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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 22 May 2017**

**Proposed Arrangement with the Mainland on reciprocal recognition and
enforcement of judgments on matrimonial and related matters**

Purpose

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

Background

2. According to the Administration, a significant number of the marriages registered in Hong Kong may be characterized as "cross-boundary marriages" between Mainland and Hong Kong residents in recent years. In view of the significant number of cross-boundary marriages, 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. The Administration first briefed the Panel on the need to enter into such an Proposed Arrangement on 23 May 2011. The Panel concluded that the Administration should work out the Proposed Arrangement with the Mainland. Thereafter, the two sides have held several rounds of working meetings during

which issues arising from the differences in the legal frameworks within which the two legal systems operate have been discussed thoroughly.

4. On 27 June 2016, the Administration launched a seven-week public consultation regarding the Proposed Arrangement. On the same day, the Administration briefed the Panel on this matter and sought members' views on the issues raised in the consultation paper.

5. Specifically, the DoJ invited public views on its preliminary proposals on eight issues, namely,

- (a) the principal types of judgments (including divorce, maintenance and custody orders) to be covered in the Proposed Arrangement;
- (b) whether "divorce certificate" obtained through the registration procedure in the Mainland should be included in the Proposed Arrangement;
- (c) whether orders for property adjustment should be included;
- (d) whether to include power of variation of maintenance orders by the courts in the place where the orders are sought to be enforced;
- (e) whether other orders should be included in the Proposed Arrangement;
- (f) the jurisdictional basis of the parties to an application for reciprocal recognition and enforcement of civil judgments;
- (g) the level of courts to be covered in the Proposed Arrangement; and
- (h) the finality of judgments.

6. Subsequently, the Administration had received 21 submissions from different stakeholders, including professional bodies from the Hong Kong legal and dispute resolution sectors, social welfare organizations 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.

7. On 19 December 2016, the Administration briefed the Panel on the outcome of the above mentioned consultation and the main response of the Administration to the related issues, and sought members' views on them.

The preliminary proposals on eight issues on which public views were invited are set out in paragraph 5. Details of the Administration's response to comments made by respondents to the 7-week public consultation can be found in LC paper No. CB(4)303/16-17(05), paragraph 4-31, which is attached as Appendix I.

Past discussions

8. Members of the Panel, the Hong Kong Bar Association ("the Bar Association") and the Law Society of Hong Kong ("the Law Society") generally supported the Proposed Arrangement. Major views expressed by members, the Bar Association and the Law Society at the meeting of the Panel held on 23 May 2011, 27 June 2016 and 19 December 2016 are summarized in the ensuing paragraphs.

Difference in the legal systems and related principles/procedures between Hong Kong and the Mainland

9. At the meetings held on 23 May 2011, 27 June 2016 and 19 December 2016, a few members 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 commercial and matrimonial matters in Hong Kong and the Mainland, for example, enforcement of custody orders and orders for transfer and division of matrimonial assets. The Bar Association also highlighted the importance of "mutual recognition and enforcement".

10. The Administration advised that in working out the Proposed Arrangement with the Mainland counterparts, the Administration would ensure that a close dialogue would be maintained between both sides when problems arisen in relation to the implementation of the arrangement and that both sides would strive to explore ways to reconcile the differences in the legal framework within which the two legal systems operated.

Transfer and division of property and assets

11. At the meetings held on 27 June 2016 and 19 December 2016, the Bar Association, the Law Society and a few members raised particular concern that orders for transfer and division of properties was difficult to enforce against for most of the cases and urged the Administration to look into the issues and concern relating to the transfer and division of property and assets. Besides the problem mentioned in paragraph 9, a member highlighted the problems arising out of the differences between Hong Kong's common law system and legal system in the Mainland.

12. A member considered it important for the Administration to make clear to the Mainland counterparts the legal principles under the common law system and highlight the mutual benefits for the communities of both sides in widening the current regime on reciprocal enforcement of judgments. Regarding enforcement of judgment, the Administration advised that reference could be made to the approach adopted in the arrangement concerning mutual enforcement of arbitral awards, which had been working well.

Maintenance orders and custody orders

13. At the Panel meeting held on 27 June 2016, the Law Society suggested that the Administration could make reference to the Hague Convention on the Civil Aspects for International Child Abduction ("Hague Abduction Convention") which adopted the concept of habitual residence, instead of custodial right of the parents as the sole connecting factor in dealing with these cases. A member concurred with the suggestion of adopting the concept of habitual residence in dealing with parental child abduction cases.

14. Moreover, based on the understanding that parental child abduction was not recognized from the Mainland law perspective, the Law Society suggested that the Administration should avoid using the word "abduction", instead it might consider adopting some other wordings in the Proposed Arrangement.

15. The Bar Association also pointed out that the Mainland did not have the concept of habitual residence, which was adopted in the Hague Abduction Convention in dealing with parental child abduction cases. Moreover, different practices were adopted in Hong Kong and the Mainland in handling custodial matters. For example, while it was unusual for the courts of Hong Kong to issue custody orders that would split up siblings, it was not necessarily the case for the courts in the Mainland.

16. 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.

17. At the Panel meeting held on 19 December 2016, the Law Society raised its particular concern about "custody orders for the purpose of return of children in parental abduction cases". In its submission, the Law Society suggested that if one parent took a child away from the existing care of another parent, this incident could be referred to as "wrongful removal and retention of the child" from their place of habitual residence, instead of child abduction.

18. The Law Society also suggested in its submission that the Proposed Arrangement should include the cooperation for the return of children who had been wrongfully removed or retained by another parent across the border.

19. A member also raised similar concern as to orders which resulted in splitting up siblings or even twins. Another member expressed concern as to the enforcement issues, in particular, issues relating to maintenance orders, child access, guardianship and abduction.

20. Regarding maintenance orders, the Administration advised that widening the scope of the current regime to facilitate reciprocal enforcement of maintenance orders would be one of the main focuses under the Proposed Arrangement. Regarding child access and guardianship, the focus of the consultation paper was on issues relating to "abduction", i.e. children being "wrongfully removed or retained". The Administration considered that the above mentioned issues boiled down to the question of "mutual recognition" and assured that the Administration would strive to work out an effective mechanism with the Mainland counterparts to address the issues concerned.

Service of petition of divorce

21. At the Panel meeting held on 19 December 2016, the Bar Association and a member raised concern about the issues relating to the service of petition for divorce owing to the problems arising out of the procedural differences between Hong Kong and the Mainland in this matter and asked whether the Administration would consider making any relevant legislative amendments and/or explore a mutually recognized way of service with the Mainland counterparts. Taking note of the above mentioned concern, the Administration would further consider the matter with a view to initiating a discussion with the Mainland.

Timetable for the implementation of the Proposed Arrangement

22. At the meeting held on 19 December 2016, a member asked about the timetable for the implementation of the Proposed Arrangement, including the signing of an arrangement with the Mainland and enactment of local legislation, if any. Other members also urged for an early conclusion of an arrangement between Hong Kong and Mainland.

23. The Administration advised that the target timetable for signing an arrangement would be 2017 and that the Administration would also consider commencing the work for preparation of a draft bill in good time and would aim at finalizing the bill as soon as practicable after the arrangement had been

signed. The Administration would also strive to introduce the legislative proposal by the end of 2017. The Administration further advised that, in taking forward the Proposed Arrangement, the issues that were easier to be handled, such as the reciprocal recognition of divorce decrees and the enforcement of maintenance orders, would be resolved first, whereas more controversial issues, such as custody orders would be resolved at a later stage.

Latest position

24. At the meeting scheduled for 22 May 2017, the Administration will brief members on the latest development on the Proposed Arrangement.

Relevant papers

25. A list of relevant papers is in the **Appendix II**.

Council Business Division 4
Legislative Council Secretariat
18 May 2017

**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
December 2016

Appendix II

Proposed Arrangement with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters

List of relevant papers

Meeting	Date of meeting	Minutes/Paper	LC Paper No.
Panel on Administration of Justice and Legal Services	23.5.2011	Administration's paper on "Information on Reciprocal Recognition / Enforcement of Matrimonial Judgments with the Mainland"	CB(2)1781/10-11(04) http://www.legco.gov.hk/yr10-11/english/panels/ajls/papers/aj0523cb2-1781-4-e.pdf
		Minutes of meeting	CB(2)1747/11-12 http://www.legco.gov.hk/yr10-11/english/panels/ajls/minutes/aj20110523.pdf
	27.6.2016	Administration's paper on "Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments on Matrimonial and Related Matters"	CB(4)1144/15-16(05) http://www.legco.gov.hk/yr15-16/english/panels/ajls/papers/ajls20160627cb4-1144-5-e.pdf
		Background brief on "Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland" prepared by Legislative Council Secretariat	CB(4)1144/15-16(06) http://www.legco.gov.hk/yr15-16/english/panels/ajls/papers/ajls20160627cb4-1144-6-e.pdf

Meeting	Date of meeting	Minutes/Paper	LC Paper No.
		Minutes of meeting	CB(4)1309/15-16 http://www.legco.gov.hk/yr15-16/english/panels/ajls/minutes/ajls20160627.pdf
	19.12.2016	Administration's paper on "Proposed Arrangement with the Mainland on Reciprocal Recognition and Enforcement of Judgments on Matrimonial and Related Matters"	CB(4)303/16-17(05) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20161219cb4-303-5-e.pdf
		Updated background brief on "Reciprocal recognition and enforcement of judgments on matrimonial and related matters with the Mainland" prepared by LegCo Secretariat	CB(4)303/16-17(06) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20161219cb4-303-6-e.pdf
		Submission from the Hong Kong Bar Association (English version only)	CB(4)303/16-17(07) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20161219cb4-303-7-e.pdf
		Submission from the Law Society of Hong Kong (English version only)	CB(4)339/16-17(02) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20161219cb4-339-2-e.pdf
		Minutes of meeting	CB(4)679/16-17 http://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20161219.pdf