

立法會

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Bills Committee on Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill

Background brief

Purpose

This paper provides background information to facilitate members' consideration of the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill ("the Bill"). It also summarizes the major views and concerns expressed by Members of the Legislative Council ("LegCo"), in particular the Panel on Administration of Justice and Legal Services ("the Panel") on related matters.

The Bill

2. Published in the Gazette on 27 November 2020 and introduced into LegCo on 2 December 2020, the Bill seeks to give effect to 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 ("HKSAR") made between the Supreme People's Court of the People's Republic of China and the Government of HKSAR on 20 June 2017 ("the Arrangement") and to provide for related matters.

Background

3. According to the Administration, Mainland judgments on matrimonial and family matters are at present generally not recognized and enforceable in Hong Kong.¹ Neither does Mainland law expressly provide for the recognition and

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.

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.

5. 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 and, on the same day, briefed the Panel on the above arrangement and sought members' views on the issues raised in the consultation paper.

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. On 22 May 2017, the Administration briefed the Panel on the key features of the Arrangement which included the finalized proposals to address the issues covered in the public consultation. The Arrangement was signed on 20 June 2017.

7. According to the Administration, the Arrangement established 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 would also enhance the legal cooperation and juridical relations between Hong Kong and the Mainland in civil and commercial matters. The Arrangement would come into effect after both sides had completed their respective internal procedures. Specifically, it would 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.

8. In the Chief Executive's 2018 Policy Agenda, it was 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 Arrangement, etc. At the Panel meeting on 26 March 2018, the Administration briefed members on the key features of the proposed Bill, which sought to implement the Arrangement in Hong Kong.

9. From 8 February to 8 March 2019, the Administration launched a public consultation on the draft of the Bill ("the draft Bill") as well as the draft of the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Rules, and consulted the Panel at its meeting on 25 February 2019.

Major views and concerns of Members on matters relating to the Bill

10. When the Matrimonial Agreement and the draft Bill were discussed at the Panel meetings, members 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 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.

Enforcement issues

11. Members were concerned about the enforcement issues relating to the 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.

12. 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.

13. When introducing the proposed Bill in March 2018, the Administration advised that one of the main focuses of the Arrangement was to widen the scope of the current regime to facilitate the reciprocal enforcement of maintenance orders. For the purposes of execution, under the proposed Bill, 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.

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

Transfer and division of properties and assets

15. At the Panel meetings held on 27 June and 19 December 2016, the Bar Association, the Law Society and a few members expressed 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.

16. The Administration further advised that the 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 Arrangement had included a provision to the effect that a Mainland judgment ordering that a property be vested in one party to the marriage would 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

17. 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.

18. 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 Arrangement and that both sides would strive to explore ways to reconcile the differences in the legal framework within which they operated.

19. 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.

20. The Administration advised that 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. 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.

21. At the Panel meeting on 25 February 2019, the Chairman pointed out that under the Hong Kong legal system, the power of final adjudication was vested in the Court of Final Appeal. However, under the trial supervision system in the Mainland, it was possible for certain parties to initiate a review of a legally effective judgment subject to the fulfilment of certain conditions. This could result in the retrial of the case by the original trial court. She considered that even if the chance of retrial under the trial supervision system was very rare, it was important to provide a clear definition in the Bill on what constituted an effective judgment in the Mainland which could be recognized and enforced under the Arrangement.

Two-year restriction on registration application for care-related orders

22. At the Panel meeting on 25 February 2019, some members and the Bar Association expressed concern about a provision in the Bill which sought to impose a two-year restriction on registration application for care-related orders, i.e. the restriction that registration application must not seek to have the order registered if the non-compliance first occurred more than two years before the application was made. They urged the Administration to amend the Bill to grant the Court discretionary power to extend such restrictions, as there might be cases in which a child in the Mainland came to live in Hong Kong two years after the non-compliance of the care-related order first occurred in the Mainland.

23. The Administration responded that under the Arrangement, only an effective Mainland judgment given in a matrimonial or family case would be enforceable in Hong Kong. According to the Civil Procedure Law of the People's Republic of China, an application for the enforcement of an effective judgment should be made within two years from the date for performance specified in the judgment or, if no such date was specified, within two years from the date on which the judgment became effective. Where two years had lapsed, the Mainland court would consider if the other party would have any objection to enforcement. The principle that a judgment given by a foreign (or Mainland) court would only be enforced by the requested court if the judgment was enforceable in the place where it was given had also been reflected in the

Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) and the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597), and was in line with the relevant Hague conventions. Nevertheless, the Administration undertook to further study the views of members and the Bar Association regarding the two-year restriction relating to care-related orders.

Latest position

24. At the House Committee meeting on 4 December 2020, members agreed to form a Bills Committee to scrutinize the Bill.

Relevant papers

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

Council Business Division 4
Legislative Council Secretariat
8 January 2021

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

List of relevant papers

Date	Meeting	Paper
23.5.2011	Panel on Administration of Justice and Legal Services	Agenda Minutes
27.6.2016	Panel on Administration of Justice and Legal Services	Agenda Minutes
19.12.2016	Panel on Administration of Justice and Legal Services	Agenda Minutes
22.5.2017	Panel on Administration of Justice and Legal Services	Agenda Minutes
20.6.2017	Panel on Administration of Justice and Legal Services	Information paper provided by the Administration
26.3.2018	Panel on Administration of Justice and Legal Services	Agenda Minutes
25.2.2019	Panel on Administration of Justice and Legal Services	Agenda Minutes
25.11.2020	-	LegCo Brief

Date	Meeting	Paper
27.11.2020	-	The Bill
3.12.2020	-	Report by the Legal Services Division

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