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**Report of the Bills Committee on
Mainland Judgments (Reciprocal Enforcement) Bill**

PURPOSE

This paper reports on the deliberations of the Bills Committee on Mainland Judgments (Reciprocal Enforcement) Bill.

BACKGROUND

The current situation

2. At present, there is no arrangement between the Hong Kong Special Administrative Region (HKSAR) and the Mainland on reciprocal enforcement of judgments. The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) provides for foreign judgments to be enforced in Hong Kong summarily on a reciprocal basis. The Mainland is not among the designated jurisdictions.

3. A Mainland judgment may be recognized and enforced by the HKSAR courts under the common law. At common law, a foreign money judgment (including a Mainland judgment) may be recognized and enforced by action as a debt, subject to certain overriding principles, for instance, judgments obtained by fraud or which are against public policy cannot be enforced. A judgment creditor of a Mainland judgment who seeks to enforce the judgment under common law in the HKSAR suffers certain disadvantages -

- (a) he cannot use the simplified procedure of registration provided under Cap. 319. The proceedings will take longer time to complete and involve higher legal costs;
- (b) he will have to bear the burden of proof whereas in proceedings for registration of a foreign judgment under Cap. 319, the burden of proof falls on the judgment debtor to show why the judgment should not be enforced; and
- (c) the Mainland judgment may not be considered by the Hong Kong court as final and conclusive for the purpose of seeking enforcement in Hong Kong, in view of the system of civil procedures in the Mainland.

4. On the other hand, the Mainland laws have not clearly provided for the recognition and enforcement of HKSAR judgments. The Mainland, being a civil law jurisdiction, does not have rules that are similar to the common law rules on recognition and enforcement of foreign judgments as those applied in Hong Kong.

5. Given the huge volume of activities, particularly commercial ones, between the Mainland and the HKSAR, it is in the interest of the Hong Kong and the international business communities that are doing business with the Mainland to have an arrangement on reciprocal enforcement of judgments, so that an option is available for the judgment creditors to seek summary enforcement of court judgments of one jurisdiction in the other jurisdiction within the specified scope of the arrangement, without going through the time-consuming and costly litigation proceedings.

6. Such an arrangement may also be conducive to the development of Hong Kong as a centre for dispute resolution in commercial cases and provision of legal services to the international communities. A simple and effective enforcement mechanism is believed to be a key consideration for investors to select the forum for resolving commercial disputes.

The Arrangement

7. The Administration consulted the Panel on Administration of Justice and Legal Services (AJLS Panel), the legal professional bodies, chambers of commerce and trade associations on the need for an arrangement on reciprocal enforcement of judgments with the Mainland and on the broad framework of the arrangement in 2002. According to the Administration, the majority of the respondents indicated support. The Administration briefed the AJLS Panel periodically on the progress of the matter since 2002. The Hong Kong Bar Association and the Law Society of Hong Kong were briefed on the proposed arrangement in December 2005 and January 2006 respectively. Both bodies supported the proposed arrangement.

8. On 14 July 2006, the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned* (the Arrangement) was signed between the Mainland and the HKSAR. A Legislative Council Brief on the Arrangement was issued to Members on 13 July 2006.

9. The Arrangement only covers judgments that -

- (a) require payment of money in business-to-business contracts. That is, employment contracts and contracts to which a natural person acting for personal consumption, family, or other non-commercial purposes is a party will be excluded;
- (b) relate to disputes in which the parties concerned have agreed in written form to either designate a people's court of the Mainland or a court of the

HKSAR as the forum to have sole jurisdiction for resolving such disputes; and

- (c) are final and conclusive.

10. The Arrangement can only be implemented in the HKSAR by means of legislation whereas, in the Mainland, the Supreme People's Court will promulgate a judicial interpretation to set out the details of the procedures for implementing the Arrangement.

THE BILL

11. The Bill is modeled on Cap. 319 which provides for the enforcement of foreign judgments in Hong Kong. The Bill will make provisions for -

- (a) the enforcement in Hong Kong of judgments in civil or commercial matters that are given in the Mainland;
- (b) facilitating the enforcement in the Mainland of judgments in civil or commercial matters that are given in Hong Kong; and
- (c) matters connected therewith.

12. A copy of the Arrangement signed on 14 July 2006 and attached to the Legislative Council Brief on the Bill is in **Appendix I** (in Chinese only). In response to the request of the Bills Committee, the Administration has provided a comparison of the provisions of the Bill with those of the Arrangement which is in **Appendix II**.

THE BILLS COMMITTEE

13. At the House Committee meeting on 9 March 2007, Members formed a Bills Committee to study the Bill. Hon Margaret NG and Hon Miriam LAU were elected Chairman and Deputy Chairman of the Bills Committee respectively. The membership list of the Bills Committee is in **Appendix III**.

14. The Bills Committee has held 13 meetings with the Administration. The Bills Committee has received views on the Bill from 11 deputations, a list of which is in **Appendix IV**.

DELIBERATIONS OF THE BILLS COMMITTEE

Views of deputations

15. Some deputations welcome the introduction of the Bill for the implementation of the Arrangement which will promote Hong Kong as a regional centre for

commercial dispute resolution. Some deputations are concerned with the difficulties in enforcing judgments in the Mainland and the competency of some Mainland courts. Some deputations have made comments on various provisions of the Arrangement or the Bill. The Bills Committee has taken note of the deputations' views and comments and the Administration's composite response in the course of scrutinizing the Bill.

Long title of the Bill

Reference to the Arrangement

16. Members have requested the Administration to consider including a reference to the Arrangement in the long title of the Bill and setting out the Arrangement in a schedule to the Bill, taking into account the manner in which international agreements are given effect in local legislation.

17. The Administration has undertaken a research on the methods adopted in local legislation to give effect to international agreements applicable to Hong Kong. The research has suggested that there is no uniform way to do so. Broadly speaking, some implementing legislation contain references to the relevant international agreement(s) in the long title with the relevant provisions of the agreement(s) attached in the schedule, some make reference to the relevant international agreement(s) in the long title without incorporating the text of the agreement(s) in the body of the ordinance, and some do not refer to any international agreement(s) in the long title or the main body, but provide a mechanism for subsidiary legislation to be made to give effect to international agreements subsequently made in relation to the same subject matter.

18. The Administration points out that in ordinances which seek to implement various agreements with other jurisdictions in rendering judicial assistance, such as Cap. 319, the Arbitration Ordinance (Cap. 341) and the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap. 188), none in their respective long titles refer to the agreements on reciprocal enforcement of judgments, arbitral awards or maintenance orders (as the case may be) between Hong Kong and other jurisdictions. Neither do they incorporate or refer to the text of any such agreements in the body of the legislation. The Administration considers that the drafting approach of the Bill should be modelled on these ordinances, all of which have a primary purpose similar to the Bill.

19. The Administration has advised that as the drafting of the Arrangement is more akin to the Mainland drafting style, it has adopted the principle that the Bill should be self-contained so that there would be no need for users to refer to the Arrangement. In addition, agreements and arrangements between the Government and other Governments do not take legal effect directly under the existing common law system. The Arrangement requires the enactment of local legislation for implementation. In order to avoid any confusion as to the status of the Arrangement, the Administration does not consider it necessary to refer to the Arrangement in the long title of the Bill.

20. Given that the Bill seeks to give effect to the Arrangement and contains special provisions which are different from Cap. 319, e.g. the special procedures to address the common law requirements of finality, the Chairman maintains that it is logical for the long title of the Bill to contain a reference to the Arrangement. Members agree that the Chairman should move an amendment on behalf of the Bills Committee in this respect. After reconsideration, the Administration has indicated that it will take on board the amendment.

Reference to "civil or commercial" in the long title and the interpretation clause

21. Some members consider that the expression "civil or commercial matters" appearing in the long title of the Bill and in the definition of "Mainland judgment" under clause 2(1) of the Bill may not be appropriate as only judgments arising from commercial matters will be covered by the Bill.

22. The Administration has explained that although the expression "civil and commercial matters" (民商事) is rather commonly used in the Mainland law, there is no legal definition of its meaning. The *General Principles of Civil Law of the People's Republic of China (PRC)* 《中華人民共和國民法通則》 and the *Contract Law of the PRC* 《中華人民共和國合同法》 make no distinction regarding contracts for "civil" or "commercial" matters. However, it seems to be common practice that in the Mainland, certain laws and regulations will be grouped together under the headings of "civil and commercial laws". In addition, the term "civil and commercial matters" can be found in various judicial interpretations promulgated by the Supreme People's Court concerning "foreign-related" matters.

23. The Administration has further explained that the purpose of the Bill is to give effect to the Arrangement. Article 1 of the Arrangement which sets out its purpose refers to judgments in a "civil and commercial case" (民商事案件) pursuant to a choice of court agreement. The long title of the Bill and the definition of "Mainland judgment" as appears in clause 2 reflect the intent of the Arrangement.

24. Taking into account the usage of the expression of "civil and commercial matters" under various Mainland laws and the purpose of the Bill, the Administration considers it proper to adopt similar expression in the Bill, where appropriate, for consistency sake. The expression will not in any way have any impact on the scope of the Bill.

Registration of Mainland judgments in Hong Kong

Provisions in the Bill

25. Under clause 5(2) of the Bill, a Mainland judgment will be registered by the Court of First Instance if the judgment creditor has proved to the satisfaction of the court that -

- (a) the judgment is given by a designated court on or after the commencement of the future legislation;
- (b) the judgment is given pursuant to a choice of Mainland court agreement made on or after the commencement of the future legislation;
- (c) the judgment is final and conclusive as between the parties to the judgment;
- (d) the judgment is enforceable in the Mainland; and
- (e) the judgment orders the payment of a sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or the penalty).

26. In considering the relevant provisions, the Bills Committee has taken note of the following definitions in the Bill -

- (a) "Mainland" means any part of China other than Hong Kong, Macau and Taiwan (clause 2(1));
- (b) "Mainland judgment" means a judgment, ruling, conciliatory statement or order of payment in civil or commercial matters that is given by a designated court (clause 2(1));
- (c) "choice of Hong Kong court agreement" and "choice of Mainland court agreement" mean "an agreement concluded by the parties to a specified contract and designating a court in Hong Kong (or the Mainland, as the case may be) to determine a dispute which has arisen or may arise in connection with the specified contract to the exclusion of courts of other jurisdictions" (clause 3(1) and (2));
- (d) "specified contract" means a contract other than -
 - (i) an employment contract; and
 - (ii) a contract to which a natural person acting for personal consumption, family or other non-commercial purposes is a party (clause 2(1));
- (e) "designated court" means a court in the Mainland which is specified in Schedule 1 to the Bill as follows -
 - (i) the Supreme People's Court;
 - (ii) a Higher People's Court;
 - (iii) an Intermediate People's Court; and

- (iv) a recognized Basic People's Court (clause 2(1)); and
- (f) "recognized Basic People's Court" means any Basic People's Court which is specified in a list provided from time to time for the purposes of this definition to the Government by the Supreme People's Court (clause 2(1)).

Choice of court

27. The Chairman has pointed out that the initial proposal in respect of the choice of court put forward by the Administration to the AJLS Panel in 2002 is different from the revised proposal which is reflected in the Bill as follows -

- (a) the 2002 proposal - the proposed arrangement would apply to judgments of the HKSAR or Mainland courts where the parties to a commercial contract have agreed that a court of either place or the courts of both places would have jurisdiction; and
- (b) the Arrangement as reflected in the Bill - the Arrangement would apply if the parties concerned express agreement in writing to designate a court of the Mainland or the HKSAR to have exclusive jurisdiction for resolving any dispute.

28. The Administration has explained that adopting an exclusive choice of court agreement in the Arrangement would minimize the risk of parallel proceedings being instituted in the courts of both places. It is difficult, if not impossible, to agree on a common set of principles to resolve problems brought by parallel litigation, as each jurisdiction has its own laws, litigation rules and procedures on enforcement of judgments which are quite different from the other. In addition, the Administration has also made reference to the *Hague Convention on Choice of Court Agreements* (the Hague Convention) which is predicated on an exclusive choice of court agreement. The Hague Convention provides for uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters among member states.

Recognized Basic People's Courts

29. Members note that the designated courts in Schedule 1 to the Bill cover, inter alia, recognized Basic People's Courts. However, a list of 47 recognized Basic People's Courts is not included in the Bill, but annexed to the Arrangement, and it is provided at the end of the Annex that -

"The Supreme People's Court may, in light of the requirements of judicial work, add to or delete from the list of Basic People's Courts authorized to exercise jurisdiction of the first instance in civil and commercial cases involving foreign, Hong Kong, Macao and Taiwan parties, and incorporate such changes into the Annex after notifying the Government of the HKSAR."

Under clause 24, the Chief Executive may, by order published in the Gazette, amend the list of designated courts in Schedule 1. Under clause 25, the Secretary for Justice shall from time to time publish in the Gazette a list of the recognized Basic People's Courts.

30. Some members point out that once an exclusive choice of Mainland court agreement is made, any dispute arising from the contract could be determined by any Mainland court stipulated in Schedule 1 to the Bill, including any recognized Basic People's Court, and the judgment could be enforced in Hong Kong. They have expressed serious concern about designating Basic People's Courts for resolving disputes under the Arrangement as the quality of justice and the propriety of the judicial officers of some Basic People's Courts, especially the ones in remote area, are questionable.

31. The Administration has explained that paragraph 1.2 of Article 2 of the Arrangement provides that "a legally enforceable final judgment" shall carry the meaning of, inter alia, any judgment of a designated Basic People's Court authorized to exercise jurisdiction on foreign-related civil and commercial cases. Any suggestion to exclude Basic People's Courts in the Bill would contravene the Arrangement. It is a matter for the Supreme People's Court to decide on the competency of the relevant Basic People's Courts in dealing with foreign-related civil and commercial matters, and the need to authorize such courts.

32. The Administration has advised that the arrangement for the Secretary for Justice to publish in the Gazette a list of recognized Basic People's Courts under clause 25 follows the arrangement adopted for the list of Mainland arbitration bodies under the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* signed on 21 June 1999. If any amendment to the list of Basic People's Courts is made in the future, the Administration will ensure that the revised list will be widely published, in addition to the Gazette. In response to the request of the Bills Committee, the Administration agrees that for clarity purpose, it will move an amendment to make a reference to clause 25 in the definition of "recognized Basic People's Court" under clause 2(1).

33. The Bills Committee has also expressed concern that the list of recognized Basic People's Courts published under clause 25 is subject to addition or deletion by the Supreme People's Court without prior consultation with the Government of the HKSAR. It has discussed the possible effect that may be caused by such addition or deletion.

34. The Administration agrees that parties' autonomy should be respected and any amendment to the list of recognized Basic People's Courts should not affect the enforceability or otherwise of a judgment under the Arrangement where (in the case of an addition to the list) the choice of court agreement was concluded prior to the amendment, and (in the case of a deletion from the list) the Mainland judgment was given before the amendment to the list. The Administration has proposed to introduce a new clause in the Bill to this effect (new proposed clause 25A).

35. The legal adviser to the Bills Committee has suggested that the list of Basic People's Courts to be published under clause 25 of the Bill should take effect on the day following its publication in the Gazette. The Administration agrees to explore with the Supreme People's Court regarding the handling of any subsequent changes to the list of Basic People's Courts annexed to the Arrangement so that the time gap between the promulgation of the list in the Mainland and the publication of the same in the Gazette could be minimized. The Administration will consider the best way of effecting such changes.

Scope of "choice of court agreement"

36. According to the Administration, the expression "designating a court" in the definition of "choice of court agreement" (paragraph 26(c) above refers) should mean "a court" or "courts" so designated, following the interpretation rule prescribed in section 7(2) of the Interpretation and General Clauses Ordinance (Cap. 1). Members consider that the expression reflects neither the Administration's intention nor Article 3 of the Arrangement. Paragraph 1 of Article 3 of the Arrangement requires the parties to agree in writing to designate any people's court in the Mainland or any court in Hong Kong to have exclusive jurisdiction over the subject matter of dispute.

37. In respect of the requirement that the choice of court agreement should designate a court to the exclusion of courts of other jurisdictions, members have requested the Administration to clarify how the exclusivity requirement can be satisfied. The Administration considers that the question of whether a choice of court agreement has specified the courts of Hong Kong (or the Mainland, as the case may be) or any of them as the court to determine a dispute to the exclusion of the courts of other jurisdictions is a question of law to be determined by the relevant court. It is inappropriate to specify in the Bill any rules for interpretation of the terms of choice of court agreement.

38. Members have expressed concern about the scope of "choice of Mainland court agreement" and discussed at length different scenarios, for example -

- (a) where a judgment is given by a Mainland court which has not been chosen by the parties but is seized with the case either of its own accord or by application from either or both of the parties; and
- (b) where, in reaching a choice of court agreement, the parties have mistakenly designated a wrong Mainland court to deal with their dispute.

The issue raised is whether the judgment given by such a Mainland court (which is a designated court under the Bill) would satisfy clause 5 of the Bill, notwithstanding that it is not the particular court chosen by the parties under a choice of court agreement. Some members have indicated that the Bill should only apply to the judgment given by the court designated in a choice of Mainland court agreement.

39. The Administration has advised that in the case of the Mainland, the Arrangement is intended to cover judgments given by the designated courts (listed in Schedule 1 of the Bill) where the contracts contain an exclusive choice of court agreement selecting either the courts of the Mainland or a specific court of the Mainland. The Arrangement (Articles 1 and 3) however does not require parties to a choice of Mainland court agreement to limit their choice to a specified designated court.

40. The Administration has provided the relevant provisions of the *Civil Procedure Law of the PRC* and the *Opinions of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the PRC* concerning jurisdiction of the Mainland courts for reference of the Bills Committee. The said Law and Opinions have specifically provided for the determination of jurisdiction by the people's courts, including the rules on transfer of cases within the people's courts in the Mainland. Under Article 25 of the *Civil Procedure Law*, "[t]he parties to a contract may agree to choose in their written contract the people's court of the place where the defendant has his domicile, where the contract is performed, where the contract is signed, where the plaintiff has his domicile or where the object of the action is located to exercise jurisdiction over the case, provided that the provisions of this Law regarding jurisdiction by forum level and exclusive jurisdiction are not violated". Article 36 of the *Civil Procedure Law* provides that "[i]f a people's court finds that a case it has entertained is not under its jurisdiction, it shall refer the case to the people's court that has jurisdiction over the case. The people's court to which a case has been referred...considers that... the case referred to it is not under its jurisdiction, it shall report to a superior people's court for the designation of jurisdiction and shall not independently refer the case again to another people's court."

41. Regarding the scenarios mentioned in paragraph 38 above, the Administration has advised that -

- (a) if the judgment in question is given by a people's court which has properly exercised its jurisdiction following the transfer of the case from the court chosen in a choice of Mainland court agreement in accordance with the Mainland law, then it should be recognized and enforced according to the provisions of the Bill; and
- (b) on the other hand, if a party or parties choose to submit the dispute to a court other than the court chosen under a choice of Mainland court agreement, the judgment should not be regarded as a judgment for the purpose of clause 5 and could not therefore seek enforcement by invoking provisions of the Bill.

42. The Administration has further advised that if the validity of the choice of court agreement is in issue, this will be dealt with by the designated court according to the governing law. A party may also oppose to the enforcement of the judgment in Hong Kong based on the validity of the choice of court agreement but such an argument could only be made under clause 18 of the Bill which sets out the grounds for setting aside registration.

43. In the light of the above discussion, members have questioned whether the expression "pursuant to" in clause 5(2)(d) (i.e. the judgment is given pursuant to a choice of Mainland court agreement) is appropriate.

44. After considering members' comments and concerns, the Administration has proposed to -

- (a) amend the expressions "designating a court in Hong Kong" and "designating a court in the Mainland" in clause 3(1) and (2) respectively to read "specifying the courts in Hong Kong or any of them as the court" and "specifying the courts in the Mainland or any of them as the court". The amended provisions more accurately reflect paragraph 1 of Article 3 of the Arrangement;
- (b) add a definition of "chosen court" (to mean the court or any of the courts specified in a choice of court agreement as the court to determine a dispute to which the agreement applies); and
- (c) delete the references to the expression "pursuant to" in clause 5(2)(b) and other provisions in the Bill when it is used in relation to a judgment. Amendments will also be made to the Bill so that the relevant judgments should be "given by a chosen court (which is a designated court)" or "a designated court to which the case was transferred according to the law of the Mainland". Further, where such judgments were subject to appeal or a retrial, the Bill should also cover the resulting judgments made on appeal or in a retrial in these cases insofar as they were delivered by a designated court.

45. In response to members on the hypothetical case where parties to a contract each instituting legal proceedings in a designated court and obtaining a Mainland judgment which is in conflict with the one obtained by the other party, the Administration has advised that the question of whether any of these Mainland judgments can be registered under the Bill will have to be considered by reference to the requirements set out in clause 5(2). In such a case, it is unlikely that any of the conflicting judgments would be regarded as enforceable in the Mainland. The mere fact that such a Mainland judgment has a certificate of finality and enforceability mentioned in clause 6(2) is of itself not sufficient. Under clause 6(2), the certificate is not conclusive in proving the finality and enforceability of the relevant Mainland judgment; it is subject to any proof to the contrary.

Application of the Arrangement to choice of court agreement

46. Under clause 4, unless otherwise provided in the specified contract between the parties, a choice of court agreement that forms part of the contract shall be regarded as an agreement independent of the other terms of the contract and the validity of the agreement shall not be affected by any modification, discharge, termination or nullification of the contract.

47. Members have enquired whether an exclusive choice of court agreement may be made after the date of commencement of the Bill in respect of a specified contract entered prior to the aforementioned date.

48. The Administration considers this permissible on the following grounds -

- (a) Article 17 of the Arrangement specifies that it will only apply to judgments made after the Arrangement has been commenced. Paragraph 1, Article 3 further stipulates that it will only cover an exclusive choice of court agreement made on or after the commencement of the Arrangement (a required exclusive choice of court agreement); and
- (b) the Arrangement contains no provisions as regards the date of entering into a contract which may be considered a specified contract under the Bill. The Arrangement will apply to such a specified contract if it is governed by a required choice of court agreement, whether the contract is made before or after the commencement of the Bill, and whether the required exclusive choice of court agreement governs all or part of the disputes arising from the contract.

Definition of "specified contract"

49. The Bills Committee considers that the drafting approach of the definition of "specified contract" (paragraph 26(d) above refers) is not user-friendly. It has requested the Administration to review the definition.

50. The Administration has advised that the definition of "specified contract" reflects paragraph 2 of Article 3 of the Arrangement. The effect of Article 3 is to cover all contracts between legal persons as well as all other contracts, with the exception of employment contracts and contracts in which a natural person acting for personal consumption, family or other non-commercial purposes is a party. In sum, the Arrangement will be limited to business-to-business contracts.

51. In view of the absence of a generally accepted definition of "commercial matters" (which sets out the transactions that it covers), the Arrangement follows the drafting practice of various international conventions to define its scope by way of exclusion. The present drafting of the definition of "specified contract" is modelled on Article 2.1 of the Hague Convention because it represents an interface of the common law and civil law jurisdictions. The drafting of the Hague Convention also represents the collective effort of different countries practising different systems of law around the world, through prolonged negotiations, in drawing up a text (including a formulation of the scope of "business-to-business" contracts) which is satisfactory to all of them. A significant advantage of following the approach of the Hague Convention is that Hong Kong may draw reference to any future case law that would be developed by the courts on the interpretation of the types of contracts covered by the Convention.

52. In view of the above, the Administration does not propose to amend the definition of "specified contract".

Definition of "Mainland"

53. The term "Mainland" is defined in clause 2(1) of the Bill to mean any part of China other than Hong Kong, Macau and Taiwan. Some members have expressed concern about the scope of the definition as it does not cover places which have disputes over sovereignty such as Diaoyu Tai and Nansha Qundao.

54. The Administration has responded that the definition of "Mainland" provided in the Bill has been commonly adopted in other ordinances and subsidiary legislation. In addition, the term "Mainland" is used in conjunction with either "judgment" or "court" when appearing in the Bill. The designated courts specified in Schedule 1 to the Bill are not located in the places which have disputes over sovereignty.

55. The Administration has further advised that research into Mainland law has indicated that the term "內地 (Mainland)" also appears in various regulations concerned with the establishment and administration of business entities set up by foreign entities. These regulations, among other things, govern the conduct of relevant activities undertaken in the Mainland by entities from Hong Kong, Macau and Taiwan. This seems to be consistent with the Administration's understanding that the term "Mainland" should be taken to mean any part of China other than Hong Kong, Macau and Taiwan. The Administration considers the present definition of "Mainland" in clause 2(1) appropriate.

Safeguards proposed to be included in the Bill

56. Some members remain concerned about the quality of justice and the propriety of judicial officers in the Mainland and the risks for the Hong Kong business community to resort to the Arrangement. The Bills Committee has discussed a number of safeguards proposed by members.

Prevention of forum shopping

57. Hon Ronny TONG considers that a balance should be struck between the autonomy and freedom of parties to a choice of court agreement and forum shopping (the practice adopted by some litigants to get their legal case heard in the court thought most likely to provide a favorable judgment). He has expressed concern whether the choice of court agreement in the Bill would affect the application of common law rules in Hong Kong that govern forum shopping, i.e. a case should be tried in a court with which it has "real and substantial connection". He has questioned whether a case with real and substantial connection with Hong Kong should be tried in a Mainland court, despite the fact that it is a designated court agreed by the contracting parties.

58. The Administration has explained that the Arrangement does not change the existing jurisdictional rules in the Mainland or Hong Kong, or confer extra jurisdiction to the courts of either side, but seeks to promote Hong Kong as a centre for resolving legal disputes. The Bill does not disturb domestic courts' ability to decline jurisdiction by applying the principle of "forum non conveniens". For example, if the case is related to matters of which Hong Kong has exclusive jurisdiction, such as immovable property in Hong Kong, the court of Hong Kong could set aside the registration of the relevant Mainland judgment under clause 18(1)(e) of the Bill. The court of Hong Kong could also set aside the registration of a Mainland judgment under clause 18(1)(j) of the Bill if it is contrary to public policy.

59. In response to members, the Administration has analyzed whether the Bill would affect the common law rules governing forum shopping. According to the Administration, at common law, a foreign judgment in *personam* given by a court having jurisdiction according to the conflict of laws rules of the place where enforcement is sought, may be enforced by action provided that it is for a debt or a definite sum of money, and it is final and conclusive. If a judgment debtor submitted to the jurisdiction of a foreign court, that court would be regarded as having jurisdiction to give a judgment in *personam* capable of enforcement under common law. It follows that if a contract provides that all disputes between the parties shall be referred to the exclusive jurisdiction of a foreign tribunal, the foreign court would be regarded as having jurisdiction over the parties pursuant to common law rules. In such a case, enforcement of a judgment in *personam* given by that foreign court would not be refused on the ground that the foreign court lacked jurisdiction. These common law rules are also reflected in Cap. 319. The Administration is of the view that the Bill will not affect the applicable common law rules discussed.

60. Mr TONG considers that the Bill should provide sufficient safeguards to prevent forum shopping, as parties to the exclusive choice of court agreement are not necessarily of equal bargaining power and Hong Kong businessmen may be obliged to enter into a choice of court agreement which is advantageous to the cause of their Mainland counterparts. He has suggested that a safeguard should be provided under clause 18 for setting aside the registration of a Mainland judgment on the ground that the judgment was given by a court which had no real and substantial connection with the dispute, or a provision should be included in the Bill to guard against injustice such as unequal bargaining power of the parties to a choice of court agreement.

61. The Chairman has pointed out that the exclusive choice of court agreement stipulated in the Arrangement, which is different from the initial proposal in 2002, may give rise to the risk of enabling a party with stronger bargaining power to dictate the choice of court at the time when the contract is negotiated.

62. Members have asked the Administration to provide information on past cases where the enforcement of Mainland judgments or arbitral awards was refused on the ground of unequal bargaining power of the contracting parties. The Administration has advised that Mainland judgments have not been enforced in Hong Kong because of the difficulties involved in establishing that they were final and conclusive. There

had been no case of registration of arbitral awards being refused on the ground that the bargaining power between the two contracting parties was unequal or the contract was signed under undue influence.

63. Regarding Mr TONG's proposal that the registration of a foreign judgment should be refused on the ground that the foreign court, being the chosen forum, did not have any real and substantial connection with the case, the Administration considers that such a ground of refusal departs from the common law rule and is inconsistent with Cap. 319. It also falls outside the grounds of refusal to recognize and enforce a judgment under the Arrangement and hence cannot be included in clause 18.

64. The Administration is of the view that the issue of unequal bargaining power should not be addressed by legislation in the context of reciprocal enforcement of judgments. It also points out that there is no such provision in Cap. 319 which applies to civil and commercial judgments of both common law and non-common law jurisdictions. Furthermore, it would not be possible to define in the law what would amount to unequal bargaining power.

Opt-in system

65. Hon James TO has proposed that parties to a choice of court agreement should expressly opt in the enforcement regime under the Arrangement.

66. The Administration has advised that the Arrangement was reached with the Mainland authorities after years of discussion and the suggestion of an opt-in system was discussed but declined by the Mainland Authorities. It is inconsistent with the Arrangement to incorporate an opt-in system in the Bill.

67. In response to Mr TO concerning overseas experience, the Administration has advised that the existing arrangement for reciprocal enforcement of judgments between the Mainland and overseas jurisdictions, and between Hong Kong and other overseas jurisdictions do not provide an opt-in system. While the Hague Convention has adopted an exclusive choice of court agreement, it is not necessary for the parties to a choice of court agreement to expressly opt in the enforcement regime.

Capping of judgment sum

68. Hon James TO has expressed concern about possible manipulation of the Arrangement, e.g. a Mainland court has awarded a judgment creditor with \$3 billion while the judgment debtor is prepared to pay only \$1 million as agreed in the contract. He has requested the Administration to advise whether Hong Kong has to enforce the Mainland judgment even though the awarded sum far exceeds the agreed limit, whether the Bill should incorporate a provision to cap the maximum judgment sum by reference to the parties' agreed limits so that parties to the contract would know the financial risk involved, and whether including such a provision in the Bill would be inconsistent with the Arrangement.

69. The Administration has advised that the Bill does not preclude parties to specify the maximum judgment sum to be enforced in a contract. However, whether or not any capping of the judgment sum as specified in a contract would be effective would depend on the law applicable to the contract and the ruling of the chosen court. The role of Hong Kong court is to ensure that a Mainland judgment covered by the Arrangement could be enforced in Hong Kong, regardless of the judgment sum.

70. The Administration has further advised that if a Mainland judgment is obtained by fraud, or is contrary to public policy, or involved punitive damage, the court of Hong Kong could set aside the registration of the Mainland judgment under clause 18 of the Bill. Moreover, Hong Kong businessmen who are concerned about possible manipulation of the Arrangement by their counterparts could choose not to avail themselves of the Arrangement.

Finality of Mainland judgments

71. The Bills Committee notes that at common law, in order to establish a foreign money judgment is final, it must be shown that the court, by which the judgment was pronounced, conclusively, finally and forever established the existence of the debt in question so as to make it *res judicata* between the parties. A judgment can still be regarded as final even if it is under appeal.

72. Under the trial supervision system in the Mainland, a party to the case, a people's court or a people's procuratorate at a higher level may initiate a review of a legally effective judgment subject to certain conditions. This could result in the retrial of the case by the original trial court. Hence, there were instances where the Hong Kong courts ruled that judgments of the Mainland courts could not be considered final and conclusive for the purpose of seeking enforcement in Hong Kong.

73. For the purpose of the Arrangement, special procedures will be adopted in order to address the common law requirements of finality. Clause 5(2) stipulates that in order to render a Mainland judgment enforceable in Hong Kong, that judgment must be, inter alia, final and conclusive as between the parties to the judgment. Clause 6(1) further provides that for the purposes of clause 5(2)(c), a Mainland judgment is final and conclusive as between the parties if -

- (a) it is a judgment given by the Supreme People's Court;
- (b) it is a judgment of the first instance given by a Higher People's Court, an Intermediate People's Court or a recognized Basic People's Court -
 - (i) from which no appeal is allowed according to the law of the Mainland;
 - (ii) in respect of which the time limit for appeal has expired according to that law and no appeal has been filed;

- (c) it is a judgment of the second instance given by a designated court other than a recognized Basic People's Court; or
- (d) it is a judgment given in a retrial by a People's Court of a level higher than the original court unless the original court is the Supreme People's Court.

The Supreme People's Court of the PRC will issue a judicial interpretation to set out the special retrial procedures applicable to Mainland judgments sought to be enforced in Hong Kong under the Arrangement. An explanatory document on the new procedures will be drawn up and distributed by the Supreme People's Court before the Arrangement comes into effect.

74. In response to members, the Administration has explained that the expression "unless ..." in clause 6(1)(d) is necessary because the concept of bringing up cases for retrial in a higher level court cannot apply to the Supreme People's Court which is the highest court in the Mainland.

75. Members consider that the above position is sufficiently clear under the Mainland law and the "unless" clause would not be required. In addition, as the term "original court" is already defined in clause 2(1) to mean "in relation to any Mainland judgment, the designated court by which that judgment was given", members have questioned whether the reference to the term in the context of clause 6(1)(d) is appropriate. After reviewing the drafting of clause 6(1)(d), the Administration has agreed to introduce amendments to better reflect its intention.

Time limit for application for registration of Mainland judgments

76. Under clause 7, the time limit for making an application for registration of a Mainland judgment is one year if one or more of the parties to the judgment are natural persons, or six months in any other case. The time limit shall be calculated from the last day of the period for performance of the Mainland judgment as specified in the judgment. Clause 7 also applies to the registration of a Mainland judgment which is required to be performed in stages (clause 13).

77. The Administration has advised that the time limit stipulated under clause 7 follows the provisions of Article 8 of the Arrangement. The same time limit applies in relation to an application to a people's court in the Mainland for the execution of a judgment under Article 219 of the *Civil Procedure Law*.

78. The Administration has subsequently advised the Bills Committee that the *Civil Procedure Law* has been amended by the Standing Committee of the National People's Congress on 28 October 2007 and the amended Law will take effect on 1 April 2008. One of the amendments introduced relate to the provisions concerning the time limit for applications of execution of judgments prescribed under Article 219. The new provision (now under Article 215) provides that the time limit for application of execution has been extended to two years without any distinction between natural and

legal persons. In the new Article 215, it is also stated that if the period of performance has not been specified in a judgment, the date shall be calculated from the day when the judgment takes effect.

79. In view of the above-mentioned amendments to the *Civil Procedure Law*, the Administration and the Supreme People's Court of the PRC have agreed, by way of exchange of Agreed Notes on 29 February 2008, that Article 8 of the Arrangement will be amended so that the time limit for an application for registration of a Mainland judgment and the calculation of such time limit will correspond with the relevant provisions under the Amended *Civil Procedure Law*. Following the agreement to amend Article 8, the Administration will amend clause 7 of the Bill accordingly.

Mainland judgments expressed in currency other than Hong Kong currency

80. Under clause 11, where the sum payable under a Mainland judgment is expressed in a currency other than Hong Kong currency, the judgment, when registered, shall be registered as if it were a judgment for such sum in Hong Kong currency as, on the basis of the rate of exchange prevailing at the date of registration, is equivalent to the sum so payable.

81. The Bills Committee has requested the Administration to provide information on how the exchange rate would be determined by the court when there has been substantial fluctuation on the exchange rate on the date of registration.

82. Having consulted the Judiciary, the Administration has advised that for the purpose of clause 11, it is for the applicant to provide a written certificate from a bank to inform the court of the prevailing exchange rate at the date of registration. In case of dispute on exchange rate, it would be a matter of evidence for the court to resolve.

Mainland judgments requiring performance in stages

Clause 13

83. Clause 13 of the Bill provides that if the performance of a Mainland judgment is required to be in stages, a judgment creditor may apply to the court under clause 5(1) to have any part of the judgment registered in the court.

84. Members have questioned the need for a judgment creditor to make separate applications for registration of a Mainland judgment which requires performance in stages. They have asked the Administration to review the need for retaining clause 13 in the Bill.

85. The Administration has explained that clause 13 is to implement Article 8(3) of the Arrangement. Article 219 of the *Civil Procedure Law* states that the time limit for the submission of an application for execution shall be calculated from the last day of the period of performance specified by the legal document. Article 219 also states that if the relevant judgment specifies performance in stages, the time limit for the

submission of an application for execution shall be calculated from the last day of the period specified for each stage of performance.

86. The Administration has sought clarifications from the relevant Mainland authority on the application of Article 219 of the *Civil Procedure Law* and has been given to understand that under Article 219, as far as a Mainland judgment requiring performance in stages is concerned, the judgment creditor would not be entitled to enforce any part of the judgment sum unless that relevant part has become due as specified in the judgment.

87. The Administration has advised that under Cap. 319, a foreign judgment shall not be registered if at the date of the application, it could not be enforced by execution in the country of the original court.

88. The Administration considers that in the context of enforcing a Mainland judgment in Hong Kong, the judgment creditor should not be entitled to register any part of the judgment sum that, at the date of application, could not be enforced by execution in the Mainland. It follows that clause 13 should be retained for the purpose of addressing the specific circumstances of enforcing Mainland judgments which require performance in stages.

Proposed Order 71A

89. Under paragraph 2 of Schedule 2 of the Bill, the proposed Order 71A, rule 11 stipulates the requirements for evidence in support of application for registration of a Mainland judgment that requires performance in stages. Under rule 11(2)(b), if an application for registration of any part of a Mainland judgment is preceded by any application for registration of a different part of the same judgment, the judgment creditor is required to exhibit documents and information which have been exhibited or stated in the affidavit supporting the preceding application.

90. Members consider the documentation requirement under rule 11(2)(b) cumbersome and not user-friendly, and have requested the Administration to simplify the procedures for enforcement of a Mainland judgment which requires performance in stages.

91. Having consulted the Judiciary, the Administration has proposed to simplify the documentation requirement under Order 71A, rule 11(2). In respect of an application for registration for a part of a Mainland judgment that is preceded by the registration of any other part of the same judgment as ordered by the court, the applicant is only required to file an affidavit, stating any relevant information relating to the current application, including the judgment sum due under the relevant part of the judgment, and exhibiting a copy of the last court order in respect of any other part of the same judgment.

Calculation of interest on a Mainland judgment registered in Hong Kong

92. Clause 12 provides that the Mainland judgment shall, in addition to the sum payable under the judgment, be registered for any interest which shall be due under the judgment, any costs duly certified by the original court and any reasonable costs of and incidental to registration. Clause 14(2) provides, *inter alia*, that the sum for which the judgment is registered shall carry interest, as if the judgment had been a judgment originally given in the Court of First Instance and entered on the day of registration.

93. The Bills Committee has discussed the calculation of interest on a Mainland judgment registered in Hong Kong, making reference to an example (the principal sum of a Mainland judgment is \$10 million and the interest accrued in the Mainland on the principal sum is \$5 million up to the time of registration of that judgment in Hong Kong).

94. Some members and the Administration hold different views as to whether interest under Mainland law accrued on the principal sum of a Mainland judgment up to the time of registration of the relevant judgment in Hong Kong should carry Hong Kong judgment interest after registration. The Administration takes the view that the registered sum (i.e. \$15 million) should carry Hong Kong judgment interest upon registration as if it were a Hong Kong judgment issued on the date of registration. Some members consider it objectionable that interest should be payable to the part of the sum registered that represents Mainland interest and are of the view that only the principal sum (i.e. \$10 million) should carry Hong Kong judgment interest upon registration. The Bills Committee has requested the Administration to look into clauses 12 and 14(2) of the Bill.

95. The Administration has advised that clauses 12 and 14(2) have been included in the Bill, taking into consideration the system of registration for foreign judgments under Cap. 319 and Article 16 of the Arrangement. Clauses 12 and 14(2) are respectively modelled on sections 4(6) and 4(2) of Cap. 319. Article 16 of the Arrangement specifies that the judgments to be enforced by the courts of the other side shall include, apart from the sum specified in the judgment, any interest that becomes due under the judgment as well as lawyers' fees and litigation costs.

96. The effect of registration of a Mainland judgment is therefore the same as that of a foreign judgment under Cap. 319. Upon registration, the relevant Mainland judgment shall be of the same force and effect in Hong Kong as if it had been a judgment originally given in the Court of First Instance. The sum for which the judgment is registered shall therefore carry simple interest as if it were a local judgment under clause 14(2).

97. Neither section 4(2) and (6) of Cap. 319 nor clauses 12 and 14(2) are considered unique for the purposes of enforcing a foreign judgment in common law jurisdictions. Similar provisions can be found in section 4(2) and (6) of the English Foreign Judgments (Reciprocal Enforcement) Act 1933 (upon which the above-mentioned sections of Cap. 319 are based).

98. The Administration however could not find any decided cases in Hong Kong on the interpretation of section 4(2) and (6) of Cap. 319 nor any relevant cases under the 1933 Act which might help resolve members' queries. It had also approached the Judiciary but was informed that they were not aware of this problem in post-registration enforcement of foreign judgments.

99. In the light of the research conducted and members' views, the Administration considers that the interpretation of the relevant clauses in the Bill need not be conclusively decided. The relevant provisions, as they stand, would not prevent a judgment debtor from arguing that there should be no compounding of interest. The court will ultimately decide on the proper interpretation of the relevant provisions in the Bill or corresponding provisions in Cap. 319 should there be a need to resolve the issue.

100. Furthermore, section 4(2) and (6) of Cap. 319 have come into operation since January 1965. The Administration does not think it justified to create a registration regime for Mainland judgments which is different from the one which now exists under Cap. 319. The Administration will not propose any amendment to clauses 12 and 14(2) of the Bill.

Grounds for setting aside registration of registered judgments

Defence of natural justice

101. Clause 18 sets out the grounds for setting aside the registration of Mainland judgments and seeks to reflect Article 9 of the Arrangement. Members have requested the Administration to review whether the defence of natural justice is covered under the grounds set out in clause 18.

102. The Administration has advised that at common law, a foreign judgment is impeachable in the following circumstances -

- (a) if the courts of the foreign country did not have jurisdiction to give that judgment in the view of the law of the place of enforcement;
- (b) if the judgment was obtained by fraud;
- (c) if its enforcement or recognition would be contrary to public policy; and
- (d) if the proceedings in which the judgment was obtained were opposed to natural justice.

103. The Administration has also advised that -

- (a) most of the grounds in paragraph 102 above are similarly provided under section 6(1) of Cap. 319 as grounds to set aside the registration of a foreign judgment under the Ordinance. However, there is no express provision under Cap. 319 which enables the court to set aside a

registered judgment on the ground that it was obtained in breach of natural justice; and

- (b) the Arrangement, similar to Cap. 319, does not specify "natural justice" as a ground for refusing to enforce a judgment covered thereunder.

104. The Administration has further advised that the grounds for refusing to recognize or enforce a judgment of a Contracting State in the Hague Convention are comparable to those found in paragraph 1(4) and (5), and paragraph 2 of Article 9 of the Arrangement, which are respectively reflected in clause 18(1)(f) (the judgment was given in the absence of the judgment debtor), clause 18(1)(g) (the judgment was obtained by fraud), and clause 18(1)(j) (the enforcement of the judgment is contrary to public policy) of the Bill. In the *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention*, it is suggested that these three grounds have considerable overlap amongst one another, and "all relate, wholly or partly to procedural fairness" which is "also known as ... natural justice" in some countries.

105. Reading the interpretations in various common law jurisdictions and the comments contained in the *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* together, the Administration considers that it may be fair and reasonable to conclude that the defence of natural justice is encompassed by the public policy defence. The notion of natural justice also has a considerable overlap with the elements of fraud. This being the case, the Administration considers that the natural justice defence is adequately covered under clause 18 of the Bill.

Proof of contravention of public policy

106. Under the Bill, all the grounds (including "public policy") against enforcement of judgments are set out in clause 18(1). A judgment debtor is required "to prove to the satisfaction of the Court of first Instance" that a judgment should not be enforced. Members point out that the formulation of clause 18 is different from Article 9 of the Arrangement and section 6(1)(a) of Cap. 319 as follows -

- (a) paragraph 2 of Article 9 stipulates that "the court has the discretion" not to enforce a judgment on the ground that it is contrary to "social and public interests" in the Mainland or "public policy" in Hong Kong; and
- (b) section 6(1)(a) of Cap. 319 stipulates, inter alia, that the registration of judgment shall be set aside if "the registering court is satisfied" that the enforcement of the judgment shall be contrary to public policy in Hong Kong.

Members have requested the Administration to advise whether the defence of "public policy" against enforcement of a foreign judgment can be raised at the court's initiative under clause 18.

107. After consideration, the Administration considers it appropriate to follow the drafting of section 6(1)(a) of Cap. 319 and will amend clause 18(1) accordingly. The

amended provision would leave the court with the discretion to invoke the public policy ground on its own volition.

Other issues

Interpretation of expressions of the Mainland law

108. Clause 2(2) provides that "where an expression of the law of the Mainland which refers to any court, court document or court procedures is used in the Chinese language text of this Ordinance, the expression shall be construed having regard to the meaning of the expression under the law of the Mainland, and an analogous expression used in the English language text of this Ordinance shall be construed accordingly".

109. According to the Administration, the drafting of clause 2(2) is similar to section 10C of the Interpretation and General Clauses Ordinance (Cap. 1) which provides for an expression of the common law found in the English text of an ordinance to be construed in accordance with the common law meaning of that expression.

110. Members have discussed the effect of clause 2(2). They are concerned whether a court of Hong Kong has to seek clarification from the Mainland authorities if it is uncertain about the meaning of an expression of the Mainland law used in the Bill and whether it is obliged to accept the interpretation given by the Mainland authorities. They have suggested that it is more appropriate to define the expressions of the law of the Mainland in clause 2(1) of the Bill.

111. The Administration has explained that since the Bill seeks to implement the Arrangement, various references in the Bill are expressions used in the *Civil Procedure Law*. The Administration would have great difficulties in defining these expressions on behalf of the Mainland authorities. Even if these expressions are defined in the Bill, it would follow that where any changes are brought to the *Civil Procedure Law* affecting the interpretation or understanding of these expressions, consequential amendments would have to be made to the domestic legislation of Hong Kong and this would not be desirable. The Administration has advised that clause 2(2) was inserted with a view to helping the court and parties to appreciate that the interpretation of such terminology is a matter of the Mainland law.

112. Members consider that the Administration should consider the practical effect of including clause 2(2), e.g. whether the advice of experts in Mainland Law would be required to assist the court in proceedings under the Bill and the quality of the legal advice obtained. They have requested the Administration to consider the pros and cons of deleting the clause from the Bill.

113. The Administration considers that the deletion of the clause will not affect the operation of the Bill. In view of members' concerns, the Administration has agreed to delete the clause from the Bill.

Documents in electronic form

114. Under clause 3(4), the Bill applies to a choice of court agreement whether it is concluded or evidenced in one document or several documents. As there is no definition on the word "documents" in the Bill, members have asked whether the word covers documents in electronic form.

115. The Administration has advised that the following definition as provided in the Interpretation and General Clauses Ordinance (Cap. 1) would apply -

"document' (文件) means any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means."

The Administration takes the view that the above definition is wide enough to cover documents in electronic form. The wording in clauses 3(3) and 3(4) of the Bill together is sufficiently clear to convey the intention that the Bill covers an agreement concluded or evidenced by electronic means for the purpose of clause 3.

Amendments to clauses 18(1)(f), (h) and (i) and clauses 21(1) and (2)

116. In view of members' comments, the Administration has reviewed the drafting of clauses 18(1)(f) and (i) as well as clauses 21(1) and (2). Amendments will be introduced to render them clearer and more user friendly.

117. The Administration has also advised that clause 18(1)(h) will be amended so that the registration of a Mainland judgment may be set aside if an arbitral award on the same cause of action between the parties to the judgment has been made by an arbitration body in Hong Kong. Clause 18(1)(i) contains similar provisions relating to an arbitral award made by an arbitration body outside Hong Kong. The proposed amendment should better reflect Article 9(6) of the Arrangement.

Consequential amendments

Consequential amendments to Order 71A of the Rules of High Court (paragraph 2 of Schedule 1)

118. The Administration has advised the Bills Committee that upon the gazettal of the Bill, the Office of the Privacy Commissioner for Personal Data wrote to it suggesting that the requirement under the proposed rule 3(2)(a) of Order 71A for a judgment creditor to exhibit a certified copy of identity card upon an application for registration of a Mainland judgment ("the proposed requirement") might entail a risk of exposing the personal data of the judgment creditor.

119. The Administration points out that there is no similar requirement for the provision of identification documents in support of an application for enforcement of a local judgment or a foreign judgment under the current law. Following the procedure

for applying for registering a foreign judgment under Cap. 319, an application for registering a Mainland judgment under the Bill will need to be supported by an affidavit. Such an affidavit will have to be sworn before qualified personnel who would take steps to satisfy themselves of the identity of the deponent. Further, there is a criminal sanction against wilful use of false affidavit. In the circumstances, the Administration considers it appropriate to seek the views of the Bills Committee on the retention of "the proposed requirement" or otherwise.

120. Members consider that the personal data of the judgment creditor should not be an issue of concern if he is a party to the legal proceedings in Hong Kong, and the judgment debtor should have the right to know and verify the identity of the judgment creditor. Given that the proposed Order is intended to implement Article 6(4) of the Arrangement and the evidential requirements to support applications for enforcement of Mainland and Hong Kong judgments under the Arrangement should be similar, "the proposed requirement" should be retained.

121. The Administration has further consulted the Privacy Commissioner for Personal Data, the Judiciary, various chambers of commerce and other organizations of the business sector on "the proposed requirement". The Privacy Commissioner considers that "the proposed requirement" is unnecessary and excessive under Data Protection Principle 1 in Schedule 1 to the Personal Data (Privacy) Ordinance (Cap. 486). The judgment debtor's concern may not be well founded as the identity of the judgment creditor would be verified by the witnessing solicitors when the affidavit is made. The Privacy Commissioner has also cautioned that the application of "the proposed requirement" to Order 71A only may be inconsistent with Order 71 and may result in unnecessary litigation. The Privacy Commissioner therefore remains of the view that there is no sufficient justification for imposing "the proposed requirement". The International Chamber of Commerce, Hong Kong considers that "the proposed requirement" may be retained in its present form. The Federation of Hong Kong Industries opines that given the existing legal safeguards against falsification of the identity of a deponent and the fact that Cap. 319 does not contain a similar provision, "the proposed requirement" would not be necessary. The Judiciary considers that, insofar as processing an application for enforcement of a judgment (local or foreign) is concerned, it will not require the provision of any identification documents by the applicant.

122. Taking account of the comments received, the Administration proposes waiving "the proposed requirement" under rule 3(2)(a) and (b) of Order 71A, as there is no comparable requirement relating to the registration of foreign judgments pursuant to Cap. 319. The current procedures should be sufficient for the purpose of verifying the identity of the party who wishes to file an affidavit for or on behalf of oneself. The Administration will propose amendments to delete the relevant rule.

Consequential amendments to Foreign Judgments (Restrictions on Recognition and Enforcement) Ordinance (paragraph 3 of Schedule 2)

123. The Administration originally proposed to amend the Foreign Judgments

(Restrictions on Recognition and Enforcement) Ordinance (Cap. 46) so that Mainland judgments or any part thereof that satisfy the requirement of clause 5(2)(a) to (e) of the Bill would be excluded from the purview of Cap. 46.

124. In the light of the Hong Kong Bar Association's comment, the Administration has reviewed the need for such an amendment. It is noted that Cap. 46 seeks to address a different problem and is not inconsistent with the Bill. Cap. 46 addresses the problem of foreign judgments which were given in violation of a choice of court agreement between the parties.

125. The Administration therefore comes to the view that Cap. 46 should continue to apply to foreign judgments which are given in violation of a choice of forum agreement. On this understanding, the Administration considers that paragraph 3 of Schedule 2 should be removed from the Bill.

FOLLOW-UP ACTION BY THE ADMINISTRATION

126. The Administration has undertaken to provide a copy of the judicial interpretation to be promulgated by the Supreme People's Court on the procedures for implementing the Arrangement for reference of Members (paragraphs 10 and 73 above refer).

127. The Administration agrees to explore with the Supreme People's Court how the time gap between the promulgation of any subsequent changes to the list of Basic People's Courts in the Mainland and the publication of the same in the Gazette could be minimized (paragraph 35 above refers).

CONSULTATION WITH THE HOUSE COMMITTEE

128. The Bills Committee reported its deliberations to the House Committee on 23 April 2008.

Council Business Division 2
Legislative Council Secretariat
21 April 2008

關於內地與香港特別行政區法院相互認可和執行
當事人協議管轄的民商事案件判決的安排

根據《中華人民共和國香港特別行政區基本法》第九十五條的規定，最高人民法院與香港特別行政區政府經協商，現就當事人協議管轄的民商事案件判決的認可和執行問題作出如下安排：

第一條 內地人民法院和香港特別行政區法院在具有書面管轄協議的民商事案件中作出的須支付款項的具有執行力的終審判決，當事人可以根據本安排向內地人民法院或者香港特別行政區法院申請認可和執行。

第二條 本安排所稱“具有執行力的終審判決”：

(一) 在內地是指：

1. 最高人民法院的判決；
2. 高級人民法院、中級人民法院以及經授權管轄第一審涉外、涉港澳臺民商事案件的基層人民法院（名單附後）依法不准上訴或者已經超過法定期限沒有上訴的第一審判決，第二審判決和依照審判監督程序由上一級人民

法院提審後作出的生效判決。

(二) 在香港特別行政區是指終審法院、高等法院上訴法庭以及原訟法庭和區域法院作出的生效判決。

本安排所稱判決，在內地包括判決書、裁定書、調解書、支付令；在香港特別行政區包括判決書、命令和訴訟費評定證明書。

當事人向香港特別行政區法院申請認可和執行判決後，內地人民法院對該案件依法再審的，由作出生效判決的上一級人民法院提審。

第三條 本安排所稱“書面管轄協議”，是指當事人為解決與特定法律關係有關的已經發生或者可能發生的爭議，自本安排生效之日起，以書面形式明確約定內地人民法院或者香港特別行政區法院具有唯一管轄權的協議。

本條所稱“特定法律關係”，是指當事人之間的民商事合同，不包括僱傭合同以及自然人因個人消費、家庭事宜或者其他非商業目的而作為協議一方的合同。

本條所稱“書面形式”是指合同書、信件和數據電文(包括電報、電傳、傳真、電子數據交換和電子郵件)等可以有形地表現所載內容、可以調取以備日後查用的形式。

書面管轄協議可以由一份或者多份書面形式組成。

除非合同另有規定，合同中的管轄協議條款獨立存在，合同的變更、解除、終止或者無效，不影響管轄協議條款的效力。

第四條 申請認可和執行符合本安排規定的民商事判決，在內地向被申請人住所地、經常居住地或者財產所在地的中級人民法院提出，在香港特別行政區向香港特別行政區高等法院提出。

第五條 被申請人住所地、經常居住地或者財產所在地在內地不同的中級人民法院轄區的，申請人應當選擇向其中一個人民法院提出認可和執行的申請，不得分別向兩個或者兩個以上人民法院提出申請。

被申請人的住所地、經常居住地或者財產所在地，既在內地又在香港特別行政區的，申請人可以同時分別向兩地法院提出申請，兩地法院分別執行判決的總額，不得超過判決確定的數額。已經部分或者全部執行判決的法院應當根據對方法院的要求提供已執行判決的情況。

第六條 申請人向有關法院申請認可和執行判決的，應當提交以下文件：

- (一) 請求認可和執行的申請書；
- (二) 經作出終審判決的法院蓋章的判決書副本；
- (三) 作出終審判決的法院出具的證明書，證明該判決屬於本安排第二條所指的終審判決，在判決作出地可以執行；
- (四) 身份證明材料：
 - 1. 申請人爲自然人的，應當提交身份證或者經公證的身份證複印件；
 - 2. 申請人爲法人或者其他組織的，應當提交經公證的法人或者其他組織註冊登記證書的複印件；
 - 3. 申請人是外國籍法人或者其他組織的，應當提交相應的公證和認證材料。

向內地人民法院提交的文件沒有中文文本的，申請人應當提交證明無誤的中文譯本。

執行地法院對於本條所規定的法院出具的證明書，無需另行要求公證。

第七條 請求認可和執行申請書應當載明下列事項：

- (一) 當事人爲自然人的，其姓名、住所；當事人爲法人或者其他組織的，法人或者其他組織的名稱、住所以及法定代

表人或者主要負責人的姓名、職務和住所；

(二) 申請執行的理由與請求的內容，被申請人的財產所在地以及財產狀況；

(三) 判決是否在原審法院地申請執行以及已執行的情況。

第八條 申請人申請認可和執行內地人民法院或者香港特別行政區法院判決的程序，依據執行地法律的規定。本安排另有規定的除外。

申請人申請認可和執行的期限，雙方或者一方當事人是自然人的為一年，雙方是法人或者其他組織的為六個月。

前款規定的期限，內地判決到香港特別行政區申請執行的，從判決規定履行期間的最後一日起計算，判決規定分期履行的，從規定的每次履行期間的最後一日起計算；香港特別行政區判決到內地申請執行的，從判決可強制執行之日起計算，該日為判決上註明的判決日期，判決對履行期限另有規定的，從規定的履行期限屆滿後開始計算。

第九條 對申請認可和執行的判決，原審判決中的債務人提供證據證明有下列情形之一的，受理申請的法院經審查核實，應當裁定不予認可和執行：

- (一) 根據當事人協議選擇的原審法院地的法律，管轄協議屬於無效。但選擇法院已經判定該管轄協議為有效的除外；
- (二) 判決已獲完全履行；
- (三) 根據執行地的法律，執行地法院對該案享有專屬管轄權；
- (四) 根據原審法院地的法律，未曾出庭的敗訴一方當事人未經合法傳喚或者雖經合法傳喚但未獲依法律規定的答辯時間。但原審法院根據其法律或者有關規定公告送達的，不屬於上述情形；
- (五) 判決是以欺詐方法取得的；
- (六) 執行地法院就相同訴訟請求作出判決，或者外國、境外地區法院就相同訴訟請求作出判決，或者有關仲裁機構作出仲裁裁決，已經為執行地法院所認可或者執行的。

內地人民法院認為在內地執行香港特別行政區法院判決違反內地社會公共利益，或者香港特別行政區法院認為在香港特別行政區執行內地人民法院判決違反香港特別行政區公共政策的，不予認可和執行。

第十條 對於香港特別行政區法院作出的判決，判決確定的

債務人已經提出上訴，或者上訴程序尚未完結的，內地人民法院審查核實後，可以中止認可和執程序。經上訴，維持全部或者部分原判決的，恢復認可和執程序；完全改變原判決的，終止認可和執程序。

內地地方人民法院就已經作出的判決按照審判監督程序作出提審裁定，或者最高人民法院作出提起再審裁定的，香港特別行政區法院審查核實後，可以中止認可和執程序。再審判決維持全部或者部分原判決的，恢復認可和執程序；再審判決完全改變原判決的，終止認可和執程序。

第十一條 根據本安排而獲認可的判決與執行地法院的判決效力相同。

第十二條 當事人對認可和執行與否的裁定不服的，在內地可以向上一級人民法院申請復議，在香港特別行政區可以根據其法律規定提出上訴。

第十三條 在法院受理當事人申請認可和執行判決期間，當事人依相同事實再行提起訴訟的，法院不予受理。

已獲認可和執行的判決，當事人依相同事實再行提起訴訟的，

法院不予受理。

對於根據本安排第九條不予認可和執行的判決，申請人不得再行提起認可和執行的申請，但是可以按照執行地的法律依相同案件事實向執行地法院提起訴訟。

第十四條 法院受理認可和執行判決的申請之前或者之後，可以按照執行地法律關於財產保全或者禁制資產轉移的規定，根據申請人的申請，對被申請人的財產採取保全或強制措施。

第十五條 當事人向有關法院申請執行判決，應當根據執行地有關訴訟收費的法律和規定交納執行費或者法院費用。

第十六條 內地與香港特別行政區法院相互認可和執行的標的範圍，除判決確定的數額外，還包括根據該判決須支付的利息、經法院核定的律師費以及訴訟費，但不包括稅收和罰款。

在香港特別行政區訴訟費是指經法官或者司法常務官在訴訟費評定證明書中核定或者命令支付的訴訟費用。

第十七條 內地與香港特別行政區法院自本安排生效之日（含本日）起作出的判決，適用本安排。

第十八條 本安排在執行過程中遇有問題或者需要修改，由最高人民法院和香港特別行政區政府協商解決。

第十九條 本安排在內地由最高人民法院發布司法解釋以及在香港特別行政區完成修改有關法律程序後，由雙方公布生效日期並予以執行。

本安排於 2006 年 7 月 14 日在香港簽署，一式兩份。

最高人民法院
副院長

香港特別行政區
律政司司長

附：截至 2006 年 5 月 31 日止，內地經授權管轄第一審涉外、涉港澳臺民商事案件的基層人民法院名單

直轄市、省、自治區

基層人民法院名稱

廣東	廣州市越秀區人民法院
	廣州市海珠區人民法院
	廣州市天河區人民法院
	廣州市番禺區人民法院
	廣州市蘿崗區人民法院
	廣州市南沙區人民法院
	深圳市福田區人民法院
	深圳市羅湖區人民法院
	深圳市寶安區人民法院
	深圳市龍崗區人民法院
	深圳市南山區人民法院
	深圳市鹽田區人民法院
	佛山市禪城區人民法院
	東莞市人民法院
	湛江經濟技術開發區人民法院
	惠州市大亞灣經濟技術開發區人民法院
	山東
淄博高新技術產業開發區人民法院	
泰安高新技術產業開發區人民法院	
煙臺經濟技術開發區人民法院	
日照經濟開發區人民法院	
河北	石家莊高新技術產業開發區人民法院
	廊坊經濟技術開發區人民法院

	秦皇島市經濟技術開發區人民法院
湖北	武漢市經濟技術開發區人民法院 武漢東湖新技術開發區人民法院 襄樊高新技術開發區人民法院
遼寧	瀋陽經濟技術開發區人民法院 瀋陽高新技術產業開發區人民法院 大連經濟技術開發區人民法院
江蘇	蘇州市工業園區人民法院 無錫市高新技術產業開發區人民法院 常州高新技術產業開發區人民法院 南通經濟技術開發區人民法院
上海	浦東新區人民法院 黃浦區人民法院
吉林	長春市經濟技術開發區人民法院 吉林高新技術產業開發區人民法院
天津	天津市經濟技術開發區人民法院
浙江	義烏市人民法院
河南	鄭州高新技術產業開發區人民法院 洛陽市高新技術開發區人民法院
四川	成都高新技術產業開發區人民法院 綿陽高新技術產業開發區人民法院
海南	洋浦開發區人民法院
內蒙古	包頭稀土高新技術產業開發區人民法院
安徽	合肥高新技術產業開發區人民法院

最高人民法院根據審判工作的需要，對授權管轄第一審涉外、涉港澳臺民商事案件的基層人民法院進行增減的，在通報香港特別行政區政府後，列入附件。

MAINLAND JUDGMENTS (RECIPROCAL ENFORCEMENT) BILL

COMPARISON WITH THE ARRANGEMENT ON RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE COURTS OF THE MAINLAND AND OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION PURSUANT TO CHOICE OF COURT AGREEMENTS BETWEEN PARTIES CONCERNED (“the Arrangement”)

Clause 2: Interpretation	
Clause 2(1):	
“choice of Hong Kong court agreement” (選用香港法院協議)	<ul style="list-style-type: none"> ▪ See <u>Art. 3</u> of the Arrangement
“choice of Mainland court agreement” (選用內地法院協議)	
“designated court” (指定法院)	<ul style="list-style-type: none"> ▪ See <u>Art. 2</u> and <u>Annex</u> to the Arrangement
“Hong Kong judgment” (香港判決)	<ul style="list-style-type: none"> ▪ See <u>Art. 2</u> of the Arrangement
“Mainland judgment” (內地判決)	
“recognized Basic People’s Court” (認可基層人民法院)	<ul style="list-style-type: none"> ▪ See <u>Art. 2 (1)(i)</u> and Annex to the Arrangement.
“specified contract” (指明合約)	<ul style="list-style-type: none"> ▪ See <u>Art. 3</u> of the Arrangement
Clause 3: “choice of Hong Kong court agreement” and “choice of Mainland court agreement”	<ul style="list-style-type: none"> ▪ See <u>Art. 3</u> of the Arrangement
Clause 4: Severability of choice of Hong Kong court agreement and choice of Mainland court agreement	<ul style="list-style-type: none"> ▪ See <u>Art. 3(5)</u> of the Arrangement
Clause 5: Application for registration of Mainland judgments	
Clause 5(2)	<ul style="list-style-type: none"> ▪ See <u>Art. 4</u> of the Arrangement

Clause 6 : Finality of Mainland judgments	
Clause 6(1)	▪ See <u>Art. 2(1)(i)</u> of the Arrangement
Clause 6(2)	▪ See <u>Art. 6(1)(iii)</u> of the Arrangement

Clause 7: Time limit for application for registration of Mainland judgments	
Clause 7(1)	▪ See <u>Art. 8(2)</u> of the Arrangement
Clause 7(2)	▪ See <u>Art. 8(3)</u> of the Arrangement

Clause 8: Application fee	▪ See <u>Art. 15</u> of the Arrangement
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Clause 12: Interest, costs, etc., to be included in registration of Mainland judgments	▪ See <u>Art. 16(1)</u> of the Arrangement
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Clause 13: Cases in which Mainland judgments are required to be performed in stages	
Clause 13(1)	▪ See <u>Art. 8(3)</u> of the Arrangement

Clause 14: Effect of registration	
Clause 14(1)	▪ See <u>Art. 11</u> of the Arrangement

Clause 18: Cases in which registration of registered judgments shall be set aside	
Clause 18(1)(c)	▪ See <u>Art. 9(1)(i)</u> of the Arrangement
Clause 18(1)(d)	▪ See <u>Art. 9(1)(ii)</u> of the Arrangement
Clause 18(1)(e)	▪ See <u>Art. 9(1)(iii)</u> of the Arrangement
Clause 18(1)(f)	▪ See <u>Art. 9(1)(iv)</u> of the Arrangement
Clause 18(1)(g)	▪ See <u>Art. 9(1)(v)</u> of the Arrangement
Clause 18(1)(h)&(i)	▪ See <u>Art. 9(1)(vi)</u> of the Arrangement
Clause 18(1)(j)	▪ See <u>Art. 9(2)</u> of the Arrangement
Clause 18(2)	▪ See <u>Art. 9(1)(iv)</u> of the

	Arrangement
Clause 19: Cases in which registration of registered judgments may be set aside or application to set aside registration may be adjourned	<ul style="list-style-type: none"> See <u>Art. 10(2)</u> of the Arrangement
Clause 21: Jurisdiction to issue certified copies of Hong Kong judgments and certificate for Hong Kong judgments	
Clauses 21(1) & 21(2)	<ul style="list-style-type: none"> See <u>Art. 2, 6(1)(ii) & 15</u> of the Arrangement.
Clause 21(3)	<ul style="list-style-type: none"> See <u>Art. 6(1)(iii)</u> of the Arrangement.
Clause 22: Restrictions on proceedings	
Clauses 22(1)(a)	<ul style="list-style-type: none"> See <u>Art. 13(1)</u> of the Arrangement.
Clauses 22(1)(b)	<ul style="list-style-type: none"> See <u>Art. 13(2)</u> of the Arrangement
Clause 23: Rules of court	
Clause 23(1)(b)	<ul style="list-style-type: none"> See <u>Art.14</u> of the Arrangement
Clause 23(1)(d)	<ul style="list-style-type: none"> See <u>Art. 5(2)</u> of the Arrangement
Clause 23(1)(g)	<ul style="list-style-type: none"> See <u>Art. 2(1)(ii), 6(1)(ii) & 6(1)(iii)</u> of the Arrangement
Clause 23(2)(a)	<ul style="list-style-type: none"> See <u>Art. 5(2)</u> of the Arrangement
Clause 23(2)(b)	<ul style="list-style-type: none"> See <u>Art. 2(1)(ii), 6(1)(ii) & 6(1)(iii)</u> of the Arrangement
SCHEDULE 1 - Designated Courts	<ul style="list-style-type: none"> See <u>Art. 2(1)</u> of and Annex to the Arrangement

SCHEDULE 2

CONSEQUENTIAL AMENDMENTS

The Rules of the High Court

ORDER 71A

RECIPROCAL ENFORCEMENT OF MAINLAND JUDGMENTS

Clause 3: Evidence in support of application for registration of Mainland judgments (O. 71A, r. 3)

Clause 3(1)(a)	▪ See <u>Art. 2(1), 6(1)(ii) & 6(1)(iii)</u> of the Arrangement
Clause 3(2)	▪ See <u>Art. 6(1)(iv)</u> of the Arrangement.

ORDER 71B

CERTIFIED COPIES OF JUDGMENTS GIVEN BY COURT OF FINAL APPEAL
AND HIGH COURT

Clause 2: Certified copies of judgments	▪ See <u>Art. 6(1)(ii) & 6(1)(iii)</u> of the Arrangement
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Bills Committee on Mainland Judgments (Reciprocal Enforcement) Bill

Membership list

Chairman	Hon Margaret NG
Deputy Chairman	Hon Miriam LAU Kin-yee, GBS, JP
Members	Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Audrey EU Yuet-mee, SC, JP Hon LI Kwok-ying, MH, JP Hon Andrew LEUNG Kwan-yuen, SBS, JP Hon Ronny TONG Ka-wah, SC Total: 8 Members
Clerk	Mrs Percy MA
Legal Adviser	Mr KAU Kin-wah
Date	21 March 2007

《內地判決(交互強制執行)條例草案》委員會
Bills Committee on
Mainland Judgments (Reciprocal Enforcement) Bill

曾向法案委員會表達意見的團體/個別人士名單
List of organizations/individual who have
given views to the Bills Committee

<u>團體/個別人士名稱</u>	<u>Name of organizations and individual</u>
1. 王友金先生	Mr ONG Yew-kim
2. 余翰棠先生	Mr 余翰棠
3. 香港大律師公會	Hong Kong Bar Association
4. 香港工業總會	The Federation of Hong Kong Industries
5. 香港中華廠商聯合會	The Chinese Manufacturers' Association of Hong Kong
6. 香港中華總商會	The Chinese General Chamber of Commerce
7. 香港仲裁司學會	Hong Kong Institute of Arbitrators
8. 香港社區組織協會	Society for Community Organization
9. 香港律師會	The Law Society of Hong Kong
10. 國際商會 —— 中國香港區會	International Chamber of Commerce - Hong Kong, China
11. 駐香港的法國工商會	The French Chamber of Commerce and Industry in Hong Kong