

Views of Hong Kong Bar Association

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

The Hong Kong Bar Association (“**HKBA**”) refers to the Consultation Paper on the Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments on Matrimonial and Related Matters issued in June 2016.

HKBA fully supports this initiative, and by way of frontispiece would highlight the following issues for particular consideration :-

- Mainland divorces (the ‘divorce’ itself) are, generally speaking, recognised in Hong Kong provided that Part IX (“**Part IX**”) of the Matrimonial Causes Ordinance (Cap.179) (“**MCO**”) is satisfied. This is similarly the case in relation to divorces from many other foreign jurisdictions.
- Insofar as a Mainland divorce gives rise to financial consequences, parties divorced on the Mainland might be able to proceed under Part IIA (“**Part IIA**”) of the Matrimonial Proceedings & Property Ordinance (Cap.192) (“**MPPO**”) with leave of the Hong Kong Court. In this way and in this sense, Mainland divorce financial orders already have an avenue for recognition and enforcement in Hong Kong, as do divorce financial orders from many other foreign jurisdictions.
- One extremely important area that requires further thought and consideration is – If a Mainland financial order is to be recognised / enforceable in Hong Kong, then whether that would be

'automatic', such as by way of mere 'registration' (*akin* to a foreign civil judgment or arbitration award), or not? In the case of the latter, it might be noted that Part IIA MPPPO already provides an available avenue. In the case of the former, it may be thought to be undesirable to leave the Hong Kong Family Court with no control whatsoever over the recognition and enforcement of Mainland financial orders, especially given the very great substantive, procedural and evidential differences that still exist between the Mainland and Hong Kong legal systems.

- However, and by way of contrast, where there are Mainland persons involved, it is the understanding of HKBA (and can be seen discussed in a number of Hong Kong Judgments) that :-
 - Hong Kong Divorce Orders (the 'divorce' itself) are not generally speaking recognised nor enforceable under Mainland law – in other words, the parties are "still married" and would need to obtain a Mainland Divorce. This gives rise to a 'limping marriage' problem (in one jurisdiction, the marriage has ended; in another jurisdiction, the marriage still exists). This also gives rise to practical problems, *e.g.* if one of them dies, is the survivor a widow / widower, or not?
 - Hong Kong financial ancillary relief awards are not recognised nor enforceable under Mainland law – so, Mainland properties and assets would be difficult if not impossible to enforce against.
 - Hong Kong awards under Part IIA are also not recognised nor enforceable under Mainland law – again, Mainland properties

and assets would be difficult if not impossible to enforce against.

- Rightly or wrongly, many litigants “perceive” that Hong Kong financial ancillary relief and/or Part IIA is “better than” the equivalent legal proceedings in the Mainland. One reason often cited is the more comprehensive duty of full and frank financial disclosure available in Hong Kong, and the correspondingly more comprehensive discovery and financial disclosure process in Hong Kong.
- Another reason often cited is the ‘burden of proof’ – in the Mainland one spouse has to gather his / her own evidence in order to show / prove that the other spouse is hiding properties and assets; in Hong Kong, it is different and indeed the other way around – the Court will assist in the process of financial discovery and ensure that there is full and frank disclosure.
- These ‘evidential’ and ‘procedural’ differences result in huge disparities in real life situations and results – and it is often these differences that lead litigants to wish to proceed under one jurisdiction rather than another.
- In turn, this gives rise to many jurisdiction / forum challenges – with one spouse preferring to proceed in Hong Kong, and the other spouse preferring to proceed in the Mainland. This is essentially ‘forum shopping’.
- Although Hong Kong has a vibrant ‘expat’ community involving foreigners – there are many more marriages where one or both

spouses are “Mainland persons” or have “Mainland connections” or have “Mainland properties / assets”.

- There are numerous jurisdiction / forum challenges going through the Hong Kong Family Courts – and where Mainland persons are involved, it becomes quite difficult to ascertain questions such as domicile, habitual residence and/or substantial connection (*i.e.* whether or not Hong Kong Family Court has jurisdiction).
- A lot of judicial time and legal costs is wasted on these jurisdiction / forum challenges, which can be greatly reduced if the Hong Kong and Mainland divorce law and procedures are brought more in line with one another, including mutual recognition and enforcement.
- There is also a lack of clarity regarding Children matters – such as custody, care & control, access, and Children’s maintenance.
- While the Courts of Hong Kong might take into account a custody order made in the Mainland, and *vice versa*, these recognitions are not direct nor mutual. Further, different practices are adopted in Hong Kong and the Mainland in handling custodial matters. For example, whilst the Courts of Hong Kong tend to issue custody orders that would not split up siblings, it is not unknown for the Courts in the Mainland to issue custody orders that would grant a child to each parent.
- Another problem area is the Child Abduction & Custody Ordinance (Cap.512) – which does not apply to the Mainland. The Hague Convention on the Civil Aspects for International Child Abduction is only applicable to Hong Kong but not the Mainland. Moreover,

the Mainland does not appear to have the concept of ‘habitual residence’.

Bearing in mind the abovementioned points, which are in and of themselves very important, we now turn to also consider the specific “Issues for Consultation”.

(I)(a) – In the same way that Mainland divorces are, generally speaking, recognised in Hong Kong provided that Part IX MCO is satisfied; so it is that Hong Kong divorces must, generally speaking, be recognised in the Mainland also. This would then avoid ‘limping marriage’ problems, as well as probate problems (*e.g.* ascertaining whether the survivor is a widow / widower or not) and other practical issues.

(I)(b) – In order for Hong Kong financial ancillary relief and/or Part IIA MPPO financial orders to have teeth, especially given the many situations where Mainland properties / assets are involved, it is vital that they be recognised and enforceable in the Mainland. As for recognising and enforcing Mainland financial orders, as abovementioned, some further thought needs to be given as to – If a Mainland financial order is to be recognised / enforceable in Hong Kong, then whether that would be ‘automatic’, such as by way of mere ‘registration’ (*akin* to a foreign civil judgment or arbitration award), or not? In the case of the latter, it might be noted that Part IIA MPPO already provides an available avenue. In the case of the former, it may be thought to be undesirable to leave the Hong Kong Family Court with no control whatsoever over the recognition and enforcement of Mainland financial orders, especially given the very great substantive, procedural and evidential differences that still exist between the Mainland and Hong Kong legal systems.

(I)(c) – The most straightforward and convenient method would be for The Hague Convention on the Civil Aspects for International Child Abduction to be applied to both the Mainland and Hong Kong; and/or for the Mainland to enact laws similar to the Child Abduction & Custody Ordinance (Cap.512). However, this would require the Mainland to develop and embrace the concept of ‘habitual residence’. An alternative avenue would be to enact a new set of laws that deal only with cross-border situations involving Hong Kong and the Mainland – but this would be cumbersome and unnecessarily complicated, generating an entire new area of law and jurisprudence.

(II) – HKBA supports this initiative.

(III) & (IV) – HKBA supports this initiative. However, this is a very sensitive and important area, and includes the considerations that HKBA has highlighted hereinabove.

(V) – HKBA agrees that “*only those judicial decisions which exist under the law of the HKSAR and which are commonly sought in the family court*” ought to be included. It is difficult to see how the Hong Kong Family Court can be expected to deal with Mainland concepts that have no equivalent existence under Hong Kong domestic laws.

Hong Kong Bar Association

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