

律政司
憲制及政策事務科

香港中環下亞厘畢道 18 號
律政中心中座 5 樓

網址: www.doj.gov.hk



Department of Justice
Constitutional and Policy Affairs Division

5/F, Main Wing, Justice Place
18 Lower Albert Road
Central, Hong Kong

Web site: www.doj.gov.hk

電話號碼 Tel No.: (852) 3918 4068
傳真號碼 Fax No.: (852) 3918 4799
本函編號 Our Ref.: L/M (5) to LP CLU 5037/7/3C
來函編號 Your Ref.: LS/B/4/20-21

By Fax (2877 5029)

15 January 2021

Ms Vanessa CHENG
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Ms Cheng,

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

We refer to your letter dated 29 December 2020 (“**Letter**”) and our letter dated 8 January 2021 (“**Our First Reply**”). Our reply to the questions raised in paragraphs 12 to 21 of the Letter are set out below. We have adopted the defined terms used in Our First Reply unless otherwise specified.

Clause 17(3) and Clause 26(5)

2. Clause 17(3) seeks to cater for contingencies during an adjournment of a setting aside application by enabling the court to grant certain relief. Clause 17(3)(a) seeks to preserve the parties’ status quo, clause 17(3)(b) concerns the need to ensure the child’s welfare and best interests; while 17(3)(c) is a general fall-back provision (which may overlap with (a) and (b)) to cater for other deserving cases. Similarly, Clause 26(5) caters for contingency while the pending proceedings in Hong Kong are stayed. Clause 26(5)(a) to (c) serves similar purposes as Clause 17(3)(a) to (c) does.

3. Without limiting the situations in which Clauses 17(3)(c) and 26(5)(c) may apply, an example on preventing an irremediable injustice is where there is a serious likelihood that the party applying to set aside the registration may dissipate assets so that no valuable asset is left to satisfy the Mainland judgment upon execution, thereby causing irremediable injustice to the registering party. Another example where appropriate reliefs are necessary to prevent an irremediable injustice may be where a child to a divorced couple has been suffering from acute and rare illness and he or she needs to consult a reputable specialist overseas immediately. Absent agreement from both parents, the court gives approval for the child to go abroad to seek medical treatment immediately as well as requiring the contribution of medical expenses by the relevant parent. The court makes such orders to ensure the welfare and best interest of the child as well as to prevent an irremediable injustice to the child and the parent who takes care of the child.

Clause 25

4. The Bill lays down a procedural mechanism for specified orders in Mainland judgments given in a matrimonial or family case to be recognized and enforced in Hong Kong. However, the Bill itself does not provide for the recognition of findings of law or fact under the Mainland judgment. Clause 25 of the Bill preserves the common law position in relation to Hong Kong courts' consideration of whether findings of any matters of laws and facts made in a Mainland judgment given in a matrimonial and family case may be recognized as conclusive in matrimonial and family or any other proceedings in Hong Kong.

5. In other words, upon commencement of the Bill after its enactment, the Hong Kong courts will continue to decide whether findings on matters of law or fact decided in a Mainland judgment may be recognized as conclusive on the basis of the applicable common law principles.

6. With respect to the question in paragraph 14 of the Letter, if the Hong Kong court, based on the applicable common law principles, decides that a finding of law or fact decided in a Mainland judgment can be recognized as conclusive under the common law, that law or fact may be relied on as being conclusive in the Hong Kong proceedings.

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

Paragraph 15(a) of the Letter

7. The requirement under Clause 26(3) of the Bill for the adjudicating court to order pending proceedings in Hong Kong to be stayed seeks to enable the registration application to be duly considered and to minimise parallel proceedings in Hong Kong and the Mainland by re-litigating the dispute in both places. If there are any irregularities with the Mainland judgment which fall within any of the grounds under Clause 16 of the Bill, the other party to the Mainland judgment can apply for the registration of specified orders in the Mainland judgment to be set aside, and will have the opportunity to raise issues and be heard in the setting aside proceedings, which will take place while the pending proceedings are stayed. Besides, the requirement to stay proceedings under Clause 26 only applies if the pending proceedings are in respect of the same cause of action between the same parties as compared with the Mainland judgment. If a party to the pending proceedings in Hong Kong considers that the condition for stay under Clause 26 has not been met, the party can raise it with the adjudicating court.

Paragraph 15(b) of the Letter

8. The power of the adjudicating court under Clause 26(4) of the Bill is subject to Clause 26(6). In other words, the adjudicating court may make an order to resume or terminate the pending proceedings in Hong Kong only if the requirements set out in Clause 26(6) have been met. Without limiting the discretion of the adjudicating court to make such orders as it considers appropriate in light of individual cases, we anticipate that the power will likely be exercised in the following scenarios:

- (a) where the registration application and any setting aside application have been finally disposed of resulting in the specified orders being registered and enforceable or recognized as valid (as the case may be), the pending proceedings in Hong Kong will likely be ordered to be terminated to the extent that those proceedings concern the same cause of action as that giving rise to the specified orders which have been registered;

- (b) on the other hand, where the registration application and any setting aside application have been finally disposed of resulting in the registration of the specified orders being set aside, the pending proceedings in Hong Kong may be ordered to be resumed.

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

9. The purpose of the grounds for setting aside under Clause 16(1)(e), (f) and (g), the provision for stay of pending proceedings in Hong Kong under Clause 26(3) and the restriction on the bringing of new proceedings in Hong Kong under Clause 27(1), is to discourage and restrict parallel proceedings in Hong Kong and the Mainland over the same cause of action, thereby fulfilling the underlying objective of the Arrangement and the Bill of minimising the need for re-litigation.

10. Under Hong Kong law, a “cause of action” refers to the underlying factual basis for making a claim or seeking a remedy (or, to put it another way, material facts entitling a plaintiff to succeed).¹ While what constitutes “same cause of action” is a fact-specific question depending on the case at hand, it is not expected that proceedings concerning the grant of divorce or the status of divorce would be regarded as constituting the “same cause of action” as proceedings concerning related disputes in respect of custody of a child or the amount of maintenance payment the claims of which would be based on a different factual basis. By contrast, if the Mainland court has made a judgment against a divorced couple over the custody of their child, the divorced couple cannot seek to re-litigate the custody of their child in Hong Kong as this will constitute “same cause of action”, unless there are material differences in the circumstances (see paragraph 11).

11. Nonetheless, Clauses 26(7) and 27(4) make clear that the cause of action on which the Mainland judgment was given and the cause of action of the Hong Kong proceedings are not the same where the circumstances which give rise to the proceedings in Hong Kong are materially different from the circumstances which have given rise to the proceedings in the Mainland. Further, a party’s right to take out applications under Part IIA of Cap. 192

¹ See *Cooke v Gill* (1873) LR 8 CP 107, at 116, *Letang v Cooper* [1965] 1 QB 232, at 242-243 and *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, which are cited by the Court of Appeal in *Ho Sin Ying v Chan Yui Ling* (CACV 221/2013, date of judgment: 25 July 2014), at [23]; see also [38] of the judgment of the Court of Appeal.

will not be affected by the restrictions under Clauses 26 and 27.

Clause 27

12. It has been the intention under the Arrangement that the requested court, be it a Hong Kong court or a Mainland court, should not have the power to vary an order granted by the original court in the other jurisdiction. This is based on the views expressed by a majority of the responses received during the public consultation conducted by the Department of Justice in 2016. Should the parties wish to vary a court order, the parties should apply to the original court which made the relevant order instead of the requested court. Similarly, requests for suspension of an order should be made to the original court. Where it is not feasible for a party to apply to the original court in the Mainland, the party may, where applicable, bring proceedings in Hong Kong under Part IIA of Cap. 192. Further, where the circumstances have become materially different, Clause 27(4) of the Bill makes clear that the party would not be precluded from bringing new proceedings in Hong Kong.

13. As to the suggestion for the court to be empowered under Clause 27 of the Bill to make orders for purposes similar to those set out in Clause 26(5), unlike Clause 26 which deals with the stay of pending proceedings in Hong Kong, Clause 27 only seeks to prevent new proceedings from being brought in Hong Kong in respect of the same cause of action in future. Such prohibition under Clause 27 does not affect any ongoing proceedings in Hong Kong, which will be subject to Clause 26. Where there are no ongoing proceedings in Hong Kong, a party which needs to have recourse to reliefs in case of emergency during a pending registration application or a pending setting aside application may make necessary applications to the court.

Clause 33

14. Pursuant to Article 1076 of the PRC Civil Code, divorce certificates may be issued by the Mainland authorities responsible for marriage registration if the couple voluntarily consent to the divorce. Without limiting the scenarios in which the Hong Kong court may consider recognition of a Mainland divorce certificate to be “manifestly contrary to public policy”, one possible example is where one party “consented” to the

divorce under threat or intimidation by the other party, so that consent was not freely given.

Clause 38 and Clause 39

15. For Clauses 38 and 39 of the Bill to apply, the requirements in Clause 37 must be satisfied, namely, the relevant Hong Kong judgment must be given in a matrimonial or family case², is given on or after the commencement date of the Bill and is effective in Hong Kong³. The procedural requirements for an application under Clause 38 and the issue of a certified copy of the Hong Kong judgment and a certificate under Clause 39 will be provided in the rules to be made by the Chief Judge pursuant to Clause 40 of the Bill.

Article 15 of the Arrangement

Paragraph 21(a) of the Letter

16. We have considered reported cases under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) for reference as to the possible grounds of appeal by applicants in Hong Kong. It would appear that so far there has not been a reported case on appeal against the order or judgment of the Hong Kong courts under that Ordinance.

17. On the other hand, we have mentioned in footnote 26 of Our First Reply the appeal case of *Hebei Import & Export Corporation v Polytek Engineering Co. Ltd.*⁴. This case is an example where parties to the court order disagreed on the application of the public policy ground of refusal to enforce an arbitral award. A second example is the case of *Pt First Media TBK v Astro Nusantara International B.V. and Others*⁵. The relevant ground of appeal is the exercise of the court's discretion to extend time for a party to resist the enforcement of a New York Convention award out of time.

² Pursuant to Clause 4 of the Bill, a Hong Kong judgment is given in a matrimonial or family case where the judgment is given in or in respect of proceedings in which one or more orders specified in Schedule 3 to the Bill are granted or made.

³ See Clause 6 of the Bill for the requirements to be satisfied for a Hong Kong judgment to be considered to be effective.

⁴ FACV 10/1998, reported in [1999] 1 HKLRD 665.

⁵ FACV 14/2017, reported in [2018] 21 HKCFAR 118.

Paragraph 21(b) of the Letter

18. An appeal against a decision or an order made by the District Court or the Court of First Instance (as the case may be) may be made in accordance with the existing procedure under the District Court Ordinance (Cap. 336) and the High Court Ordinance (Cap. 4). We consider it not necessary to expressly provide in the Bill that appeals may be made.

Yours sincerely,



(Deneb CHEUNG)

Senior Assistant Solicitor General (China Law)