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Panel on Administration of Justice and Legal Services

Meeting on 26 March 2018

Background brief on 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

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 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 ("Matrimonial Arrangement").

Background

2. According to the Administration, the Matrimonial Arrangement establishes a mechanism for reciprocal recognition and enforcement of civil judgments in matrimonial and family cases between the Hong Kong Special Administrative Region and the Mainland, thereby providing better safeguards to families, in particular, parties to cross-boundary marriages and their children. It will also enhance the legal co-operation and juridical relations between Hong Kong and the Mainland in civil and commercial matters.¹ A copy of the Matrimonial Arrangement is (Chinese version only) in **Appendix I**.

¹ Details are set out in LC Paper No. CB(4)1275/16-17(01).

3. At present, Mainland judgments on matrimonial and family matters are generally not recognized and enforceable in Hong Kong². Neither does Mainland law expressly provide for the recognition and enforcement of Hong Kong judgments on matrimonial and family matters in the Mainland.

4. In view of the increasing number of cross-boundary marriages and related matrimonial matters, the Administration observed that there existed a pressing need to establish a bilateral arrangement between Hong Kong and the Mainland to provide for reciprocal recognition and enforcement of civil judgments on matrimonial and family matters. The Panel was first briefed on such a need at its meeting on 23 May 2011 and concluded that the Administration should work out such an arrangement with the Mainland as soon as possible. Thereafter, the Administration had held several rounds of working meetings with the Mainland side during which issues arising from the differences in the legal frameworks within which the two legal systems operate have been discussed thoroughly.

5. On 27 June 2016, the Administration launched a seven-week public consultation concerning a possible arrangement with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters ("the Proposed Arrangement") and, on the same day, briefed the Panel on this and sought members' views on the issues raised in the consultation paper. Specifically, the Department of Justice ("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;

² The exceptions include non-Hong Kong divorces recognised under Part IX of the Matrimonial Causes Ordinance (Cap. 179) and adoptions given legal effect under section 17 of the Adoption Ordinance (Cap. 290). Family matters are also expressly excluded from the scope of 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 (關於內地與香港特別行政區法院相互認可和執行當事人協議管轄的民商事案件判決的安排), signed in July 2006 and took effect as from August 2008.

- (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. The Panel was then briefed on 19 December 2016 on the outcome of the above consultation and the main response of the Administration to the related issues. After that, the Administration further discussed with the Mainland side and sought further views and comments from the relevant stakeholders on various issues arising from the Proposed Arrangement.

7. On 22 May 2017, the Administration briefed the Panel on the key features of the Matrimonial Arrangement which included the finalized proposals to address the eight issues covered in the public consultation in paragraph 5 above. The Government signed the Matrimonial Arrangement with the Supreme People's Court on 20 June 2017.

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 welcomed and supported the establishment of a bilateral arrangement between Hong Kong and the Mainland to provide for reciprocal recognition and enforcement of civil judgments on matrimonial and family matters. Their major views and concerns expressed at previous Panel meetings are summarized in the ensuing paragraphs.

Enforcement issues

9. Members were concerned about the enforcement issues of the Matrimonial Arrangement, in particular, maintenance orders, child access and guardianship, etc. Some members expressed the concerns that the courts in the Mainland might give orders granting the custody of siblings to a different parent, thereby splitting up the siblings, while this might not be the case in Hong Kong.

10. To provide better safeguards to parties of cross-boundary marriages and give due regard to the best interests of children, there was a view that DoJ

should consult the Immigration Department on the arrangements in handling custody cases across the borders and liaise with the Social Welfare Department ("SWD") to follow up on issues arising from the mutual recognition and enforcement of judgments and/or orders, especially those relating to the welfare of children. Also, both the Administration and the Mainland side should set up channels for the parties in need to seek assistance and advice on enforcement issues.

11. 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 Matrimonial 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".

12. The Law Society suggested that in dealing with parental child abduction cases, 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.³ A member concurred with the above suggestion.

13. Based on its 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". In the view of the Law Society, if one parent took a child away from the existing care of another parent, this incident could be referred as "wrongful removal and retention of the child" from their place of habitual residence. The Law Society also suggested that the Matrimonial Arrangement should include the cooperation for the return of children who had been wrongfully removed or retained by another parent across the border.

14. In response, 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. The Administration also pointed out that the various enforcement issues raised by the Panel, the Law Society and the Bar Association 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

³ According to the Law Society, the objective of Hague Abduction Convention was to ensure that children who had been wrongfully removed from the country of their habitual residence were returned to that country for the courts there to make substantive decisions concerning their welfare.

to address the issues concerned. The Administration also advised that DoJ had been maintaining on-going discussions with the stakeholders, including SWD.

Transfer and division of properties and assets

15. At the meetings held on 27 June 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 were difficult to enforce against for most of the cases and urged the Administration to look into the above issues. There was a view that the Administration should make clear to the Mainland counterparts the legal principles under the common law system adopted by Hong Kong and highlight the mutual benefits for the communities of both sides in widening the current regime on reciprocal enforcement of judgments.

16. In response, 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.

17. According to the Administration, the Matrimonial Arrangement signed with the Mainland side covered orders *in personam* for transfer of property and orders for sale. Since the concept of property ownership in a marriage under the Mainland law was different from that under the Hong Kong law, the Matrimonial Arrangement includes a provision to the effect that a Mainland judgment ordering that a property be vested in one party to the marriage will be deemed to mean, for the purpose of enforcement in Hong Kong, an order for transfer of the property to that party.

Power of variation of maintenance orders

18. The Law Society was of the view that any variation to the maintenance orders should be determined by the court which made the original order. According to the Administration, the Matrimonial Arrangement did not include a power on the part of the requested court to vary maintenance orders made by the original court.

Service of petition of divorce

19. At the Panel meeting held on 19 December 2016, the Bar Association and a member raised concern about the issues arising out of the procedural differences between Hong Kong and the Mainland in the service of petition for divorce. They asked whether the Administration would consider making any relevant legislative amendments and/or explore a mutually recognized way of service with the Mainland counterparts. The Administration noted the above

concerns and indicated that it would further consider the matter with a view to initiating a discussion with the Mainland.

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

20. Some 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".

21. The Administration advised that in working out the arrangement with the Mainland counterparts, the Administration would ensure that a close dialogue would be maintained between both sides when problems arose 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.

22. Some members expressed concern that due to the differences in legal principles and civil procedures between Hong Kong and the Mainland, a more financially able party to a cross-boundary marriage might try to start a cause of action and obtain a judgment in the Mainland in his/her favour and then seek to enforce the judgment in Hong Kong, or might try to affect the judgments of the Mainland courts by means of bribes.

23. The Administration advised that according to the Proposed Arrangement, if the Mainland court considered that the recognition and enforcement of the Hong Kong judgment was manifestly contrary to the basic legal principles of Mainland law or the social and public interests of the Mainland; or the Hong Kong court considered that the recognition and enforcement of the Mainland judgment was manifestly contrary to the basic principles under the law of Hong Kong or the public policy of Hong Kong, the recognition and enforcement of such judgment would be refused under the Proposed Arrangement. In addition, if the judgment involved a child, the court should take into account the best interests of the child in deciding the application of the ground of refusal mentioned above. Furthermore, if the judgment was obtained by fraud, the recognition and enforcement of such judgment would also be refused under the Proposed Arrangement.

Implementation timetable

24. Members in general urged for an early conclusion of an arrangement between Hong Kong and Mainland and asked about the timetable for the implementation of the Matrimonial Arrangement.

25. The Administration advised that the Matrimonial Arrangement will come into effect after both sides have completed their respective internal procedures. Specifically it will be implemented in the Mainland by way of a judicial interpretation and in Hong Kong by way of legislation. The Matrimonial Arrangement does not have any retrospective effect.

Latest position

26. The Administration will consult the Panel on the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill as well as the proposed way forward at the Panel meeting scheduled for 26 March 2018. According to the Administration, the Bill, which seeks to implement the Matrimonial Arrangement, will be refined taking into account the result of the consultation, with a view that the Bill be introduced into the Legislative Council in mid-2018.

Relevant papers

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

Council Business Division 4
Legislative Council Secretariat
20 March 2018

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

根據《中華人民共和國香港特別行政區基本法》第九十五條的規定，最高人民法院與香港特別行政區政府經協商，現就婚姻家庭民事案件判決的認可和執行問題作出如下安排：

第一條 當事人向香港特別行政區法院申請認可和執行內地人民法院就婚姻家庭民事案件作出的生效判決，或者向內地人民法院申請認可和執行香港特別行政區法院就婚姻家庭民事案件作出的生效判決的，適用本安排。

當事人向香港特別行政區法院申請認可內地民政部門所發的離婚證，或者向內地人民法院申請認可依據《婚姻制度改革條例》（香港法例第 178 章）第 V 部、第 VA 部規定解除婚姻的協議書、備忘錄的，參照適用本安排。

第二條 本安排所稱生效判決：

（一）在內地，是指第二審判決，依法不准上訴或者超過法

定期限沒有上訴的第一審判決，以及依照審判監督程序作出的上述判決；

（二）在香港特別行政區，是指終審法院、高等法院上訴法庭及原訟法庭和區域法院作出的已經發生法律效力的判決，包括依據香港法律可以在生效後作出更改的命令。

前款所稱判決，在內地包括判決、裁定、調解書，在香港特別行政區包括判決、命令、判令、訟費評定證明書、定額訟費證明書，但不包括雙方依據其法律承認的其他國家和地區法院作出的判決。

第三條 本安排所稱婚姻家庭民事案件：

（一）在內地是指：

1. 婚內夫妻財產分割糾紛案件；
2. 離婚糾紛案件；
3. 離婚後財產糾紛案件；
4. 婚姻無效糾紛案件；
5. 撤銷婚姻糾紛案件；
6. 夫妻財產約定糾紛案件；
7. 同居關係子女撫養糾紛案件；

8. 親子關係確認糾紛案件；
9. 撫養糾紛案件；
10. 扶養糾紛案件（限於夫妻之間扶養糾紛）；
11. 確認收養關係糾紛案件；
12. 監護權糾紛案件（限於未成年子女監護權糾紛）；
13. 探望權糾紛案件；
14. 申請人身安全保護令案件。

（二）在香港特別行政區是指：

1. 依據香港法例第 179 章《婚姻訴訟條例》第 III 部作出的離婚絕對判令；
2. 依據香港法例第 179 章《婚姻訴訟條例》第 IV 部作出的婚姻無效絕對判令；
3. 依據香港法例第 192 章《婚姻法律程序與財產條例》作出的在訟案待決期間提供贍養費令；
4. 依據香港法例第 13 章《未成年人監護條例》、第 16 章《分居令及贍養令條例》、第 192 章《婚姻法律程序與財產條例》第 II 部、第 IIA 部作出的贍養令；
5. 依據香港法例第 13 章《未成年人監護條例》、第 192 章

- 《婚姻法律程序與財產條例》第 II 部、第 IIA 部作出的財產轉讓及出售財產令；
6. 依據香港法例第 182 章《已婚者地位條例》作出的有關財產的命令；
 7. 依據香港法例第 192 章《婚姻法律程序與財產條例》在雙方在生時作出的修改贍養協議的命令；
 8. 依據香港法例第 290 章《領養條例》作出的領養令；
 9. 依據香港法例第 179 章《婚姻訴訟條例》、第 429 章《父母與子女條例》作出的父母身份、婚生地位或者確立婚生地位的宣告；
 10. 依據香港法例第 13 章《未成年人監護條例》、第 16 章《分居令及贍養令條例》、第 192 章《婚姻法律程序與財產條例》作出的管養令；
 11. 就受香港法院監護的未成年子女作出的管養令；
 12. 依據香港法例第 189 章《家庭及同居關係暴力條例》作出的禁制騷擾令、驅逐令、重返令或者更改、暫停執行就未成年子女的管養令、探視令。

第四條 申請認可和執行本安排規定的判決：

(一) 在內地向申請人住所地、經常居住地或者被申請人住所地、經常居住地、財產所在地的中級人民法院提出；

(二) 在香港特別行政區向區域法院提出。

申請人應當向符合前款第一項規定的其中一個人民法院提出申請。向兩個以上有管轄權的人民法院提出申請的，由最先立案的人民法院管轄。

第五條 申請認可和執行本安排第一條第一款規定的判決的，應當提交下列材料：

(一) 申請書；

(二) 經作出生效判決的法院蓋章的判決副本；

(三) 作出生效判決的法院出具的證明書，證明該判決屬於本安排規定的婚姻家庭民事案件生效判決；

(四) 判決為缺席判決的，應當提交法院已經合法傳喚當事人的證明文件，但判決已經對此予以明確說明或者缺席方提出申請的除外；

(五) 經公證的身份證件複印件。

申請認可本安排第一條第二款規定的離婚證或者協議書、備

忘錄的，應當提交下列材料：

（一）申請書；

（二）經公證的離婚證複印件，或者經公證的協議書、備忘錄複印件；

（三）經公證的身份證件複印件。

向內地人民法院提交的文件沒有中文文本的，應當提交準確的中文譯本。

第六條 申請書應當載明下列事項：

（一）當事人的基本情況，包括姓名、住所、身份證件信息、通訊方式等；

（二）請求事項和理由，申請執行的，還需提供被申請人的財產狀況和財產所在地；

（三）判決是否已在其他法院申請執行和執行情況。

第七條 申請認可和執行判決的期間、程序和方式，應當依據被請求方法律的規定。

第八條 法院應當盡快審查認可和執行的請求，並作出裁定或者命令。

第九條 申請認可和執行的判決，被申請人提供證據證明有下列情形之一的，法院審查核實後，不予認可和執行：

（一）根據原審法院地法律，被申請人未經合法傳喚，或者雖經合法傳喚但未獲得合理的陳述、辯論機會的；

（二）判決是以欺詐方法取得的；

（三）被請求方法院受理相關訴訟後，請求方法院又受理就同一爭議提起的訴訟並作出判決的；

（四）被請求方法院已經就同一爭議作出判決，或者已經認可和執行其他國家和地區法院就同一爭議所作出的判決的。

內地人民法院認為認可和執行香港特別行政區法院判決明顯違反內地法律的基本原則或者社會公共利益，香港特別行政區法院認為認可和執行內地人民法院判決明顯違反香港特別行政區法律的基本原則或者公共政策的，不予認可和執行。

申請認可和執行的判決涉及未成年子女的，在根據前款規定審查決定是否認可和執行時，應當充分考慮未成年子女的最佳利益。

第十條 被請求方法院不能對判決的全部判項予以認可和執行時，可以認可和執行其中的部份判項。

第十一條 對於香港特別行政區法院作出的判決，一方當事人已經提出上訴，內地人民法院審查核實後，可以中止認可和執行情序。經上訴，維持全部或者部份原判決的，恢復認可和執行情序；完全改變原判決的，終止認可和執行情序。

內地人民法院就已經作出的判決裁定再審的，香港特別行政區法院審查核實後，可以中止認可和執行情序。經再審，維持全部或者部份原判決的，恢復認可和執行情序；完全改變原判決的，終止認可和執行情序。

第十二條 在本安排下，內地人民法院作出的有關財產歸一方所有的判項，在香港特別行政區將被視為命令一方向另一方轉讓該財產。

第十三條 被申請人在內地和香港特別行政區均有可供執行財產的，申請人可以分別向兩地法院申請執行。

兩地法院執行財產的總額不得超過判決確定的數額。應對方

法院要求，兩地法院應當相互提供本院執行判決的情況。

第十四條 內地與香港特別行政區法院相互認可和執行的財產給付範圍，包括判決確定的給付財產和相應的利息、遲延履行金、訴訟費，不包括稅收、罰款。

前款所稱訴訟費，在香港特別行政區是指訟費評定證明書、定額訟費證明書核定或者命令支付的費用。

第十五條 被請求方法院就認可和執行的申請作出裁定或者命令後，當事人不服的，在內地可以於裁定送達之日起十日內向上一級人民法院申請覆議，在香港特別行政區可以依據其法律規定提出上訴。

第十六條 在審理婚姻家庭民事案件期間，當事人申請認可和執行另一地法院就同一爭議作出的判決的，應當受理。受理後，有關訴訟應當中止，待就認可和執行的申請作出裁定或者命令後，再視情終止或者恢復訴訟。

第十七條 審查認可和執行判決申請期間，當事人就同一爭議提起訴訟的，不予受理；已經受理的，駁回起訴。

判決獲得認可和執行後，當事人又就同一爭議提起訴訟的，不予受理。

判決未獲認可和執行的，申請人不得再次申請認可和執行，但可以就同一爭議向被請求方法院提起訴訟。

第十八條 被請求方法院在受理認可和執行判決的申請之前或者之後，可以依據其法律規定採取保全或者強制措施。

第十九條 申請認可和執行判決的，應當依據被請求方有關訴訟收費的法律和規定交納費用。

第二十條 內地與香港特別行政區法院自本安排生效之日起作出的判決，適用本安排。

第二十一條 本安排在執行過程中遇有問題或者需要修改的，由最高人民法院和香港特別行政區政府協商解決。

第二十二條 本安排在最高人民法院發布司法解釋和香港特別行政區完成有關內部程序後，由雙方公布生效日期。

本安排於二零一七年六月二十日在香港簽署，一式兩份。

最高人民法院

常務副院長

香港特別行政區政府

律政司司長

**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**

List of relevant papers

Meeting	Date of meeting/ issue	Minutes/Paper	LC Paper No.
Panel on Administration of Justice and Legal Services	23.5.2011	Administration's paper	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	CB(4)1144/15-16(05) http://www.legco.gov.hk/yr15-16/english/panels/ajls/papers/ajls20160627cb4-1144-5-e.pdf
		Background brief	CB(4)1144/15-16(06) http://www.legco.gov.hk/yr15-16/english/panels/ajls/papers/ajls20160627cb4-1144-6-e.pdf
		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	CB(4)303/16-17(05) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20161219cb4-303-5-e.pdf
		Background brief	CB(4)303/16-17(06) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20161219cb4-303-6-e.pdf

Meeting	Date of meeting/ issue	Minutes/Paper	LC Paper No.
		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
	22.5.2017	Administration's paper	CB(4)1022/16-17(03) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170522cb4-1022-3-e.pdf
		Background brief	CB(4)1022/16-17(04) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170522cb4-1022-4-e.pdf
		Minutes of meeting	CB(4)272/17-18 http://www.legco.gov.hk/yr16-17/english/panels/ajls/minutes/ajls20170522.pdf
	20.6.2017	Information provided by the Administration paper	CB(4)1275/16-17(01) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajlscb4-1275-1-e.pdf