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29 December 2020

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Constitutional and Policy Affairs Division
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Dear Miss CHEUNG,

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

We are scrutinizing the legal and drafting aspects of the captioned Bill and should be grateful if you could clarify the following matters:

Clause 3(1) and Schedules 1 and 2

1. Clause 3(1) of the Bill seeks to provide that a Mainland Judgment given in a matrimonial or family case is a Mainland Judgment that is given in a matrimonial or family case and contains at least one specified order set out in Schedule 2. Matrimonial or family cases, in relation to a Mainland Judgment, would include disputes over (a) custody or maintenance of a child arising from cohabitation, (b) custody or maintenance of a child, (c) right of guardianship (limited to guardianship of a minor child) and (d) right of access to a child (see items 7, 9, 12 and 13 of Schedule 1). Specified orders would include an order

in relation to the custody, guardianship, right of access, maintenance of a child under the age of 18 years (see items 1, 3 and 4 in Part 1 and item 1 in Part 3 of Schedule 2), an order in relation to the custody or maintenance of a child, whether or not under the age of 18 years, who cannot live independently (see item 2 in Parts 1 and 3 of Schedule 2) and an order for the protection of a person from violence in a domestic relationship (see item 5 in Part 1 of Schedule 2).

- (a) Does a "minor child" or "child" (referred to in Schedules 1 and 2) include an illegitimate, step-child or adopted child?
- (b) Hong Kong courts do not have jurisdiction to make or grant a custody order in respect of a person above the age of 18 years under the existing legislation. Hong Kong courts have the power to make ancillary relief orders for a child of the family who is below 18 years old and the courts may include in such order a provision extending beyond the age of 18 if it appears to the courts that the child is or will be receiving instruction at an educational establishment or undergoing some training for a trade, profession or vocation or there are special circumstances which justify the making of the order or provisions (see section 10(3) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) and section 12A(3) of the Guardianship of Minors Ordinance (Cap. 13)). Please clarify whether the recognition and enforcement of a custody order or maintenance order in a Mainland Judgment in relation to a child above the age of 18 years who cannot live independently can reconcile with the jurisdiction of Hong Kong courts in respect of the custody and maintenance of a child under the existing legislation.
- (c) What does "domestic relationship" in an order for the protection of a person from violence in a domestic relationship under Schedule 2 refer to? Would it include the relationship arising from the cohabitation relationship apart from spousal relationship? Please also set out the categories of the persons intended to be protected under such an order.

Clause 3(2) and (3)

2. Under clause 3(2) and (3) of the Bill, matrimonial or family cases, in relation to a Mainland Judgment, are those set out in paragraphs 1 to 10, 12, 13 and 14 of Article 3(1)(1) (the relevant paragraphs are set out in Schedule 1 to the Bill) of the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and the Hong Kong Special Administrative Region made between the Supreme People's Court of the People's Republic of China ("SPC") and the Government of the Hong Kong Special Administrative Region ("HKSAR") signed on 20 June 2017 ("the Arrangement"). It appears that the list of matrimonial or family cases set out in items 1 to 10, 12 to 14 of Schedule 1 are reproduced from and contained in Article 3(1) of the Arrangement rather than Article 3(1)(1). Please consider whether an amendment should be made to replace the reference to Article 3(1)(1) under clause 3(2) and (3) and Schedule 1 to the Bill accordingly.

Clause 4

3. Under clause 4(2) of the Bill, it is proposed that matrimonial or family cases, in relation to a Hong Kong Judgment, are proceedings in which one or more orders specified in Schedule 3 are granted or made (as reflected in Article 3(2) of the Arrangement). The orders set out in Schedule 3 would include an order for the transfer or sale of property made under Cap. 13 or Part II or IIA of Cap. 192 (see item 5 in Schedule 3).

4. Please clarify why the settlement of property order made by a court in Hong Kong under sections 10(2)(e), 11(1)(b)(v) and 12(b)(v) of Cap. 13 and section 6(1)(b) in Part II of Cap. 192 would not be included in Schedule 3 for the purpose of recognition and enforcement of such an order by a Mainland court.

Clause 5 and Clause 10(2)

5. Clause 5(1) proposes that a Mainland Judgment is effective if it is (a) enforceable in the Mainland; and (b) it is a Mainland Judgment (i) given by SPC; (ii) of the second instance given by a Higher People's Court ("HPC") or an Intermediate People's Court ("IPC"); or (iii) of the first instance given by a HPC, IPC 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 appeal in respect of the Judgment has expired according to the law of the Mainland and

no appeal has been filed. A Mainland Judgment mentioned in clause 5(1)(b) would include a Mainland Judgment given according to the trial supervision procedure of the Mainland (clause 5(2)). Clause 10(2) proposes that, a Mainland Judgment is presumed, until the contrary is proved, to be given in a matrimonial or family case and effective in the Mainland if a certificate certifying those matters is issued by the original Mainland court.

- (a) Please explain the procedure involved under "trial supervision procedure" of the Mainland and, in particular, the distinctive features of the "trial supervision procedure" as opposed to other legal procedure in the Mainland, and how such procedure can be invoked in the context of a Mainland Judgment given in a matrimonial or family case.
- (b) Please clarify whether the application for review/retrial of the case under the trial supervision procedure, would be considered as contrary evidence to rebut the presumption that a Mainland Judgment given in a matrimonial or family case is effective under clause 10(2) of the Bill.

Clause 8

6. It is proposed in clause 8 of the Bill that registration application in respect of a care-related order and a maintenance-related order (requiring payment of a sum of money or performance of an act) shall be made within two years after the non-compliance of the order or after the date on which the Mainland Judgment has become effective, as the case may be. The District Court may, on the application of the party to a Mainland Judgment given in a matrimonial or family case, give permission for the registration application to be made after the expiry of the two-year period.

7. What considerations will be taken into account in determining whether permission may be given for such registration application to be made after the expiry of the two-year period?

Clause 11

8. Clause 11(4) of the Bill proposes that the registering court may order the maintenance-related order to be registered in relation to a payment or an act (to be made or performed periodically) that (a) is required by the maintenance-related order to be made or performed by a date that falls on a day

(i) before the date of the registration application ("application date"); or (ii) on or after the application date; and (b) has not been made or performed.

- (a) Clause 11(4), as presently drafted, seems to allow a registration order to be made in relation to future obligations to pay or perform an act (i.e. payment to be made or act to be performed falls on a day after the application date) even if there has not yet been a default in any periodical payment or periodical performance of an obligation in a maintenance-related order before the application date. Please confirm whether it is the legislative intent.
- (b) If your answer to (a) is in the negative and the legislative intent is that the registration will cover future obligations to pay or perform an act only if there has been default in a periodical payment or periodical performance of an obligation before the application, please consider whether amendments to clause 11(4) would be proposed so as to reflect such legislative intent.

Clause 12

9. Clause 12(2)(a)(ii) of the Bill seeks to provide that the specified order must also be registered for any costs duly certified by the original Mainland court as if they were required to be paid under the specified order. Please clarify the types of costs that would be certified by the original Mainland court.

Clause 16(1)(b), (c) and (h) and Clause 16(2)

10. It is proposed that the registering court must, on an application for setting aside the registration of a specified order in a Mainland Judgment, set aside the registration if it is satisfied that the respondent to the Judgment was not summoned to appear according to the law of the Mainland, the respondent to the Judgment was summoned to appear according to the law of the Mainland but was not given a reasonable opportunity to make submissions or defend the proceedings (clause 16(1)(b) and (c)), or the recognition or enforcement of the specified order is manifestly contrary to the public policy of Hong Kong (clause 16(1)(h)).

11. Clause 16(2) proposes that for the purposes of clause 16(1)(h), if the Judgment containing the specified order involves a child under the age of 18 years, in deciding whether the recognition or enforcement of the order, is

manifestly contrary to the public policy of Hong Kong, the registering court must take into account the best interests of the child. It is noted that clause 16(2) reflects Article 9 of the Arrangement.

- (a) Please explain the mode(s) of service of the summons on the respondent to a Mainland Judgment requiring his/her appearance in a court in the Mainland. How would the respondent be summoned to appear a court in the Mainland according to the laws of the Mainland if his or her whereabouts are unknown?
- (b) Please provide examples to illustrate the circumstances under which the respondent to the Mainland Judgment would be considered as not being given a reasonable opportunity to make submissions or defend the proceedings.
- (c) What are the considerations that would be taken into account (apart from the best interests of a child as provided in clause 16(2)) in determining whether the recognition or enforcement of the specified order is manifestly contrary to the public policy of Hong Kong?
- (d) Please advise the factors that would be taken into account for determining what is in the best interests of the child under the age of 18 years when considering the application for setting aside the registration order on the public policy ground under clause 16(2). Would similar factors be taken into account by a court in the Mainland when dealing with an application for setting aside the registration of a Hong Kong Judgment which involves a child below the age of 18 years, if not, please set out those different factors.

Clause 17(3) and Clause 26(5)

12. For the purpose of adjourning applications for setting aside registration of specified orders, the registering court may impose any terms it considers just for, among others, preventing an irremediable injustice (clause 17(3)(c)). Clause 26(5) proposes that despite the Hong Kong proceedings being stayed, the adjudicating court may at any time make any order as it considers necessary for, among others, preventing an irremediable injustice (clause 26(5)(c)). Please provide examples to illustrate the circumstances that would constitute an irremediable injustice under clauses 17(3)(c) and 26(5)(c).

Clause 25

13. Clause 25 proposes that the registration of a specified order in a Mainland Judgment under Part 2 of the Bill does not prevent a court in Hong Kong from recognizing the Judgment as conclusive of any law or fact decided in the Judgment if the Judgment would be recognized as conclusive under the common law before the commencement date of this Ordinance.

14. Please clarify the purpose and effect of this clause, in particular, whether any matter of law or fact decided in the Mainland Judgment which is recognized as conclusive under the common law shall be sufficient proof of that law or fact and may be relied on in other proceedings in Hong Kong founded on the same cause of action between the parties to the Mainland Judgment.

Clause 26(1), (3) and (4)

15. Clause 26(1) and (3) of the Bill proposes that where a registration application is made in relation to any specified order in a Mainland Judgment and proceedings are pending before a court in Hong Kong in respect of the same cause of action between the same parties, the adjudicating court must order that the Hong Kong proceedings be stayed. Such Hong Kong proceedings would be stayed until the adjudicating court, on its own initiative or on the application of a party to the Hong Kong proceedings, orders that the Hong Kong proceedings be resumed or terminated (clause 26(4)).

- (a) Please advise whether the rules of the procedural fairness can be complied with if the other party to the Mainland Judgment would not be given an opportunity to be heard before the adjudicating court makes the order to stay the Hong Kong proceedings.
- (b) What considerations will be taken into account in deciding whether the Hong Kong proceedings should be resumed or terminated?

Clause 16(1)(e), (f) and (g), Clause 26 and Clause 27

16. Under clause 16(1)(e), (f) and (g), a specified order would be set aside on the grounds that the proceedings in which the Mainland Judgment was given were accepted by a court in the Mainland after proceedings in respect of the same cause of action between the same parties were started in a court in Hong Kong; a court in Hong Kong or a court in a place outside Hong Kong has

given a judgment on the same cause of action between the same parties (and the judgment has already been recognized by a court in Hong Kong). Clauses 26 and 27 of the Bill seek to restrict Hong Kong court proceedings for the same cause of action between the same parties in the Mainland Judgment by providing for proceedings pending before a Hong Kong court to be stayed and by restricting the commencement of proceedings in a court in Hong Kong, pending the final disposal of a registration application or an application to set aside the registration.

17. Please clarify whether the "same cause of action" cover other proceedings arising in respect of the breakdown of the marriage such as children related applications (e.g. custody and right of access), ancillary and other financial relief. In this regard, please provide examples of what would constitute the "same cause of action" within the meaning of clauses 16, 26 and 27.

Clause 27

18. Clause 27 seeks to restrict a party to a Mainland Judgment from bringing in Hong Kong proceedings in respect of the same cause of action. Please clarify whether a Hong Kong court would be precluded from exercising its powers to vary or suspend a specified order under clause 27 where there has been a change of circumstances after the specified order has been made such as where the party against whom that order was made has died and if so, would it cause injustice? In this regard, please consider if it is necessary to provide for exceptional circumstances under clause 27 that the court may have the discretion to deal with applications and make any order as it considers necessary for the purpose of ensuring the welfare and best interest of a child under the age of 18 years or preventing an irremediable injustice similar to that of clause 26(5) of the Bill.

Clause 33

19. Clause 33(c) proposes that the District Court must set aside an order for the recognition of a Mainland divorce certificate if it is satisfied that the recognition is manifestly contrary to the public policy of Hong Kong. Please provide examples to illustrate the circumstances under which the recognition of a Mainland divorce certificate would be considered as manifestly contrary to the public policy of Hong Kong.

Clause 38 and Clause 39

20. Apart from the certification of the Hong Kong Judgments given in matrimonial or family cases as provided for in clauses 38 and 39 of the Bill, please clarify whether there are other requirements involved for the purpose of facilitating the recognition and enforcement of the Hong Kong Judgment given in a matrimonial or family case in the Mainland and if so, please provide for the same in the Bill.

Article 15 of the Arrangement

21. Article 15 of the Arrangement provides that where any party is aggrieved by a decision or an order made by the court of the requested place on an application for recognition and enforcement of a judgment, the party may, in the case of Mainland, apply to a people's court at the next higher level for review within 10 days from the date of service of the decision or, in the case of the HKSAR, lodge an appeal according to its law.

- (a) Please provide examples to illustrate the grounds on which a party may feel aggrieved by a decision or an order made by the court of the requested place.
- (b) Please clarify whether and how the contents of Article 15 of the Arrangement are reflected in the Bill, if not, please let us know the reason(s) for not spelling it out in the Bill.

We look forward to receiving your reply in both English and Chinese as soon as practicable, preferably by 8 January 2021.

Yours sincerely,



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