

**For discussion on
19 December 2016**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Proposed Arrangement with the Mainland on Reciprocal
Recognition and Enforcement of Judgments on Matrimonial and
Related Matters**

PURPOSE

This paper briefs Members on the outcome of the public consultation on the proposed arrangement with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters (“**Proposed Arrangement**”) and the main response of the Government to the related issues, and seeks Members’ views on them.

BACKGROUND

2. In June 2016, the Government briefed Members on its consultation on the Proposed Arrangement and sought Members’ views on the issues raised in the consultation paper, which was released on the same day.

3. Subsequently, the Government received 21 submissions from different stakeholders, including professional bodies from the Hong Kong legal and dispute resolution sectors, social welfare organisations and academics. On the whole, most respondents supported the proposed conclusion of an arrangement with the Mainland. A respondent also expressed the hope for an early conclusion of an arrangement between the two places.

4. The Government has made a preliminary study of the comments of the respondents. Its main response to the related issues is summarised below for Members’ further comment.

(a) Principal types of judgments to be covered in the Proposed Arrangement

(i) Divorce decrees

5. Regarding whether reciprocal recognition of divorce decrees should be covered in the Proposed Arrangement, the response of most of the respondents was positive. A respondent also suggested including certain principles under the Hague Convention on the Recognition of Divorces and Legal Representations (1970) (“**1970 Hague Convention**”) in the Proposed Arrangement. Noting that Article 1 of the 1970 Hague Convention covers decrees of divorce (and of legal separation) made in judicial or other proceedings, the Government will further consider the suggestion.

(ii) Maintenance orders

6. Most of the respondents agreed that the Proposed Arrangement should include reciprocal recognition and enforcement of maintenance orders.

7. The Government proposed in the consultation paper that maintenance orders should include orders for periodical payment and lump sum payment for spouse or children born in or out of wedlock. All of the respondents who have responded to this agreed to the proposal.

8. Regarding the enforcement of Mainland financial orders, a respondent suggested that consideration should be given as to whether there should be a simple registration mechanism for enforcement of such judgments, or whether introduction of relevant provisions are required to confer certain power on the courts in Hong Kong to ensure that the judgments are suitable for enforcement. The Government will give the proposal thorough consideration, including whether safeguard provisions under the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007) (“**2007 Hague Convention**”) are suitable for inclusion in the Proposed Arrangement to ensure due protection of the interests of families (including children) concerned.

(iii) Custody orders

9. Most of the respondents supported the Government’s proposal that the Proposed Arrangement should cover custody orders relating to children to facilitate mutual assistance between the two places for the return of children who have been wrongfully removed.

10. Some respondents suggested referring to the relevant provisions such as the grounds for non-recognition for judgments relating to parental

responsibility in the **Brussels II Regulation (EC) No. 2201/2003 (Revised)**. Also, some respondents suggested making reference to the Hague Convention on the Civil Aspects of International Child Abduction (1980), in particular its concepts relating to “habitual residence” and “rights of custody”.

11. The Government will explore with the Mainland on establishing a relevant mechanism under the Proposed Arrangement to facilitate mutual assistance between the two places for the return of children who have been wrongfully removed.

(b) Whether “divorce certificate” obtained in the Mainland should be included in the Proposed Arrangement

12. Most respondents agreed to include divorce certificates in the Proposed Arrangement. On the other hand, some respondents had reservations on covering divorce certificates in the Proposed Arrangement.

13. The Government wishes to point out that a divorce certificate obtained through registration with a Mainland administrative authority and a divorce order granted by a Mainland court both have the same legal effect in the Mainland. Besides, statistics in recent years show that an average of 80% of the divorces in the Mainland each year was obtained through registration with administrative authorities in the Mainland.

14. After considering the situation mentioned above and the respondents’ comments, the Government is still, at this moment, inclined to maintain its original proposal that divorces obtained through the registration procedure in the Mainland should be covered under the Proposed Arrangement. If the proposal is adopted, we will incorporate a specific provision in the definition of “judgment” under the Proposed Arrangement to cover divorce certificates.

15. Meanwhile, the Government also takes note of a suggestion by a respondent to include the dissolution of customary marriages under the Marriage Reform Ordinance (Cap. 178) in the Proposed Arrangement. The Government will further consider this suggestion.

(c) Whether orders for property adjustment should be included

16. Most respondents agreed that orders for property adjustment could be excluded from the Proposed Arrangement. A few respondents,

however, opined without giving detailed justifications that orders for property adjustment should be included in the Proposed Arrangement.

17. The Government reiterates that the effective execution of orders in relation to the transfer of interests in land requires the co-operation of the court where the landed property is situated. Such matters involve areas outside the sphere of family law. Having made reference to the comments of the respondents, based on practical considerations, the Government is still, at this moment, inclined to propose that orders for property adjustment should not be covered under the Proposed Arrangement.

(d) Whether to include power of variation of maintenance orders by the courts in the place where the orders are sought to be enforced

18. The majority of the respondents agreed that the power of variation of maintenance orders should not be included in the Proposed Arrangement. A few respondents, however, considered that certain power should be conferred on the court to vary maintenance orders under the Proposed Arrangement.

19. After considering the comments of the respondents, the Government is still, at this moment, inclined to adopt a simpler approach by not including in the Proposed Arrangement a power to vary the order as made by the original court.

(e) Whether other orders should be included in the Proposed Arrangement

20. Some respondents were of the view that other orders set out in Paragraph 31 of the consultation paper should not be included in the Proposed Arrangement, or that the Government should be more cautious when considering what should be included in it. Some respondents, on the other hand, considered that the Proposed Arrangement should cover orders in relation to children, such as orders for access to children, guardianship, wardship and adoption.

21. Other respondents agreed to the principle set out by the Government in the consultation paper that judicial decisions which exist under the law of Hong Kong and which are commonly sought in the family court could be included in the Proposed Arrangement.

22. Having considered the comments of the respondents, the Government is inclined to adopt the principle stated in the preceding paragraph, namely that judicial decisions commonly sought in the family court in Hong Kong (including orders in relation to parentage and adoptive relationship) should be included in the Proposed Arrangement, to ensure a certain degree of usefulness.

(f) Jurisdictional basis

23. Some respondents supported adopting the relevant requirement under Part IX of the Matrimonial Causes Ordinance (Cap. 179) as the jurisdictional basis so that divorces obtained in one place would be recognised in the other if, at the date of institution of the relevant judicial proceedings or registration procedure in the place in which the divorce was obtained, either spouse was habitually resident in that place or a national of that place¹.

24. On the other hand, some respondents suggested making reference to 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 concluded between Hong Kong and the Mainland in 2006, which does not provide for any jurisdictional requirement concerning the nationality of the parties to the application for reciprocal recognition and enforcement.

25. Separately, some respondents suggested making reference to the relevant provisions of the 1970 Hague Convention and adopting habitual residence as the jurisdictional basis. A respondent also expressed that the jurisdictional basis of applications for recognition and enforcement of financial orders should be where the assets of the payer are situated rather than the place of residence of the payer.

26. After considering the comments of the respondents, the Government is of the view that the adoption of habitual residence as the jurisdictional basis for the recognition of divorces is worthy of further exploration. Regarding the recognition and enforcement of financial orders, the government will scrutinise the international practices with a view to considering the feasibility of adopting the place where the assets of the payer are situated as the jurisdictional basis.

¹ Paragraph 34 of the consultation paper states that in the case of the Mainland, either spouse was a Chinese national, or in the case of the HKSAR, a permanent resident of the HKSAR.

(g) Level of courts to be covered

27. In respect of courts in Hong Kong, most respondents supported covering judgments of the District Court or above in the Proposed Arrangement.

28. In respect of courts in the Mainland, most respondents supported covering relevant judgments of Basic People's Courts. A few respondents however had reservations about the proposed inclusion of Basic People's Courts in the Mainland.

29. The Government notes that civil proceedings in the Mainland are generally administered by Basic People's Courts unless otherwise provided by law. Having considered the comments of the respondents, the Government is still, at this moment, inclined to take the view that there is a certain need and rationality for the Proposed Arrangement to cover judgments on matrimonial and related matters made by Basic People's Courts in the Mainland.

(h) Finality

30. With regard to divorce decrees, some respondents considered that the notion of finality in common law was more appropriate. On the other hand, for maintenance orders, some respondents agreed that although maintenance orders were generally not final and conclusive, these orders should be recognised and enforced under the Proposed Arrangement. Some respondents further suggested making reference to the relevant provisions in the 2007 Hague Convention so that the courts could decide whether to recognise and enforce maintenance orders without taking into account the requirement on finality.

31. After considering the comments of the respondents, the Government is still, at this moment, inclined to propose that recognition of divorce decrees be limited to decrees absolute granted by the courts of the HKSAR and divorce orders granted by Mainland courts, as well as divorce certificates issued under the registration procedure by the relevant Mainland authorities as mentioned above. As regards maintenance orders, we agree that reference may be made to the relevant provisions of the 2007 Hague Convention, which is to consider whether the maintenance arrangement has effect and is enforceable in the place of origin, without any requirement on finality.

ADVICE SOUGHT

32. Members are invited to give their views on the above proposals.

Department of Justice
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