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Panel on Administration of Justice and Legal Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 19 December 2016**

**Reciprocal recognition and enforcement of judgments on matrimonial and
related matters with the Mainland**

Purpose

This paper provides a brief account of the past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") concerning a possible arrangement on reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland ("Proposed Arrangement").

Background

2. In recent years, a significant number of the marriages registered in Hong Kong may be characterized as "cross-boundary marriages" between Mainland and Hong Kong residents. In the light of this, the Administration has studied the possibility of establishing a mechanism for reciprocal recognition and enforcement of matrimonial judgments between the Mainland and Hong Kong so as to provide better legal protection and certainty to parties to such a marriage should it break down.

3. Although the Hong Kong Special Administrative Region ("HKSAR") and the Mainland concluded a bilateral arrangement on reciprocal recognition and enforcement of civil judgments in 2006 ("the 2006 Arrangement"), it is limited in scope and does not cover family matters. There has been calls from time to time in the community to widen the scope of the current regime on reciprocal enforcement of judgments between the HKSAR and the Mainland.

4. Since 2011, the HKSAR has started to discuss with the Mainland side on the need to enter into an arrangement for reciprocal recognition and enforcement of matrimonial judgments. Thereafter, the two sides have held several rounds of working meetings during which issues arising out of the differences in the legal frameworks within which the two legal systems operate have been discussed thoroughly.

The Proposed Arrangement

5. In view of the pressing need in the community to pursue a solution to address reciprocal enforcement of judgments in the matrimonial context arising from the increasing number of cross-boundary marriages, the Administration considers that the preferred approach is to aim at first concluding a specific standalone reciprocal enforcement of judgments arrangement on matrimonial and related matters as a matter of priority.

6. The Administration proposes that similar to the 2006 Arrangement, the Proposed Arrangement will cover such issues as basic requirements for reciprocal enforcement of judgments, grounds for refusal, application procedures and other safeguards. The Administration's preliminary proposals for the Proposed Arrangement are summarized in paragraphs 7-29.

(a) Types of judgments to be covered in the Arrangement

(i) Divorce decrees

7. Under Part IX of the Matrimonial Causes Ordinance (Cap. 179) ("MCO"), subject to exceptions set out in section 61 thereof, foreign orders on divorce, including divorces obtained in the Mainland, shall be recognised in the HKSAR provided that the relevant statutory requirements are met. As far as the Mainland courts are concerned, the Zhuhai Intermediate People's Court has recognised a divorce decree pronounced by a court of the HKSAR on the ground that the recognition would not contradict basic legal principles in the Mainland, nor violate state sovereignty, security and public interest in society¹.

8. It remains, however, uncertain as to whether all the courts in the Mainland will adopt the same approach as the Zhuhai Intermediate People's Court. The Administration considers that the proposal to include reciprocal recognition and enforcement of divorce decrees is in line with our domestic legal regime. Besides, such arrangement will bring certainty to the public that

¹ 凌某申請認可香港法院判決案, (2011)珠中法民確字第4號.

divorce decrees obtained in the HKSAR are expected to be recognized and enforced in the Mainland under the Proposed Arrangement, and *vice versa*.

(ii) *Maintenance orders*

9. Under the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap. 188) (“MOREO”) and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), matrimonial orders made in other jurisdictions may be enforced in the HKSAR provided certain conditions are met. However, neither of these two Ordinances is applicable to matrimonial orders made in the Mainland. Therefore, a payee under a maintenance order cannot rely on these two Ordinances to seek enforcement of maintenance orders made by the Mainland courts in the HKSAR.

10. Similarly, in the Mainland, orders made outside the Mainland on division of matrimonial assets, ancillary relief and custody may not be recognised under the relevant legal provisions².

11. The Administration considers that the proposal to include reciprocal recognition and enforcement of maintenance orders could help fill a lacuna in the law, enable the payees of a maintenance order of either place to seek enforcement in court more expeditiously and afford better protection to them. The Administration proposes that “maintenance orders” should include orders for periodical payment and lump sum payment for spouse or children born in or out of wedlock.

(iii) *Custody orders to facilitate the return of children in parental abduction cases*

12. At common law, there is no rule regulating the recognition and enforcement of foreign custody orders. Nor is there any rule under the HKSAR’s statutory regime to regulate the recognition and enforcement of the same. Any order affecting children would only be made having regard to the best interests of a child as the first and paramount consideration.

13. In the Mainland, both divorced parents would still enjoy some form of custody (whether “direct” or “indirect”) and guardianship of the child in the Mainland and thus there are academic views that parental child abduction is not being recognised from the Mainland law perspective.

14. Although a proposed inclusion of mutual recognition and enforcement of custody orders under the Proposed Arrangement may be viewed as a departure

² See Article 2 of 《最高人民法院關於中國公民申請承認外國法院離婚判決程序問題的規定》 promulgated on 13 August 1991.

from the current legal regime in both jurisdictions, the Administration considers that this issue is worth further exploration with the Mainland if it is considered that it is in the public interest to procure the prompt return of children having been wrongfully removed elsewhere to their place of habitual residence.

(b) *Inclusion of “divorce certificate” obtained in the Mainland*

15. The Administration further proposes that apart from divorce orders obtained from Mainland courts, the Proposed Arrangement should also cover divorce certificates obtained through registration with the relevant Mainland administrative authorities as provided under Article 31 of the Marriage Law of the People’s Republic of China (PRC).

16. The Administration understands that the conditions for issuing a divorce certificate by the relevant Mainland authority are generally in line with that under section 18 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (“MPPO”) which provides, inter alia, that the court shall not make absolute a divorce decree unless it is satisfied that the arrangements made for the welfare of the children of the family are satisfactory or are the best that can be devised in the circumstances.

17. On the other hand, section 55 of the MCO provides that for the purpose of recognition in the HKSAR of the validity of overseas divorces, the overseas divorces should have been obtained by means of judicial or other proceedings in any place outside Hong Kong, and are effective under the law of that place. A pertinent issue arising from that section is that in the absence of any court endorsement, it is uncertain whether a divorce obtained through the registration procedure, which is an administrative procedure, would constitute a divorce obtained overseas by means of “judicial or other proceedings” for the purpose of its recognition in Hong Kong³

18. Besides, statistics show that the majority of divorces in the Mainland are obtained through the registration procedure instead of court proceedings. In this regard, the Administration considers that divorces obtained through the registration procedure in the Mainland should be covered under the Proposed Arrangement so as to give parties to the divorce under such registration procedure the assurance that their divorces would be treated in the same manner

³ Cf the decision of the House of Lords in *Quazi v Quazi* [1980] AC 744 that “other proceedings” under section 2 of the Recognition of Divorces and Legal Separation Act 1971 were not to be limited to quasi-judicial proceedings by being construed ejusdem generis with “judicial” proceedings, that they referred to any proceedings, other than judicial proceedings, which were officially recognised in the country in which they were taken, and that a divorce obtained by talaq in Pakistan in accordance with the requirements of Pakistani law was a divorce obtained by such “other proceedings”. The decision was applied in *Chaudhary v Chaudhary* [1985] FLR 476.

as those granted by the Mainland courts, and hence achieving legal certainty and equal treatment to both types of divorces which have the same legal effect in the Mainland. Moreover, this will also maximise the number of persons who may benefit under the Proposed Arrangement.

19. Since a divorce certificate obtained through the registration procedure is not as a matter of law a “judicial decision” in the Mainland, it may be necessary to incorporate a specific provision in the definition of a “judgment” under the Proposed Arrangement to cater for them. In drawing up an appropriate definition to deem a divorce certificate as “judgment”, reference may be made to other international precedents.

(c) Inclusion of orders for property adjustment

20. Given the complexity involved, the Administration takes the provisional view that orders for property adjustment should not be covered under the Proposed Arrangement.

(d) Inclusion of power of variation of maintenance orders

21. Given the complexity involved, the Administration takes the provisional view that the power to vary an order made by the original court should not be included under the Proposed Arrangement.

(e) Whether other orders should be included

22. The Administration has reviewed whether the Proposed Arrangement should cover other judicial decisions on matrimonial and related matters such as legal separation, nullity of marriage and orders made under the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481). The Administration’s proposal is to include in the Proposed Arrangement only those judicial decisions which exist under Hong Kong law and which are commonly sought in the Family Court.

(f) Jurisdictional basis

23. Taking into account the respective legal positions in the HKSAR and the Mainland, the Administration proposes two possible ways in which divorces granted by the courts in both jurisdictions and also divorces obtained through registration with the relevant Mainland administrative authorities shall be recognised in the HKSAR and the Mainland respectively under the Proposed Arrangement. The first of these approaches is to adopt the existing jurisdictional rules in the HKSAR⁴ such that divorces obtained in one place

⁴ See section 56 of the MCO and *Moore v Moore* [2007] EWCA Civ 361.

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, in the case of the Mainland, a Chinese national or in the case of the HKSAR, a permanent resident of the HKSAR. Alternatively, it is suggested that the approach adopted in the 2006 Arrangement, which does not provide for any jurisdictional requirement concerning the nationality of the parties to the application for reciprocal recognition and enforcement, may be followed. There are views that the latter approach would facilitate recognition of orders made by courts of the two places, thereby maximising the number of persons who may benefit under the Proposed Arrangement.

(g) *Level of courts to be covered*

24. The Administration suggests that the Proposed Arrangement should cover judgments of the District Court or above in the HKSAR.

25. The Administration notes that in the Mainland, civil proceedings are generally administered by Basic People's Courts unless otherwise provided in the law. The Administration further note that the Mainland laws make no specific provision in relation to the jurisdiction of Mainland courts over matrimonial cases involving the HKSAR parties. Therefore, there are merits in including judgments on matrimonial and other matters made by Basic People's Courts under the Proposed Arrangement. Hence, the Administration proposes that judgments given by the Supreme People's Court, Higher People's Courts, Intermediate People's Courts, Basic People's Courts and specialised Courts in the Mainland should be covered.

(h) *Finality*

26. In respect of orders for ancillary relief granted in the HKSAR, the very court having made such orders continues to retain jurisdiction under the law to vary, discharge, suspend or revive an order for financial provision for a party to a marriage or the child of the family based on change of circumstances subsequent to the making of the relevant order. This means that the notion of finality may not be appropriate in the context of reciprocal enforcement of ancillary relief orders, or at least is an issue which needs to be addressed.

27. In respect of judgments involving claims for spousal and child maintenance in the Mainland, it is noted that under the trial supervision procedures, a case may be retried by the same court that made the original judgment although the original judgment will remain legally enforceable. This raises issues as to whether a Mainland matrimonial judgment on the matter may

be considered as final and conclusive under the common law rules applied by the Hong Kong courts.

28. Given the difference between the legal systems of the HKSAR and the Mainland, the Administration proposes that reference may be made to international practice to ensure that the Proposed Arrangement to be reached will be mutually satisfactory.

29. With regard to the recognition of divorce decrees, the Administration proposes that recognition should be limited to decrees absolute granted by the courts of the HKSAR since a decree nisi may be rescinded by a subsequent order of the court. As for the Mainland, since the Mainland laws provide that the parties to a marriage may not apply for retrial with respect to a legally effective judgment or conciliation statement on dissolution of marriage, subject to the considerations in paragraph 19 above, the Administration proposes that both court orders for divorce as well as divorce certificates issued under the registration procedure by the relevant Mainland authority would be covered.

Public Consultation on the Proposed Arrangement

30. On 27 June 2016, the Administration launched a seven-week public consultation regarding the Proposed Arrangement. Specifically, public views were invited on the issues raised under the preliminary proposal for the Proposed Arrangement, i.e. the eight issues, discussed above, as listed under (a) – (h). The public consultation ended on 15 August 2016.

Past discussions

31. At the meeting of the Panel held on 23 May 2011, the Administration briefed the Panel on its initial discussions with the Mainland authorities on the need to enter into such an Proposed Arrangement. Major views expressed by members, the Hong Kong Bar Association ("the Bar Association") and the Law Society of Hong Kong ("the Law Society") are summarized in paragraphs 32 to 35.

32. Both the Bar Association and the Law Society welcomed the Administration's discussion with the Mainland on the Proposed Arrangement.

33. Members in general agreed on the need to enter into an arrangement on co-operation in matrimonial matters. They considered that the Administration should expedite its discussion with the Mainland authorities with a view to

reaching agreements and principles on matters of urgency, such as the issues relating to parental child abduction and custody of children across the borders, having regard to the practice in the international context.

34. The Administration advised that given the differences between the legal systems of the Mainland and Hong Kong, those issues that were easier to be handled, such as the reciprocal recognition of divorce decrees and the enforcement of maintenance orders, would first be discussed with the Mainland.

35. A member suggested that apart from the two legal professional bodies, the Administration should also consult the Immigration Department and the Hong Kong Family Law Association on the Proposed Arrangement.

36. At the meeting of the Panel held on 27 June 2016, members were briefed by the Administration on the public consultation concerning the Proposed Arrangement. Major views expressed by members, the Bar Association and the Law Society are summarized in paragraphs 37 to 41.

37. The Bar Association was in support of the Proposed Arrangement. In presenting their views on the following three aspects, the Bar Association urged the Administration to look into these issues when working out and finalizing the Proposed Arrangement:

- (a) under Part IX of the MCO, divorces granted by the courts of the Mainland, including court divorces and administrative divorces, were generally recognized in Hong Kong. However, according to the understanding of some members of the legal profession who were working in the Mainland, divorces granted by the courts of Hong Kong were not generally recognized in the Mainland. The provisions of the law of the Mainland which enabled the recognition of foreign divorces did not apply to Hong Kong;
- (b) financial awards in divorce cases obtained in Hong Kong could not be enforced in the Mainland. In addition, the Administration had to work out whether the financial awards in divorce cases obtained in the Mainland should be automatically recognized in Hong Kong by way of registration, or the party concerned had to use the judgment as the basis for making applications under Part IIA of the MPPO in order to make the award enforceable in Hong Kong or request for other awards in Hong Kong; and
- (c) as different practices were adopted in Hong Kong and the Mainland in handling custodial matters, the Administration had to work out

how to address the issues arising out of these differences in the Proposed Arrangement.

38. The Administration's views on the issues raised by the Bar Association were as follows:

- (a) under the MCO, divorces granted by the courts of the Mainland would be recognized in Hong Kong and that in 2011, the Zhuhai Intermediate People's Court recognized a divorce decree pronounced by a court of Hong Kong. The Administration considered that inclusion of reciprocal recognition and enforcement of divorce decrees in the Proposed Arrangement would bring certainty to the public that divorce decrees obtained in the Mainland were expected to be recognized and enforced in Hong Kong, and vice versa;
- (b) regarding the proposal of using the financial awards in divorce cases obtained in the Mainland as a basis to make applications under Part IIA of the MPPO in order to make it enforceable in Hong Kong or request for other awards in Hong Kong, the Administration would look into this issue upon receiving this proposal in detail;
- (c) the Administration agreed to explore the suggestion of adopting the concept of habitual residence in dealing with parental child abduction cases and would try its best to reach agreement with the Mainland on this issue;

39. The Law Society welcomed the Proposed Arrangement and presented their views as follows:

- (a) reference could be made to the Hague Convention on the Civil Aspects for International Child Abduction which adopted the concept of habitual residence, instead of the custodial right of the parents, as the sole connecting factor in dealing with parental child abduction case. (A member concurred with this suggestion of adopting the concept of habitual residence in dealing with parental child abduction case). As parental child abduction (擄拐) was not recognized from the Mainland law perspective, the Administration should avoid using the word "abduction" in the Proposed Arrangement;
- (b) the Law Society considered that it was important for the Administration to undertake in-depth study on orders for property adjustment and work out how reciprocal enforcement of such orders might be implemented in practice since the Family Court in Hong

Kong often dealt with matrimonial cases involving Mainland properties. The Law Society also hoped that the Administration would consider introducing a mechanism to provide for a power of variation of maintenance orders in the Proposed Arrangement to facilitate the effective enforcement of maintenance orders by the courts in the place where the orders were sought to be enforced.

40. A member expressed concern as to the difficulty in establishing a mechanism for reciprocal recognition and enforcement of matrimonial judgments owing to the very different legal principles, concepts, administrative or civil procedures in dealing with matrimonial matters in Hong Kong and the Mainland, for example, the division of matrimonial assets which involved assets held in trusts.

41. The Bar Association shared the member's view and considered that the Administration should work out how to address the issues arising out of these difference in the Proposed Arrangement. The Bar Association pointed out that, by way of an example, for matrimonial cases in Hong Kong, full and frank disclosure of each party's assets must be made to the court, but for matrimonial cases in the Mainland, if one party questioned the sufficiency of financial disclosure of the other party, the burden was on that party to prove to the court that the other party had been untruthful. The Law Society supplemented under Part IIA of the MPPO, either party could apply to the Family Court of Hong Kong for a ruling regarding assets in Hong Kong that had not been dealt with in the orders for division of matrimonial assets obtained by other jurisdictions.

Latest position

42. At the Panel meeting scheduled for 19 December 2016, the Administration will consult members on the proposed way forward in the light of the views and submissions received during the public consultation. The Administration will then finalize its recommendations on the Proposed Arrangement for discussion with the Mainland as soon as possible

Relevant papers

43. A list of relevant papers is in the **Appendix**.

Appendix

Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland

List of relevant papers

Date	Meeting	Paper
23 May 2011	Panel on Administration of Justice and Legal Services	Administration's paper on "Information on Reciprocal Recognition / Enforcement of Matrimonial Judgments with the Mainland" LC Paper No. <u>CB(2)1781/10-11(04)</u> Minutes of meeting LC Paper No. <u>CB(2)1747/11-12</u>
27 June 2016	Panel on Administration of Justice and Legal Services	Administration's paper on "Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments on Matrimonial and Related Matters" LC Paper No. <u>CB(4)1144/15-16(05)</u> Background brief on "Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland" prepared by Legislative Council Secretariat LC Paper No. <u>CB(4)1144/15-16(06)</u> Minutes of meeting LC Paper No. <u>CB(4)1309/15-16</u>