

For discussion on
26 March 2018

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

**Mainland Judgments in Matrimonial and Family Cases (Reciprocal
Recognition and Enforcement) Bill**

PURPOSE

This paper seeks to brief Members on the key features of the proposed Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill (“**Bill**”) and the proposed way forward.

BACKGROUND

2. The Government previously briefed Members on the proposal regarding an arrangement for reciprocal recognition and enforcement of civil judgments in matrimonial and family cases between Hong Kong and the Mainland in May 2011, June 2016, December 2016 and May 2017. Members, as well as the representatives of the Law Society of Hong Kong and the Hong Kong Bar Association, had indicated support for the conclusion of the proposed arrangement.

3. The *Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (《關於內地與香港特別行政區法院相互認可和執行婚姻家庭民事案件判決的安排》) (“**Arrangement**”) was subsequently signed with the Supreme People’s Court on 20 June 2017. An information paper on the signed Arrangement was issued to the Panel in June 2017.

4. The Arrangement will come into effect after both Hong Kong and the Mainland have completed their respective internal procedures and will only apply to judgments made after the commencement of the Arrangement. Specifically, the Arrangement will be implemented in the Mainland by way of judicial interpretation and in Hong Kong by way of legislation. The Bill seeks to implement the Arrangement in Hong Kong.

5. The Government has recently sought the preliminary views of the representatives of the Law Society of Hong Kong, the Hong Kong Bar Association and the Hong Kong Family Law Association (“**the major stakeholders**”) on the key features of the Bill.

6. The key features of the Bill are outlined below.

KEY FEATURES OF THE PROPOSED BILL

(a) Registration mechanism for Mainland judgments in matrimonial or family cases in the Mainland

7. It is proposed that the Bill would provide for a registration mechanism for Mainland judgments covered by the Arrangement similar to the mechanism under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) and the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597).

(i) *Requirements for Registration*

8. To be registered, the Mainland judgment needs to be:

- (1) a Mainland judgment given in a matrimonial or family case that is covered under Article 3(1) of the Arrangement (details of this is set out in **Annex A**) on or after commencement of the Bill; and
- (2) a judgment that is legally effective in the Mainland.

9. A Mainland judgment is legally effective in the Mainland if it is:

- (1) a judgment given by the Supreme People’s Court;
- (2) a judgment of the second instance given by a Higher People’s Court or an Intermediate People’s Court;
- (3) a judgment of the first instance given by a Higher People’s Court, an Intermediate People’s Court or a Primary People’s Court, and no appeal is allowed from the judgment according to the law of the Mainland; or the time limit for filing an appeal in respect of the judgment has expired according to the law of the Mainland and no appeal has been filed; or
- (4) a judgment of (1), (2) or (3) above which is given according to the trial supervision procedure of the Mainland.

10. Applications to register a Mainland judgment under the Bill would be made to the District Court and the District Court **may**, if it is satisfied that at the date of the application the requirements specified under paragraph 8 above are satisfied, order the Mainland judgment to be registered. For this purpose, a Mainland judgment is presumed, until the contrary is proved, to be given in a matrimonial or family case in the Mainland and is legally effective in the Mainland if a certificate certifying that matter is issued by the original Mainland court.

11. Considering that the reasons for setting aside registration (as set out under paragraph 15 below) may, at the time of the application for registration, already be readily demonstrated or self-evident in the proceedings in Hong Kong, it is proposed that the District Court be given discretion on whether to register the Mainland judgment under the Bill (instead of stipulating for automatic registration) in order to help save litigation costs and judicial resources. The major stakeholders have expressed that they have no objection to this proposal.

12. Similar to Cap. 597, it is proposed that an application for registration under the Bill may be made *ex parte*, but the District Court may also direct an originating summons to be issued, i.e. the application will be *inter partes*. There will be requirements on service of a notice of registration on the party (or parties) against whom the judgment is enforceable, whether or not the application is made *ex parte* or *inter partes*.

(ii) *Payments or performance of acts which are not yet due*

13. Under both Cap. 319 and Cap. 597, a judgment should have been due for payment before a judgment creditor may apply to the relevant court for registration. Given the particular nature of orders in matrimonial or family cases and to cause minimum inconvenience to users of this mechanism, the Government is considering whether a Mainland judgment given in a matrimonial or family case may be registered for all the orders under that judgment notwithstanding that **some** of the payments or acts ordered are not yet due for performance at the time of the application for registration. An example of this would be periodical maintenance payments or where performance is ordered to be in stages.

14. The major stakeholders have suggested that as long as the orders are covered by Article 3(1) of the Arrangement (see Annex A), the Mainland judgment should be registered for all the orders in the judgment whether or not the payments or acts ordered are due for performance and whether or not default

in payment or performance has occurred. The Government is examining the merits of the suggestion and its implications on implementation, in particular since the suggestion is a departure from the existing mechanism used under Cap. 319 and Cap. 597.

(iii) *Setting Aside Registration*

15. A party against whom a registered judgment may be enforced may apply to the District Court for the registration of the judgment to be set aside within the period specified by the District Court. The grounds on which registration of a registered judgment must be set aside are:

- (1) as at the date of the application, the judgment is not a Mainland judgment which satisfies the requirements under paragraph 8;
- (2) the judgment has been registered in contravention of the Bill;
- (3) if the judgment orders the payment of a sum of money or the performance of an act, the judgment has been wholly satisfied;
- (4) the respondent/the party against whom a registered judgment is enforceable under the law of the Mainland in respect of which the judgment was given was not summoned according to the law of the Mainland;
- (5) the respondent/the party against whom a registered judgment is enforceable under the law of the Mainland was summoned according to the law of the Mainland, but was not given a reasonable opportunity to make submissions or defend the proceedings according to the law of the Mainland;
- (6) the judgment was obtained by fraud;
- (7) the judgment was given in respect of a cause of action between the parties that was accepted by a court in the Mainland after a court in Hong Kong has already accepted the same cause of action between the parties;
- (8) a judgment on the same cause of action between the parties to the judgment has been given by a court in Hong Kong;
- (9) a judgment on the same cause of action between the parties to the judgment has been given by a court in a place outside Hong

Kong, and the judgment has already been recognised in or enforced by the courts in Hong Kong;

- (10) the enforcement of the judgment is contrary to the basic legal principles of the law or public policy of Hong Kong; or
- (11) the registered judgment has been reversed or otherwise set aside pursuant to an appeal or a retrial under the law of the Mainland.

For the purposes of (10) above, if the Mainland judgment involves a person under the age of 18, in deciding whether the enforcement of the judgment is contrary to the basic legal principles of the law or public policy of Hong Kong, the District Court must take into account the best interests of the person.

(iv) Execution

16. For the purposes of **execution**, a registered judgment is of the same force and effect as if it had been a judgment originally given by the District Court (as if the District Court had had jurisdiction to make it) and entered on the day of registration. Proceedings may be taken for the enforcement of the judgment and the District Court has the same control over the execution of the judgment as if it had been a judgment originally given in the District Court on the day of registration and entered on the day of registration.

17. If a registered judgment orders any property to be vested in a party to the judgment (**transferee**), it is taken to be an order for the transfer of the property from one party to the judgment to the transferee.

(v) Stay

18. The Bill will provide that if an application is made under the Bill for registration of a Mainland judgment (**registration application**) in the course of a Hong Kong court (**adjudicating court**) adjudicating a case on a cause of action which is the same as that in the Mainland judgment under the registration application, the applicant of the registration application must notify the adjudicating court of the application at the time when the application is made. On receiving the notification, the adjudicating court must order the proceedings for the case before it to be stayed. The proceedings for the case are then stayed until the adjudicating court, on the application of a party to the proceedings, orders that the proceedings for the case (or any part of it) be resumed or terminated.

19. The case may only be resumed or terminated if the District Court:
- (1) refuses to make an order to register the Mainland judgment; or
 - (2) makes an order to register the judgment and –
 - (i) the time limit for applying to set aside the registration has expired and no application to set aside is made; or
 - (ii) an application for setting aside the registration is made and the application has been determined.

20. The Government is considering the implications of the stay on applications for financial relief following the obtaining of a divorce outside Hong Kong under Part IIA of the Matrimonial Proceedings and Property Ordinance (Cap. 192).

(b) **Recognition**

(i) ***Recognition of Mainland Orders***

21. For recognition purposes, it is proposed that adoption orders or determination on adoptive relationships made by a Mainland court would continue to be governed by section 17 of the Adoption Ordinance (Cap. 290).

22. For the recognition of a determination on the validity of a marriage, annulment of a marriage or parentage made by a Mainland court, it is proposed that there is no need to apply for registration in order for these judgments in relation to status to be recognised. As long as the Mainland judgments satisfy the requirements for registration as set out under paragraph 8 above, whether or not the judgment has been registered, it would be recognised as valid under the law of Hong Kong *provided* that this would *not* apply if the judgment has been registered, it has been set aside on any ground other than that the judgment has been wholly satisfied; or where the judgment has not been registered, it is shown that if it had been registered, the registration would have been set aside on any ground other than that the judgment has been wholly satisfied.

23. One of the major stakeholders has suggested that the requirements for recognition should be separated from the requirements for registration. The Government is considering this suggestion together with the suggestion of the major stakeholders set out in paragraph 14 above.

24. In this connection, in relation to recognition of a divorce granted by a

Mainland court, the Government will further consider whether to continue to have the recognition determined by Part IX of the Matrimonial Causes Ordinance (Cap. 179).

(ii) Recognition of Mainland Divorce Certificates

25. There will be a separate mechanism for applying to recognise Mainland divorce certificates since the granting of a Mainland divorce certificate is not a judicial act and does not involve judicial proceedings.

26. It is proposed that a party to a divorce specified in a Mainland divorce certificate may apply to the District Court for an order to have the certificate recognised to the effect that the divorce covered by the certificate is recognised as valid in Hong Kong.

27. The requirement for the recognition is that the District Court needs to be satisfied that the divorce certificate is valid in the Mainland. For this purpose, the divorce certificate would be presumed, until the contrary is proved, to be valid in the Mainland if the certificate is notarised by an attesting officer in the Mainland.

28. The other party to the divorce in the Mainland divorce certificate which is ordered to be recognised may apply to set aside the order for recognition within the period specified by the District Court. The grounds on which recognition of a divorce certificate must be set aside are:

- (1) the certificate was obtained by fraud;
- (2) the certificate is invalid; or
- (3) the recognition is contrary to the basic legal principles of Hong Kong law or the public policy of Hong Kong.

29. The major stakeholders have not indicated any particular objection to the above proposal.

(c) Recognition and enforcement in the Mainland of Hong Kong judgments given in matrimonial or family cases in Hong Kong

30. The recognition and enforcement in the Mainland of judgments in matrimonial or family cases in Hong Kong given by Hong Kong courts covered by Article 3(2) of the Arrangement (details of this is set out in **Annex B**) would be implemented by way of judicial interpretation in the Mainland. To facilitate

the application for recognition and enforcement of the Hong Kong judgments in the Mainland, the Bill would provide for the power of Hong Kong courts to issue certified copies of the Hong Kong judgments and a certificate that the Hong Kong judgment is a legally effective judgment given in a matrimonial or family case in Hong Kong.

31. With regard to recognition of an agreement or memorandum of dissolution of customary marriages or modern marriages under Part V of the Marriage Reform Ordinance (Cap. 178) and an agreement or memorandum of dissolution of certain marriages celebrated in the Mainland under Part VA of Cap. 178, as only a notarised copy of the agreement or memorandum is required to be submitted to the relevant Mainland court, it does not appear that there is a need for any specific provisions on this in the Bill.

(d) **Applications under the Bill to be dealt with exclusively by the District Court**

32. The District Court has a general power to transfer proceedings to the Court of First Instance. As the applications under the Bill are relatively straight-forward, it is considered more appropriate for the District Court to have exclusive jurisdiction to deal with applications under the Bill (with the exception of the need to apply to the High Court for certified copies and certificates of judgments made by the Court of Final Appeal, Court of Appeal or Court of First Instance covered by the Arrangement). It is also relevant to note that a party would still have the right to apply for leave to appeal to the Court of Appeal in respect of an order for registration of a Mainland judgment or an order for setting aside a registration of a Mainland judgment made by the District Court.

33. The major stakeholders have indicated that they have no issue with the District Court having exclusive jurisdiction to deal with applications under the Bill.

(e) **Procedural Matters**

34. Similar rules to Orders 71A and 71B of the Rules of the High Court (Cap. 4A) as well as Order 42, rule 6 of the Rules of the District Court (Cap. 336H), which are rules for applications made under Cap. 597, with modifications to include the requirements under the Arrangement, would be made under the Bill to provide for the matters related to the application for registration of a Mainland judgment given in a matrimonial or family case, recognition of Mainland divorce certificates, obtaining a certified copy of and a certificate for Hong Kong judgments given in a matrimonial or family case as

well as other related matters.

35. Particular rules or amendment of existing rules to provide for enforcement of a Mainland judgment registered under the Bill will also be made.

WAY FORWARD

36. While the Government is still considering the suggestions of the major stakeholders, comments from Members are welcome, before refining the Bill for conducting a public consultation. Subject to the result of the consultation, the Government intends to introduce the Bill into the Legislative Council before the end of this year.

ADVICE SOUGHT

37. Members are invited to note and comment on the above proposals.

Department of Justice
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Matrimonial or family cases in Mainland

1. A dispute over the division of the property of the parties to a marriage during the subsistence of the marriage.
2. A dispute regarding an application for divorce.
3. A dispute over property after divorce.
4. A dispute over the validity of a marriage.
5. A dispute over the annulment of a marriage.
6. A dispute over property, and the custody or maintenance of children arising from a dispute mentioned in items 2, 4 or 5.
7. A dispute over a property agreement entered into between parties to a marriage before or during the subsistence of a marriage, whether or not the dispute arises during the subsistence of a marriage or during or after a divorce.
8. A dispute over the custody or maintenance of children arising from cohabitation.
9. A dispute over the determination of parentage.
10. A dispute over the custody or maintenance of children.
11. A dispute over maintenance (limited to spousal maintenance only).
12. A dispute over the right of guardianship (limited to guardianship of a person under the age of 18).
13. A dispute over the right of access to children.
14. A case concerning an order providing for protection of a person from violence in a domestic relationship.
15. A dispute over adoptive relationship.¹

¹ Please see comment at paragraph 21 of the paper.

Matrimonial or family cases in Hong Kong

1. A decree absolute of divorce granted under Part III of the Matrimonial Causes Ordinance (Cap. 179).
2. A decree absolute of nullity granted under Part IV of the Matrimonial Causes Ordinance (Cap. 179).
3. An order under section 3 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) for maintenance pending suit.
4. A maintenance order as defined by—
 - (a) section 2 of the Guardianship of Minors Ordinance (Cap. 13);
 - (b) section 2 of the Separation and Maintenance Orders Ordinance (Cap. 16); or
 - (c) section 2 of the Matrimonial Proceedings and Property Ordinance (Cap. 192).
5. An order for maintenance granted under Part IIA of the Matrimonial Proceedings and Property Ordinance (Cap. 192).
6. An order for the transfer or sale of property made under—
 - (a) section 10(2), 11(1)(b) or 12(b) of the Guardianship of Minors Ordinance (Cap. 13); or
 - (b) section 6, 6A or 29AG of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
7. An order under section 6 of the Married Persons Status Ordinance (Cap. 182) with respect to property or payment of money.
8. An order under section 15 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) for the alteration of a maintenance agreement.
9. An adoption order as defined by section 2 of the Adoption Ordinance (Cap. 290).

10. A declaration under –
 - (a) section 49 of the Matrimonial Causes Ordinance (Cap. 179) regarding the legitimacy of a person, or for the legitimation of a person; or
 - (b) section 6 the Parent and Child Ordinance (Cap. 429) regarding the parentage or the legitimacy of a person, or for the legitimation of a person;
11. An order for the custody of a person made under –
 - (a) section 10(1), 11(1)(a), 12(a) or 13(1)(b) of the Guardianship of Minors Ordinance (Cap. 13);
 - (b) section 5(1)(b) of the Separation and Maintenance Orders Ordinance (Cap. 16); or
 - (c) section 19 or 20 of the Matrimonial Proceedings and Property Ordinance (Cap. 192).
12. A order relating to custody/care and control made in respect of a person under the age of 18 who has been made a ward of court.
13. An injunction granted under section 3, 3A or 3B of the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189).
14. An order under section 7A of the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189) for varying or suspending the execution of a custody or access order.