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Panel on Administration of Justice and Legal Services

Meeting on 25 February 2019

**Updated 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 an updated 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") and related issues.

Background

2. In the Chief Executive's 2018 Policy Agenda, it is stated that the Department of Justice ("DoJ") would continue to enhance legal co-operation in civil and commercial matters between Hong Kong and the Mainland, including seeking early introduction of a legislative bill to implement the Matrimonial Arrangement, etc.

3. According to the Administration, the Matrimonial Arrangement establishes a mechanism for reciprocal recognition and enforcement of judgments in civil matrimonial and family cases between Hong Kong 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

cooperation and juridical relations between Hong Kong and the Mainland in civil and commercial matters.

4. At present, Mainland judgments on matrimonial and family matters are generally not recognized and enforceable in Hong Kong.¹ Neither does Mainland law expressly provide for the recognition and enforcement of Hong Kong judgments on matrimonial and family matters in the Mainland.

5. 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.

6. On 27 June 2016, the Administration launched a 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 the Proposed Arrangement and sought members' views on the issues raised in the consultation paper.²

¹ The exceptions include non-Hong Kong divorces recognized 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.

² Specifically, 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.

7. 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. 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 issues covered in the public consultation. The Hong Kong Special Administrative Region signed the Matrimonial Arrangement with the Supreme People's Court on 20 June 2017.

8. According to the Administration, 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, and does not have any retrospective effect. At the Panel meeting on 26 March 2018, the Administration briefed members on the key features of the proposed Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill ("Bill"), which sought to implement the Matrimonial Arrangement in Hong Kong.

Major views and concerns of members in past discussions

9. Members of the Panel 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, and urged for early implementation of the Matrimonial Arrangement. The Hong Kong Bar Association ("the Bar Association") and the Law Society of Hong Kong ("the Law Society") were also invited to give their views at the relevant Panel meetings. The major views and concerns expressed at previous Panel meetings are summarized in the ensuing paragraphs.

Enforcement issues

10. Members were concerned about the enforcement issues relating to the Matrimonial Arrangement, in particular those regarding maintenance orders, child access and guardianship, etc. Some members expressed concerns that the Mainland courts might, out of certain considerations, grant the custody of siblings to different parents and caused the separation of the siblings, while this might not be the case in Hong Kong.

11. To provide better safeguards for the parties in cross-boundary marriages and give due regard to the best interests of children, some members considered that DoJ should consult the Immigration Department on the arrangements for

handling custody cases across the boundary, and liaise with the Social Welfare Department on measures to follow up relevant issues arising from the mutual recognition and enforcement of judgments, 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.

12. The Administration advised that one of the main focuses of the Matrimonial Arrangement was to widen the scope of the current regime to facilitate reciprocal enforcement of maintenance orders. Under the proposed Bill, for the purposes of execution, a registered Mainland judgment would be of the same force and effect as if it had been a judgment originally given by the District Court. Proceedings might be taken for the enforcement of the Mainland judgment, and the District Court would have the same powers with respect to the execution of the Mainland 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.

13. The Administration added that it had consulted the relevant government departments on various issues before entering into the Matrimonial Arrangement with the Mainland, including the supporting measures.

Transfer and division of properties and assets

14. 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. 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.

15. The Administration further advised that 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 had included 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.

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

16. Some members expressed concerns about the difficulty in establishing a mechanism for reciprocal recognition and enforcement of matrimonial judgments between Hong Kong and the Mainland in view of the very different legal principles, concepts, administrative or civil procedures in dealing with commercial and matrimonial matters in both places. The Administration should make clear to the Mainland counterparts the legal principles under the common law system adopted in Hong Kong and highlight the mutual benefits to both sides through widening the current regime on reciprocal enforcement of judgments.

17. The Administration advised that it would ensure that a close dialogue would be maintained between Hong Kong and the Mainland when problems arose in relation to the implementation of the Matrimonial Arrangement and that both sides would strive to explore ways to reconcile the differences in the legal framework within which they operated.

18. Some members expressed concern that due to the differences in legal principles and civil procedures between Hong Kong and the Mainland, one party to a cross-boundary marriage might take advantage of the judicial procedure in one place which was to his/her benefit and seek to obtain the court judgment there first, with a view to binding the other party across the boundary through the recognition and enforcement of that judgment.

19. 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. Furthermore, if the judgment was obtained by fraud, the recognition and enforcement of such judgment would also be refused under the Proposed Arrangement.

Latest position

20. The Administration will consult members on the Bill at the Panel meeting scheduled for 25 February 2019.

Relevant papers

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

Council Business Division 4
Legislative Council Secretariat
20 February 2019

**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 paper provided by the Administration	CB(4)1275/16-17(01) http://www.legco.gov.hk/yr16-17/english/panels/ajls/papers/ajls20170522cb4-1275-1-e.pdf
	26.3.2018	Administration's paper	CB(4)762/17-18(04) https://www.legco.gov.hk/yr17-18/english/panels/ajls/papers/ajls20180326cb4-762-4-e.pdf

Meeting	Date of meeting/ issue	Minutes/Paper	LC Paper No.
		Background brief	CB(4)762/17-18(05) https://www.legco.gov.hk/yr17-18/english/panels/ajls/papers/ajls20180326cb4-762-5-e.pdf
		Minutes of meeting	CB(4)81/18-19 https://www.legco.gov.hk/yr17-18/english/panels/ajls/minutes/ajls20180326.pdf

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