgment creditor should reflect on the appropriateness of the continuation of the judgment summons procedure after seeing the evidence of the judgment debtor. Given the penal consequence, like a committal for civil contempt, the judgment creditor has to satisfy the court beyond reasonable doubt that the judgment debtor has the means to pay the judgment debt, see *Kao, Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830. If a judgment creditor has no firm and cogent evidential basis to discharge such onus, it would not be appropriate to proceed by way of judgment summons. The judgment summons procedure, as applied in Hong Kong at present, has been subject to successful challenge for infringement of human rights in the United Kingdom: see *Mubarak v Mubarak* [2001] 1 FLR 698. As a result, the rules under CCR Order 28 were changed in England. Though this is not the occasion for discussing at length the merits of a similar challenge in Hong Kong, I would point out that there are similar safeguards for human rights in Hong Kong in Articles 10 and 11 of our Bill of Rights. Family practitioners should bear this in mind when they advise their clients to enforce a judgment debt by judgment summons. In particular they should consider whether it is BoR compliant to combine a process of examination of debtor with a process of commitment. Disposition and costs I will therefore allow the appeal in respect of the order made on the Judgment Summons to the following extent, Set aside para 1 and 2 of the order and replace it with an order that Choi shall pay the arrears in maintenance in the sum of \$124,109.13 plus interest at the rate of 8% per annum from 29 April 2010 forthwith. Interest shall accrue on these sums at the rate of 8% per annum up to the date of payment. Set aside para 3. I will not disturb the order made on the variation application. As regards costs, given that the primary basis for my decision was the proper construction of the 1999 order which was not a point taken by Ms Yip, a fair order is that there be no order as to costs here and below. We were told by counsel at the hearing that so far Choi has incurred about \$1.2 million on legal costs in respect of these applications and this appeal whilst Yung has incurred about \$200,000. We were also told that costs are likely to escalate with further applications pending in the Family Court. This is alarming as costs are getting disproportionate to the subject matter of the dispute. Parties should remember every dollar spent on costs mean one dollar less in the resources of the parents which could better be spent on the welfare of the children. It is high time that they should really put an effort in trying to resolve their differences with regard to the past education expenses once and for all. By now, they should have learned that litigation is an expensive and time and energy consuming process and there are uncertainties built into it. It should be a process of last resort and I sincerely hope that Choi and Yung, together with those advising them, can reflect on what I have just said seriously. Hon Au J: I agreed. (Peter Cheung) Justice of Appeal (M H Lam) MACROBUTTON nomacro Justice of Appeal (Thomas Au) Judge of the Court of First Instance Ms Anita Yip, instructed by Ng & Shum, for the Petitioner/Appellant Mr Ernest Ng, instructed by Leung & Lau, for the Respondent/Respondent As per Form 23 of the MCR It is unlikely that she would be satisfied with an order for payment by reference to

the 10% personal income set out in the tax assessments of Choi, whether for 2007 and 2008 or 2008 and 2009. See the relevant discussion under CCR Order 28 in the English White Book

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