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By Fax (2877 5029)

8 January 2021

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Dear Ms Cheng,

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

We refer to your letter dated 29 December 2020 ("**Letter**"). Our reply to the questions raised in paragraphs 1 to 11 of your Letter are set out below. Our reply to the questions as set out in paragraphs 12 to 21 of your Letter will follow.

Clause 3(1) and Schedules 1 and 2

Paragraph 1(a) of the Letter

2. To recap, 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* ("**Arrangement**") aims to establish a procedural framework to facilitate the recognition and enforcement of Hong Kong and Mainland civil judgments in matrimonial and family cases by the courts of the other place. The Bill

implements the Arrangement by providing a procedural framework for recognition and enforcement of certain Mainland court orders given in matrimonial and family cases in Hong Kong. The range of disputes and orders stated in Schedules 1 and 2 respectively of the Bill reflects the relevant disputes and orders made under Mainland law. With this in mind, we turn to your specific questions.

3. References to a "child" in Schedules 1 and 2 of the Bill can include an illegitimate child, a step-child or an adopted child. In this regard, according to the relevant provisions of *Civil Code of the People's Republic of China* (《中華人民共和國民法典》) (**"PRC Civil Code"**),[1] illegitimate children ("非婚生子女") are entitled to the same rights as children ("子女").[2] Besides, the provisions concerning the relationship between parents and children also apply to that between step-parents and step-children ("繼子女")[3] and between adoptive parents and adopted children ("養子女")[4].

4. As for the reference to a "minor child" in item 12 of Schedule 1 of the Bill, it is used in the context of disputes over right of guardianship ("監護權"). A "minor child" ("未成年子女") is still a "child" and such term similarly includes an illegitimate child, a step-child or an adopted child.

Paragraph 1(b) of the Letter

5. The specified orders in relation to the custody or maintenance of a child above the age of 18 years and who cannot live independently, as stipulated in item 2 of Part 1 and item 2 of Part 3 of Schedule 2 to the Bill,

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1 The PRC Civil Code has come into force on 1 January 2021 and the *Marriage Law of the People's Republic of China* (《中華人民共和國婚姻法》) was repealed on the same date. See Article 1260 of the PRC Civil Code.

2 Article 1071(1) of the PRC Civil Code provides that "非婚生子女享有與婚生子女同等的權利[......]" ("Illegitimate children shall enjoy the same rights as legitimate children [...]").

3 Article 1072(2) of the PRC Civil Code provides that "繼父或者繼母和受其撫養教育的繼子女間的權利義務關係，適用本法關於父母子女關係的規定" ("The relevant provisions of this Law which govern the relationship between parents and children shall apply to the rights and obligations in the relationship between step-fathers or step-mothers and their step-children who are subject to the custody of and receive education from them").

4 Article 1111(1) of the PRC Civil Code provides that "自收養關係成立之日起，養父母與養子女間的權利義務關係，適用本法關於父母子女關係的規定[......]。" ("As from the date of establishment of the adoptive relationship, the provisions this Law which govern the relationship between parents and children shall apply to the rights and obligations in the relationship between adoptive parents and adopted children").

reflect the types of court orders which may be made by the Mainland courts in civil matrimonial and family cases in the Mainland, as agreed under Article 3(1)(1) of the Arrangement. Where a specified order which is a care-related order or maintenance-related order has been ordered to be registered, clause 19(1)(a) of the Bill provides that the specified order may be enforced in Hong Kong ***as if*** it were an order originally made by the relevant registering court and ***the registering court had jurisdiction to make such order***.

Paragraph 1(c) of the Letter

6. We note that pursuant to Articles 23(1) and 37 of the *Anti-domestic Violence Law of the People's Republic of China* (《中華人民共和國反家庭暴力法》) ("**PRC Anti-domestic violence Law**"), a person may apply to the Mainland courts for an order for protection (人身保護令) from domestic violence committed by family members ("家庭成員")[5] as well as co-habitants ("共同生活的人") other than family members.[6]

7. According to Article 1045(3) of the PRC Civil Code, "family members" ("家庭成員") include spouses, parents, children as well as other close relatives who are living together. Article 1045(2) of the PRC Civil Code provides that "close relatives" ("近親屬") include spouses, parents, children, siblings, paternal and maternal grandparents and paternal and maternal grandchildren.

<u>Clause 3(2) and (3)</u>

8. The cross-references to the relevant provision of the Arrangement (namely, "Article 3(1)(1)") as stated in clause 3(2) and (3) and Schedule 1 of the Bill are in line with the conventional cross-reference practice of Chinese texts. Reference may be made to paragraph 2 of Article 61 the *Legislation Law of the People's Republic of China* (《中華人民共和國立法法》)

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5 Article 23(1) of the PRC Anti-domestic Violence Law provides that "當事人因遭受家庭暴力或者面臨家庭暴力的現實危險，向人民法院申請人身安全保護令的，人民法院應當受理。" ("Where a party suffers from domestic violence or faces a real danger of domestic violence and applies to a people's court for an order for protection from domestic violence, the people's court shall accept the application.").

6 Article 37 of the PRC Anti-domestic Violence Law provides that "家庭成員以外共同生活的人之間實施的暴力行為，參照本法規定執行。" ("This Law shall apply, mutatis mutandis, to acts of violence committed by co-habitants other than family members.").

("**PRC Legislation Law**").[7] The phrase "*A civil matrimonial and family case referred to in this Arrangement*" forms paragraph 1 ("第一款") under Article 3, while the phrase "*in the case of the Mainland, means*" forms item 1 ("第一項") under the said paragraph 1.

Clause 4

9. Schedule 3 of the Bill reflects the agreed coverage of Hong Kong court orders as set out in Article 3(1)(2) of the Arrangement, which does not include an order for settlement of property made under the Guardianship of Minors Ordinance (Cap. 13) and the Matrimonial Proceedings and Property Ordinance (Cap. 192). In this regard, we understand that, in practice, settlement of property orders are not commonly made by the Hong Kong courts.

Clause 5 and Clause 10(2)

Paragraph 5(a) of the Letter

10. Under Mainland law, the provisions on the trial supervision procedure ("審判監督程序") are set out in Chapter 16 of the *Civil Procedure Law of the People's Republic of China* (《中華人民共和國民事訴訟法》) ("**PRC Civil Procedure Law**"). Trial supervision in respect of legally effective judgments, rulings or conciliatory statements ("已經發生法律效力的判決、裁定、調解書") can be initiated by the people's courts, the people's prosecutorates or on application by a party.[8] Trial supervision is a different procedure from the appeal procedure and involves a review ("審查") of the judgment or ruling by the court (the original court or a higher level court), which may give rise to an order for retrial ("重審") if warranted. An

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[7] Article 61 of the PRC Legislation Law provides that,

"法律根據內容需要，可以分編、章、節、條、款、項、目。

編、章、節、條的序號用中文數字依次表述，款不編序號，**項的序號用中文數字加括號依次表述**，目的序號用阿拉伯數字依次表述 [……]"

("As required by its contents, a law may consist of parts, chapters, sections, articles, paragraphs, items and sub-items.

The sequence of parts, chapters, sections, and articles shall be numbered in the order of Chinese numerals, paragraphs shall not be numbered, the sequence of **items shall be numbered in the order of bracketed Chinese numerals**, and sub-items shall be numbered in the order of Arabic numerals. […]") (emphasis in bold).

[8] See Articles 198, 199 and 208 of the PRC Civil Procedure Law.

application for retrial by a party will only be allowed where one or more of the grounds stipulated under Article 200 of the PRC Civil Procedure Law have been met.[9] An application for retrial shall generally be made by a party within 6 months after the judgment or ruling has become effective.[10] By contrast, a party has a right to file an appeal against a judgment or a ruling made on first instance ("第一審") with the people's court at the next higher level within 15 days from the date on which the written judgment is served.[11]

11. In the context of matrimonial and family cases, Article 202 of the PRC Civil Procedure Law provides that a party may not make an application for retrial in relation to effective judgments or conciliatory statements on divorce. Article 206 further provides that where a decision for retrial is made, the execution of the judgment, ruling or conciliatory statement shall be suspended, except that suspension is not mandatory for cases involving claims for spousal maintenance and support for children, etc.[12]

Paragraph 5(b) of the Letter

12. Whether a Mainland Judgment given in a matrimonial or family case is effective (within the meaning of clause 5 of the Bill) is a question of fact in respect of which the applicant bears the burden of proof. In this connection, clause 10(2) of the Bill provides a rebuttable evidentiary presumption. As mentioned in paragraph 10 above, an application for retrial is subject to review. In other words, retrial may or may not be allowed on an application by a party. Moreover, as mentioned in paragraph 11 above, execution will only be suspended, if at all, if retrial is ordered; further, execution in respect of maintenance payment may not be suspended even if the case is ordered to be retried.[13] Therefore, the fact that an application for retrial has been made

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[9] The grounds include where a party's right to defend was deprived in violation of the provisions of law ("違反法律規定，剝奪當事人辯論權利的"), where a party was not lawfully summoned and a default judgment was made in his absence ("未經傳票傳喚，缺席判決的"), etc. See Article 200 of the PRC Civil Procedure Law.

[10] See Article 205 of the PRC Civil Procedure Law.

[11] See Article 164 of the PRC Civil Procedure Law.

[12] Article 206 of the PRC Civil Procedure Law provides that "按照審判監督程序決定再審的案件，裁定中止原判決、裁定、調解書的執行，但追索贍養費、扶養費[……]等案件，可以不中止執行。" ("Where a case has been decided to be retried in accordance with the trial supervision procedure, the execution of the original judgment, ruling or conciliatory statement shall be ruled to be suspended, except for cases involving claims for maintenance of a child or a spouse [...].").

[13] See footnote 12.

under the trial supervision procedure under Mainland law may unlikely be sufficient, per se, to rebut the presumption under clause 10(2) of the Bill.

Clause 8

13. In deciding whether to give permission for registration applications to be made, the District Court is, in essence, exercising a discretion in considering whether to allow an extension of time. It is trite law that the courts have a wide and unfettered discretion in considering time extension applications with the object of avoiding injustice and prejudice to the parties.[14] The applicant should give adequate explanation for the inability to comply with the stipulated time limit.[15]

14. The particular matters that will be taken into account by the court when exercising its discretion under section 8 of the Bill would depend on the circumstances of particular cases and subject to case law that may develop after the Bill has come into operation. Nonetheless, reference may be made to how the court has allowed extension of time to make applications under statutory provisions in the matrimonial and family context. For example, section 12 of Cap. 192 provides that enforcement action may not be taken in respect of arrears under certain orders[16] for maintenance and ancillary relief which have become due for more than 12 months save with the leave of the court. In that context, it has been established that arrears will be unenforceable unless there are special circumstances and that the court should pay regard to the extent the applicant has taken action to assert his or her rights by, for example, making requests for payment.[17]

Clause 11

15. We confirm the legislative intention under Clause 11(4)(a)(ii) of the Bill that, in relation to a maintenance-related order which requires periodic payment or periodic performance of act, the registration of the order would cover all ***future obligations*** to pay or perform an act under that order even if

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[14] See, for example, *LLY v LKY* (FCMC 6897/2003, date of decision: 8 March 2009), at paragraphs 25-27.

[15] Ibid.

[16] i.e. Sections 3, 4(1), 5(2), 8(5) or 8(6) of Cap. 192.

[17] See *CSL v WWK* (CACV 278/2003, date of judgment: 25 February 2004), at [28]-[30], cited in, for example, *LBO v WWKF* (FCMC 11924/2015, date of judgment: 30 April 2005).

the relevant payments or performances have not yet become due.

Clause 12

16. According to Article 6 of the *Measures for the Charging of Litigation Fees* (《訴訟費用交納辦法》) issued by the State Council on 19 December 2006, litigation costs ("訴訟費用") include case acceptance fee ("受理費"), application fee ("申請費") and other expenses including travelling, accommodation, living expenses, etc. incurred by witnesses, translators, etc. for the purpose of attending trial.

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

Paragraph 11(a) of the Letter

17. Clause 16(1)(b) of the Bill is concerned with the respondent not having been summoned ("傳喚") to appear in the Mainland court in the relevant proceedings in respect of which the relevant Mainland Judgment has been made.

18. If a case proceeds by way of the ordinary procedure ("普通程序") under Mainland law, Article 227 of the *Interpretation of the Supreme People's Court on the Application of the "Civil Procedure Law of the People's Republic of China"* (《最高人民法院關於適用〈中華人民共和國民事訴訟法〉的解釋》) (**"Interpretation on PRC Civil Procedure Law"**) provides that the parties concerned would be summoned to appear in court 3 days in advance by way of summons ("傳票") served on them by the people's court. Modes of service include direct service, leaving the summons at the residence of the recipient, postal service, or, where the recipient agrees, by electronic means such as fax or email, etc. Further details can be found in Section 2 of Chapter 7 of the PRC Civil Procedure Law.[18]

19. Where the whereabouts of a party is not known, a summons could be

[18] It is also possible for a case to proceed by way of "summary procedure" ("簡易程序") – see Article 157 of the PRC Civil Procedure Law and Articles 256 and 257 of the Interpretation on PRC Civil Procedure Law – in which case the parties may be summoned by oral messages, phone calls, text messages, fax, emails or other simple and convenient means – see Article 261 of the Interpretation on PRC Civil Procedure Law.

deemed to have been served by way of public announcement ("公告送達") upon expiration of the prescribed period of time.[19] Service by public announcement can take the form of posting in the bulletin board of the relevant people's court and at the domicile of the party concerned, or by publication in newspapers, information networks or other media, etc.[20] With respect to a summons being served by public announcement, the announcement must state the time and venue at which the party must appear in court and the legal consequences that may arise from a failure to appear in court.[21]

Paragraph 11(b) of the Letter

20. It would be for the court to decide whether a person has been given reasonable opportunity to make submissions and defend the proceedings based on the specific facts of the case before the court. That said, one example may be found in *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd.*,[22] a case concerning an application to the Court of First Instance for leave to set aside an arbitral award made in Hong Kong. In that case, the court found that at the time of commencement of the arbitration when the Notice of Arbitration was served, and also throughout the arbitration, the applicant, Sun, was under arrest and was detained in custody in the Mainland. The court found that Sun was not given proper notice of the arbitral proceedings nor was he able to present his case. The court held that he had been "*deprived ... of the fair opportunity to consider the evidence and to present his case*"[23] and set aside the arbitral award on this basis (compare similar grounds in Clause 16 (1)(c) of the Bill).

21. References may also be drawn to the circumstances where a person would be considered under Mainland law to have been deprived of the right

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[19] Article 92(1) of the PRC Civil Procedure Law provides that "受送達人下落不明，或者用本節規定的其他方式無法送達的，公告送達。自發出公告之日起，經過六十日，即視為送達。", which can be translated as "If the whereabouts of the person on whom judicial documents are to be served is unknown, or if the documents cannot be served by the other methods specified in this Section, the documents shall be served by public announcement. The documents shall be deemed to have been served upon expiration of 60 days after the date on which a public announcement has been made.".

[20] See Article 138 of the Interpretation on PRC Civil Procedure Law.

[21] See Article 139 of the Interpretation on PRC Civil Procedure Law.

[22] (HCCT 46/2015), reported in [2016] 5 HKLRD 221.

[23] Ibid, at [57].

to defend his or her case in violation of the law, such as where the party was not allowed to put forward his or her arguments on the case; a hearing was not conducted despite being so required; the party was unable to exercise his or her right to defend because, in violation of the law, the judicial documents had not been served; or other circumstances where the party was deprived of his or her right to defend in violation of the law.[24]

Paragraph 11(c) of the Letter

22. Reference may be made to Hong Kong case law in understanding how the courts have applied the public policy ground in considering applications to set aside the enforcement of arbitral awards or the recognition of non-Hong Kong divorce.

23. Hong Kong case law has consistently held that the concept of "public policy" of Hong Kong refers to the "**fundamental conceptions of morality and justice**" of Hong Kong. In the context of enforcement of arbitral awards under the New York Convention, the Court of Final Appeal has held that the expression "public policy" as it appeared in the then section 44(3) of the Arbitration Ordinance (Cap. 341)[25] is a multi-facetted concept. Woven into this concept is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the **most basic notions of morality and justice**. It would take a very strong case before such a conclusion can be properly reached, when the facts giving rise to the allegation have been made the subject of challenge in proceedings in the supervisory jurisdiction, and such challenge has failed.[26]

24. The "public policy" ground is invoked where there is something that

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[24] See Articles 170(1)(4) and 200(1)(9) of the PRC Civil Procedure Law and Articles 325(1)(4) and 391 of the Interpretation on PRC Civil Procedure Law. Under Mainland law, the original judgment may be quashed and a re-trial ordered.

[25] Cap. 341 was repealed upon the Arbitration Ordinance (Cap. 609) coming into effect. The corresponding provision is section 86(2)(b) of Cap. 609.

[26] See *Hebei Import & Export Corporation v Polytek Engineering Co. Ltd.* (FACV 10/1998), reported in [1999] 1 HKLRD 665, at [99]-[100]. This case concerns the enforcement of an arbitral award by Hebei. The Court of Appeal allowed Polytek's appeal to set aside the enforcement order on the ground that it would be contrary to Hong Kong's public policy to enforce an award that was the product of a flawed proceeding. The Court of Final Appeal reversed the Court of Appeal's decision, finding that Polytek could have raised the issue of procedural flaw before the arbitration tribunal but chose not to do so. A party invoking the public policy ground must act in good faith.

amount to "**substantial injustice**" which is "**so shocking to the court's conscience as to render enforcement repugnant**".[27] While the factors considered by the court would vary from case to case, such considerations can include whether the respondent has been given due and fair notice of the proceedings so as to be able to answer and defend the claims against him, as seen in the case of *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* mentioned in paragraph 20 above.[28]

25. In the context of matrimonial proceedings, "contrary to public policy" is a ground on which recognition of divorce obtained overseas (including divorce obtained in the Mainland) may be refused under the existing mechanism in Part IX of the Matrimonial Causes Ordinance (Cap. 179).[29] In this regard, it was observed in the majority judgment of the Court of Final Appeal in the case of *ML v YJ*[30] that,

> "*Leaving aside cases of want of procedural fairness, the public policy discretion has only been applied in cases where the decree offends against our ideas of "substantial justice". [...]*
>
> *It is not possible to define "public policy" or what is meant by "substantial justice". Although the discretion is to be exercised sparingly, there is no limit to the combination of circumstances which fall to be considered under it. [...]*"[31]

26. Nonetheless, it has been stated by Litton LJ that recognition will not be refused on the "public policy" exception simply because "*better financial provision will be made for the wife in our courts than will be made for her in the courts of the jurisdiction the recognition of whose decree is in question*".[32] Further, the court shall also consider if recognition may render a party to be "*left without any or scant financial support*" as well as the conduct of the parties in relation to the foreign proceedings.[33]

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[27] See *A v R (Arbitration: Enforcement)* (HCCT 54/2008), reported in [2009] 3 HKLRD 389, at [23].

[28] See footnote 22, at [4].

[29] See section 61(2)(b) of Cap. 179.

[30] FACV 20/2009, reported in (2010) 13 HKCFAR 794.

[31] Ibid, at [124]-[125].

[32] Ibid, at [130].

[33] Ibid, at [131]-[132].

Paragraph 11(d) of the Letter

27. The best interests of the child is one of the factors to be taken into account when considering whether the registration of the relevant specified order(s) should be set aside on ground that its registration or enforcement is "***manifestly*** contrary to public policy of Hong Kong". While whether the "public policy" ground for setting aside a registration is made out, and considerations of the best interests of the child, are matters for the Hong Kong court to decide having regard to the specific facts of the case before it, in light of the views expressed by the Hong Kong courts on the nature of the "public policy" ground in the judgments mentioned in paragraphs 22 to 26 above, we believe that the registration would unlikely be set aside merely because the Hong Kong court considers that a different order would have been made had the substantive dispute been adjudicated in Hong Kong. It is likely that specified orders in relation to the custody or maintenance of a child may be set aside only where enforcement would be "so shocking to the court's conscience as to render enforcement repugnant", and not merely because better provision would have been made by Hong Kong courts than made by the Mainland courts.

28. Pursuant to Article 9(2) and (3) of the Arrangement, the Mainland courts are expected to take into account the best interests of the child in the course of considering whether recognition and enforcement of the Hong Kong judgment will be manifestly contrary to the basic principles of the law of the Mainland or the social and public interests of the Mainland. This test is necessarily fact sensitive. Reference may be made to 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* signed in 2006 which contains a similar ground of refusal for the Mainland courts not to enforce Hong Kong judgments. As far as we understand, the Mainland courts have sparingly refused to enforce Hong Kong judgments under that Arrangement on the ground that to do so would be contrary to the social and public interests of the Mainland.

Further, since the objective of the Arrangement is to facilitate recognition and enforcement of judgments given by the courts of one jurisdiction by the courts of the other jurisdiction, it is expected that the threshold for refusing recognition and enforcement under Article 9(2) and (3) would be high ("***manifestly*** contrary to").

Yours sincerely,

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