

Ref: CB4/BC/1/20

Paper for the House Committee meeting on 16 April 2021

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

PURPOSE

This paper reports on the deliberations of the Bills Committee on Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill ("the Bills Committee").

BACKGROUND

2. The Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases ("the Arrangement") was signed between the Government of the Hong Kong Special Administrative Region ("the Government") and the Supreme People's Court of the People's Republic of China ("the Supreme People's Court") on 20 June 2017.

3. The Administration entered into the Arrangement having regard to the following considerations –

- (a) Mainland judgments in matrimonial and family matters are at present generally not recognized and enforceable in Hong Kong.¹

¹ The few exceptions include non-Hong Kong divorces recognized under Part IX of the Matrimonial Causes Ordinance (Cap. 179) and non-Hong Kong adoptions given legal effect under section 17 of the Adoption Ordinance (Cap. 290).

Neither does Mainland law expressly provide for the recognition and enforcement of Hong Kong judgments in matrimonial and family matters in the Mainland.

- (b) In view of the large number of cross-boundary marriages and related matrimonial and family matters, there exists 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.
- (c) The Arrangement will be in the interest of parties and families of cross-boundary marriages as it will offer better safeguards to the parties' rights, as well as reduce the need for re-litigation of the same disputes, and hence save time and cost and reduce emotional distress of the parties.

4. There have been calls from the public, the legal sector and the Judiciary for the early implementation of the Arrangement. For instance, in the case of *黎 v. 凌*, which concerned a cross-boundary marriage, the Court of Appeal urged, in its judgment,² for the early implementation of the Arrangement through legislative scheme.³

5. The Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill ("the Bill") seeks to implement the Arrangement in Hong Kong. In the Mainland, the Arrangement will be implemented by way of judicial interpretation to be promulgated by the Supreme People's Court.

² CACV 204/2016, reported in [2017] 5 HKLRD 629.

³ The Court of Appeal stated that "...absent formal arrangement [viz. the Arrangement] of this nature, there can be a lack of effective judicial redress for problems arising from the breakdown of such marriages. In the interest of society, we would urge that the preparation and enactment of the legislative scheme be proceeded with diligently and expeditiously." (see paragraph 91 of the judgment).

THE BILL

6. The Bill was published in the Gazette on 27 November 2020 and introduced into the Legislative Council ("LegCo") on 2 December 2020.

7. The Bill is modelled on the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) which provides for the enforcement in Hong Kong of Mainland money judgments.⁴ It seeks to establish mechanisms in Hong Kong for the registration of specified orders in judgments given by Mainland courts in matrimonial or family cases, for the recognition of Mainland divorce certificates and for facilitating parties in their applications to Mainland courts for the recognition and enforcement of judgments given by Hong Kong courts in matrimonial or family cases.

8. The main provisions of the Bill are set out in paragraphs 8 to 17 of the LegCo Brief (File Ref. L/M(5) to LP CLU 5037/7/3C) issued by the Department of Justice on 25 November 2020. A copy of the Arrangement is attached at Annex B of the LegCo Brief.

THE BILLS COMMITTEE

9. At the House Committee meeting on 4 December 2020, Members agreed to form a Bills Committee to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Bills Committee has held four

⁴ The Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) implements an arrangement titled 《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》 (English translation of the title: 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 between the Government and the Supreme People's Court on 14 July 2006. This arrangement only applies to money judgments made by the courts of either side where the parties to a commercial contract have agreed in writing that a court of one side will have exclusive jurisdiction to determine a dispute arising from that contract and matrimonial matters are expressly excluded from its scope. The Bill also makes reference to the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) which provides for the enforcement in Hong Kong of foreign judgments.

meetings with the Administration. The Bills Committee has invited written views on the Bill, and no written submission has been received by the submission deadline on 26 January 2021.

DELIBERATIONS OF THE BILLS COMMITTEE

Part 1 of the Bill - Preliminary (clauses 1 - 6)

Mainland Judgments given in matrimonial or family cases (clause 3)

"Child" and "minor child" in the Bill

10. According to clause 3 of the Bill, a "Mainland Judgment given in a matrimonial or family case", for the purposes of the Ordinance, is a Mainland Judgment that is given in a matrimonial or family case (as set out in Schedule 1 to the Bill)⁵ and contains at least one specified order (as set out in Schedule 2 to the Bill).⁶ In items 7, 9, 12 and 13 of Schedule 1 to the Bill, references are made to 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. Further, the specified orders as set out in items 1, 2, 3 and 4 in Part 1 and items 1 and 2 in Part 3 of Schedule 2 to the Bill refer to orders in relation to the custody, guardianship, right of access or maintenance of a child. Members and the Legal Adviser to the Bills Committee have enquired whether the "minor child" or "child" referred to in Schedules 1 and 2 include an illegitimate child, a step-child or an adopted child.

⁵ Schedule 1 to the Bill sets out those cases that are, in relation to Mainland Judgments, "matrimonial or family cases". The Chinese text of Schedule 1 reproduces paragraphs 1 to 10, 12, 13 and 14 of Article 3(1)(1) of the Arrangement, while the English text is a translation of those paragraphs.

⁶ The specified orders set out in Schedule 2 to the Bill are categorised into three types i.e. (a) care-related orders such as orders relating to custody or guardianship of a child (as set out in Part 1 of Schedule 2); (b) status-related orders such as orders granting divorce or annulment of a marriage (as set out in Part 2 of Schedule 2); and (c) maintenance-related orders such as orders relating to the maintenance of a child, spousal maintenance and division of property between the parties to a marriage (as set out in Part 3 of Schedule 2).

11. The Administration has explained that the range of disputes and orders in Schedules 1 and 2 to the Bill reflect the position under Mainland law. In this connection, references to a "child" in Schedules 1 and 2 to the Bill can include an illegitimate child ("非婚生子女"), a step-child ("繼子女") or an adopted child ("養子女") 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"). As for the reference to a "minor child" in item 12 of Schedule 1, the Administration has responded that it is used in the context of disputes over right of guardianship and a "minor child" is still a "child" and, hence, such term similarly includes an illegitimate child, a step-child or an adopted child.

12. The Legal Adviser to the Bills Committee has pointed out that 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 existing legislation, save that Hong Kong courts have the power to, when making ancillary relief orders for a child of the family who is below 18 years old, include in such order a provision extending beyond the age of 18 if it appears to the court that the child is or will be receiving certain education or training, or there are special circumstances.⁷ Members and the Legal Adviser to the Bills Committee have sought clarification on whether the recognition and enforcement of a custody-related order or maintenance-related order in a Mainland Judgment in relation to a child above the age of 18 years who cannot live independently, as stipulated in item 2 of Part 1 and item 2 of Part 3 of Schedule 2 to the Bill, can reconcile with the jurisdiction of Hong Kong courts in respect of the custody and maintenance of a child under the existing legislation. The Administration has explained that the specified orders in relation to the custody or maintenance of a child above the age of 18 years and who cannot live independently reflect the types of court orders which may be made by the Mainland courts in civil matrimonial and family cases in the Mainland (see 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

⁷ 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).

proposes that the specified order may be enforced in Hong Kong as if it were an order originally made by the registering court and the registering court had jurisdiction to make it. The Administration has further explained that, under Mainland law, an adult child who is receiving education at the level of high school or below or who cannot sustain normal livelihood due to loss or partial loss of the capability for labour or any other non-subjective reasons shall be regarded as an "adult child who cannot live independently" as prescribed in Article 1067 of the PRC Civil Code.⁸

13. In relation to an order for the protection of a person from violence in a domestic relationship under item 5 of Part 1 of Schedule 2 to the Bill, members and the Legal Adviser to the Bills Committee have enquired about what "domestic relationship" refers to and whether it would include cohabitation relationship apart from spousal relationship. The Administration has explained that, pursuant to Mainland law, a person may apply to the Mainland courts for an order for protection from domestic violence committed by family members as well as cohabitants ("共同生活的人") other than family members.⁹ "Family members" ("家庭成員") include spouses, parents, children as well as other close relatives who are living together,¹⁰ while "close relatives" ("近親屬") include spouses, parents, children, siblings, paternal and maternal grandparents and paternal and maternal grandchildren.¹¹

⁸ Under Article 1067 of the PRC Civil Code, if parents fail to perform their duty of maintenance, children who are minors or adult children who are not capable of living independently shall have the right to demand the costs of maintenance from their parents.

⁹ Article 23(1) 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") 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."). 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.")

¹⁰ See Article 1045(3) of the PRC Civil Code.

¹¹ See Article 1045(2) of the PRC Civil Code.

14. In response to the Chairman's enquiry, the Administration has clarified that the Bill does not cover the recognition and enforcement of Mainland's adoption orders in Hong Kong, which continues to be subject to the Adoption Ordinance (Cap. 290) (see footnote 1).

The term "child" and its Chinese equivalent term "子女"

15. In the course of the Bills Committee's scrutiny of the Bill, the Administration has proposed amendments to the term "child" and its Chinese equivalent term "子女" in the Bill. The Administration has explained that the term "child" is used in the Bill in the broad sense of referring to any child who may or may not be the child of a party to a dispute. The Chinese equivalent term in the Bill is "子女" which may connote that the "child" is the "son" ("[兒]子") or "daughter" ("女[兒]") of a party to the dispute.

16. According to the Administration, such connotation may not sit well in certain contexts in the Bill. For example, in the context of item 1 in Part 1 and item 1 in Part 3 of Schedule 2 to the Bill, Mainland courts can make an order that provides for a grandparent ("祖父母" or "外祖父母") to bear the obligations of custody or maintenance to a minor grandchild ("孫子女" or "外孫子女"), instead of their own child "子女". Those items where the term "子女" appears in Schedules 2 and 3 to the Bill are items 1, 2, 3 and 4 in Part 1 and items 1 and 2 in Part 3 of Schedule 2 as well as item 12 in Schedule 3. As the use of the Chinese equivalent term "子女" may connote that these items are restricted to orders in relation to custody, guardianship, right of access or maintenance of a party's own "son" ("[兒]子") or "daughter" ("女[兒]") only, the Administration has considered it desirable to replace the term "未滿 18 歲子女" as used under items 1, 3 and 4 in Part 1 and item 1 in Part 3 of Schedule 2 as well as item 12 in Schedule 3 to the Chinese text of the Bill with the term "未滿18 歲的人". In response to members' enquiries on the background and rationale for the Administration's proposed replacement of "child" by "person" in various provisions in the Bill, the Administration has provided an extract of the relevant legal provisions under the Mainland laws (as attached in Part (II) of **Appendix III**) in respect of a person other than the son or daughter of a party to a dispute is covered.

17. The Administration has explained that the amended term connotes a broader interpretation to cover any person under 18 years and these amendments will not have the effect of widening the scope of the Bill but would, instead, better and more effectively reflect what the Bill should, as a matter of fact, cover. Corresponding amendments to the English text of the Bill are also proposed such that the term of "a child under the age of 18 years" as used in the said items in Schedules 2 and 3 be replaced with the term of "a person under the age of 18 years". Consequential amendments are also proposed to be made to clauses 16(2), 17(3)(b) and 26(5)(b) of the Bill.

18. The Administration has also explained that for item 2 in Part 1 and item 2 in Part 3 of Schedule 2 to the Bill, there is a degree of overlapping with item 1 of the same Part to the extent that both of items 1 and 2 in the said Parts can cover a person under the age of 18 years who cannot live independently. For better clarity, item 2 in Part 1 of Schedule 2 is proposed to be amended to read "An order in relation to the custody of a person aged 18 years or above who cannot live independently" ("關於年滿18歲而不能獨立生活的人的撫養權的命令") and, similarly, item 2 in Part 3 of Schedule 2 is proposed to be amended to read "An order in relation to the maintenance of a person aged 18 years or above who cannot live independently" ("關於年滿18歲而不能獨立生活的人的撫養費的命令").

19. On the other hand, the term "子女" as used in items 7 and 12 of Schedule 1 to the Chinese text of the Bill shall be retained as the said items have been reproduced from Article 3(1)(1)(7) and (12) of the Arrangement, wherein the term "子女" is used. The use of the term "child" in the corresponding items in the English text shall be retained accordingly.

20. In response to members' suggestion of keeping the term "child" in the Bill with its scope of different meanings clearly defined in clause 2 of the Bill, the Administration has responded that they have considered it appropriate to make amendments to each of the individual provisions replacing the terms "child" and "子女". According to the Administration, the replacing of the terms "child" and "子女" does not apply uniformly to the whole Bill. As mentioned in paragraph 19 above, the references to "子女" in Schedule 1 to the Chinese text of the Bill were retained as such term

has been reproduced from Article 3(1)(1)(7) and (12) of the Arrangement. Further, inserting an interpretative provision of "child" and "子女" in clause 2 is not preferred from a drafting point of view as each of the terms "person" and "[的]人" is not an ordinary meaning of "child" and "子女" respectively; defining a term in a way that is at odds with its commonly accepted or ordinary meaning is to be avoided. The Administration has taken into account the use of the terms "child" and "子女" and similar terms in existing legislations in the matrimonial and family context and note that there is currently no universally adopted definition for "child". Hence, it follows that the use of the neutral term "person" ("[的]人") can connote a boarder interpretation and can better align with different scenarios and positions under existing legislations in the matrimonial and family context.

21. As to the Chairman's enquiry on whether the proposed amendments would affect other provisions in the Bill or would have implications for other relevant legislations in Hong Kong, the Administration has responded that the proposed amendments are mainly in Schedule 2 to the Bill which relates to specified orders in Mainland Judgments. There is no other legislation in Hong Kong which deals with these specified orders in Mainland judgments. As regards the amendment to item 12 of Schedule 3 to the Bill, the amendment reflects that in an order in relation to custody in respect of a ward of court, the ward is a person under 18 years old and the applicant does not have to be the parent of such person. Thus, the Administration has considered their proposed amendments would not have read-across implications to existing legislations in Hong Kong.

22. The amendments to the Bill proposed by the Administration in relation to the above changes are set out in **Appendix II**.

Effective Mainland Judgments (clause 5)

23. Clause 5(1) of the Bill 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 the Supreme People's Court; (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. Members and the Legal Adviser to the Bills Committee have requested the Administration to elaborate on the trial supervision procedure and its distinctive features 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.

24. The Administration has explained that, pursuant to the provisions 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 can be initiated by the people's courts, the people's procuratorates and on application by a party.¹² 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 application for retrial by a party will only be allowed where one or more of the stipulated grounds have been met.¹³ An application for retrial shall generally be made by a party within six months after the judgment or ruling has become effective. By contrast, a party has a right to file an appeal against a judgment or a ruling made on first instance with the people's court at the next higher level within 15 days from the date on which the written judgment is served.

25. The Administration has further elaborated that, in the context of matrimonial and family cases, a party may not make an application for retrial in relation to effective judgments or conciliatory statements on

¹² See Articles 198, 199 and 208 of the PRC Civil Procedure Law.

¹³ The grounds include where a party's right to defend was deprived in violation of the provisions of law, where a party was not lawfully summoned and a default judgment was made in his absence, etc. See Article 200 of the PRC Civil Procedure Law.

divorce.¹⁴ Where a decision for retrial has been 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.¹⁵

Chinese equivalent terms of "care-related order", "maintenance-related order" and "status-related order" (clauses 2, 8, 11, 19, 24 and Schedule 2)

26. Some members have considered that the Chinese terms of "攸關看顧命令", "攸關贍養命令" and "攸關狀況命令", which have been adopted as the Chinese equivalent terms of "care-related order", "maintenance-related order" and "status-related order" respectively in clauses 2, 8, 11, 19, 24 and Schedule 2 to the Bill, are not readily understood by the general public.

27. After taking into account the comments of members and having reviewed the provisions of the Bill as a whole, the Administration has proposed replacing the said Chinese equivalent terms with "看顧相關命令", "贍養相關命令" and "狀況相關命令" respectively. The relevant amendments proposed by the Administration are set out in **Appendix II**.

28. In response to the Chairman's enquiry, the Administration has clarified that "Mainland Judgment" as defined in the Bill does not include a judgment given by a court in a place outside the Mainland that is recognized in the Mainland under Mainland law.

Part 2 of the Bill – Registration in Hong Kong of Mainland Judgments Given in Matrimonial or Family Cases (clauses 7 - 28)

Division 1 of Part 2 – Registration Applications (clauses 7 - 9)

Additional requirements for particular registration applications (clause 8)

¹⁴ See Article 202 of the PRC Civil Procedure Law.

¹⁵ See Article 206 of the PRC Civil Procedure Law.

Time-limit for making registration application for care-related and maintenance-related orders

29. Under clause 8 of the Bill, registration application in respect of a care-related order and a maintenance-related order shall generally be made within two years after the non-compliance of the order first occurred or after the date on which the Mainland Judgment has become effective, or after the date on which the payment of a sum or performance of an act has become due, as the case may be. Members have enquired about the background and rationale for requiring such a two-year time limit, in particular whether and which parts of the Arrangement and the relevant provisions under Mainland law have been reflected in this construction.

30. The Administration has responded that Article 1(1) of the Arrangement provides that the Arrangement applies to cases where a party applies to a court of Hong Kong for the recognition and enforcement of a legally effective judgment made by a people's court of the Mainland in a civil matrimonial and family case, while Article 7 of the Arrangement provides that the time limit, procedures and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place. In this connection, Article 239 of the PRC Civil Procedure Law is relevant, which provides that the time limit for submission of an application for execution shall be two years ("the two-year time limit"). As it is one of the requirements for making a registration application that the Mainland Judgment must be effective in the Mainland under clause 7(1)(b) of the Bill, whereas clause 5(1)(a) proposes that a Mainland Judgment is effective if, inter alia, it is enforceable in the Mainland, the two-year time limit is crucial in determining if a Mainland Judgment is enforceable in the Mainland under that clause. Hence, a two-year time limit is stated in clause 8.

31. In response to the members' request, the Administration has provided an extract of Article 239 of the PRC Civil Procedure Law, as attached in Part (I) of **Appendix III**.

Discretionary power of the Hong Kong court to grant permission for registration application to be made after expiry of time limit

32. Under clause 8 of the Bill, the District Court ("DC") 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 time limit. Some members have enquired about the rationale for giving such a discretionary power to the court and, in determining whether the permission may be given, what considerations would be taken into account.

33. The Administration has responded that 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. The applicant should give adequate explanation for the inability to comply with the stipulated time limit. The particular matters that will be taken into account by the court when exercising its discretion under clause 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, such as section 12 of the Matrimonial Proceedings and Property Ordinance (Cap. 192). In that context, it has been established that arrears under certain orders for maintenance and ancillary relief which have become due for more than 12 months will be unenforceable unless there are special circumstances and the court will also pay regard to the extent the applicant has taken action to assert his or her rights.

Applicability of the two-year time limit in relation to applications made to the Mainland courts for the recognition and enforcement of Hong Kong Judgments in matrimonial and family cases

34. Some members have enquired about how applications to the Mainland courts for the recognition and enforcement of Hong Kong Judgments in matrimonial and family cases will be dealt with in relation to the two-year time limit, in particular, whether the Mainland courts will also have similar discretionary power to give permission for applications to be

made in relation to a Hong Kong Judgment after expiry of the two-year time limit.

35. In response, the Administration has explained that the Bill is not concerned with how Mainland courts will consider applications for recognition and enforcement of Hong Kong Judgments, which will be governed by the Arrangement and the relevant provisions under Mainland law. Nonetheless, the Administration understands that the PRC Civil Procedure Law in the Mainland provides for how the two-year time limit starts to run. For example, the time limit may be calculated from the last day of the period for performance of obligations.

36. Some members consider that, given that the Arrangement and the Bill will introduce new mechanisms for reciprocal recognition and enforcement, it would be of great assistance to the legal sector if the Administration could provide background information for reference, such as relevant Mainland legal provisions. Some members consider that similar information about how Mainland Judgments will be registered and enforced in Hong Kong should also be provided to the legal practitioners in the Mainland.

37. The Administration has responded that it has planned to jointly organise seminars or training courses with the Supreme People's Court for judges and legal practitioners in Mainland and Hong Kong so that they may get familiarised with the new mechanism after passage of the Bill which will be subject to the COVID-19 situation.

Division 2 of Part 2 – Registration Orders and Registration (clauses 10 - 13)

Registration orders (clause 10)

38. It is proposed in clause 10(2) of the Bill 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. Members and the Legal Adviser to the Bills Committee have enquired about whether the application for review/retrial of the case under the trial supervision

procedure under clause 5(2) would be considered as contrary evidence to rebut the presumption.

39. The Administration has explained that whether a Mainland Judgment given in a matrimonial or family case is effective is a question of fact in respect of which the applicant bears the burden of proof. Clause 10(2) of the Bill provides a rebuttable evidentiary presumption. As an application for retrial is subject to review and, hence, such application may or may not be allowed, the Administration is of the view that the fact that an application for retrial has been made under the trial supervision procedure may unlikely be sufficient, per se, to rebut the presumption under clause 10(2).

Further provisions for registration orders concerning maintenance-related orders (clause 11)

40. Clause 11(4) of the Bill proposes that the registering court may order that the registration of maintenance-related orders which require payment or act to be made or performed periodically ("periodic order") to cover, inter alia, a payment or an act which is required to be made or performed by a date that falls on a day on or after the date of the registration application ("application date") and which has not been made or performed. The Legal Adviser to the Bills Committee has pointed out that clause 11(4), as 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 yet been a default in any periodical payment or periodical performance of an obligation in a maintenance-related order before the application date. Members and the Legal Adviser to the Bills Committee have requested for a detailed explanation of the legislative intent for clause 11(4), and on whether and in what ways the clause, as drafted, could reflect such legislative intent without any ambiguity and if not, whether amendments should be made thereto.

41. The Administration has explained that the legislative intent of clause 11(4) of the Bill is to allow the registration of periodic orders to cover not only those periodic obligations to make payments or perform acts which have become overdue before the application date, but also those

future periodic obligations which will become due on or after the application date and have not yet been paid or performed on the date of registration. This means that upon further default of a periodic obligation to pay or perform an act under the periodic order in future, the judgment creditor does not need to apply to the court for registration of the periodic order again but may directly proceed to make an application to the court for execution of such order.

42. Having considered the views expressed by members and after reviewing the provisions concerned, the Administration proposes to revise clause 11 of the Bill to better reflect the policy intent. The amendments to the Bill proposed by the Administration in relation to the revision are set out in **Appendix II**.

Sums to be included on registration of specified orders (clause 12)

43. Clause 12(2)(a)(ii) of the Bill proposes 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. The Legal Adviser to the Bills Committee has enquired about the types of costs that would be certified by the original Mainland court.

44. The Administration has explained that, under Mainland law, 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.¹⁶

Division 3 of Part 2 – Setting Aside Registration (clauses 14 - 18)

Court to specify time limit for setting aside registration (clause 14)

45. In respect of clause 14(1) of the Bill, the registering court is granted discretionary power to specify a period within which an application for setting aside a registration may be made when making a registration

¹⁶ See 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.

order for a specified order. Some members have sought the Administration's view on whether it is more appropriate to specify in the Bill (or in the rules to be made by the Chief Judge under clause 40 of the Bill) a fixed period for setting aside applications to be made instead of leaving the discretion to the registering court in setting a time limit, and the pros and cons of specifying such time limit in the Bill or the rules to be made.

46. The Administration has explained that, by giving the registering court the discretion to fix the period instead of following a fixed period specified in the legislation, clause 14(1) of the Bill gives the registering court the necessary flexibility to determine the appropriate time period on a case by case basis, having regard to all circumstances of the registration application, including the nature of the specified orders in the relevant Mainland Judgment and the whereabouts of the other parties to the relevant Mainland Judgment.

47. The Administration has further elaborated that such an approach has been adopted in other ordinances, whether in the context of enforcement of judgments or otherwise, such as section 17(1) of Cap. 597,¹⁷ and has been largely effective. Further, the published judgments and decisions reveal that, in practice, applications for setting aside under Cap. 597 in those cases have largely been made in around one month's time from the date of service of the relevant notice of registration.

48. The Administration is of the view that giving necessary flexibility to the registering court does not go against the aim of facilitating the recognition and enforcement of the relevant Mainland Judgments in a timely manner. Since an underlying objective of the Civil Justice Reform is that cases should be dealt with as expeditiously as reasonably practicable, the Administration believes it is unlikely that the registering court would specify an unduly long period for setting aside application to be made. Moreover, it is likely that the party who wishes to set aside the registration would have an interest in making such application swiftly. The

¹⁷ Other examples include rule 5(3) of Order 71, as well as rule 17(3) of Order 115 and rule 7(3) of Order 115A of the Rules of the High Court (Cap. 4A).

Administration considers that there are merits in giving the court the flexibility to specify an appropriate time limit under clause 14(1) of the Bill and allowing the court to develop its practice based on actual experience, instead of specifying a fixed period in the legislation.

Applications for setting aside registration (clause 15)

49. Under clause 15 of the Bill, if a specified order in a Mainland Judgment is registered in accordance with a registration order, a party to the Judgment may, within the period specified under clause 14, apply to the registering court to set aside the registration of the specified order. Some members have enquired about the consequence if no setting aside application is made under clause 15 within the period specified in clause 14. The Administration has responded that, in such a case, the applicant may apply for execution of the registered order upon expiration of such period.

Grounds on which registration must be set aside (clause 16)

50. It is proposed in clause 16(1)(b) and (c) of the Bill 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 Mainland law, or the respondent to the Judgment was summoned to appear according to the Mainland law but was not given a reasonable opportunity to make submissions or defend the proceedings.

51. Some members and the Legal Adviser to the Bills Committee enquired about the usual modes of service of the summons on the respondent to the Mainland Judgment requiring his/her appearance in a court in the Mainland, including where his/her whereabouts are unknown. The Administration has explained that if a case proceeds by way of the ordinary procedure ("普通程序") under Mainland law, the parties concerned would be summoned to appear in court three days in advance by

way of summons ("傳票") served on them by the people's court.¹⁸ 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. Where the whereabouts of a party is not known, a summons could be deemed to have been served by way of public announcement ("公告送達") upon expiration of the prescribed period of time. 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. 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.

52. Some members have requested for examples to illustrate the circumstances under which the respondent to the Mainland Judgment will be considered as not being given a reasonable opportunity to make submissions or defend the proceedings under clause 16(1)(c) of the Bill. The Administration has responded that while these would be matters for the Hong Kong registering court to decide based on the specific facts of the case before the court, references may be drawn from Hong Kong cases¹⁹ and relevant provisions under Mainland law as to the circumstances where a person may likely be considered to have been deprived of the right to defend his or her case. Under Mainland law, examples of such circumstances include where the party is not allowed to put forward his or her arguments on the case; a hearing is not conducted despite being so required; the party is 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.²⁰

¹⁸ See 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").

¹⁹ See, for example, *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd.* (HCCT 46/2015), reported in [2016] 5 HKLRD 221, as cited in paragraph 20 of the Administration's response dated 8 January 2021 to the Legal Adviser to the Bills Committee (LC Paper No. CB(4)354/20-21(03)).

²⁰ See Articles 170(1)(4) and 200(1)(9) of the PRC Civil Procedure Law and Articles

Registration application to be set aside for being "manifestly contrary to the public policy of Hong Kong"

53. Members have enquired about the criteria or considerations that would be taken into account in determining whether the recognition or enforcement of the specified order is manifestly contrary to the public policy of Hong Kong under clause 16(1)(h) of the Bill (as a ground for setting aside the registration of a specified order in a Mainland Judgment).

54. The Administration has explained that whether the recognition or enforcement of a specified order would be "manifestly contrary to the public policy of Hong Kong" is necessarily a fact-sensitive issue to be considered in light of the circumstances of each case. In this connection, 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.²¹ It has been noted by the Administration that the "public policy" ground is invoked where there is something that amounts to "substantial injustice" which is "so shocking to the court's conscience as to render enforcement repugnant".²² Further, the Court of Final Appeal has said that "there is no limit to the combination of circumstances which fall to be considered" under the public policy ground, the discretion is to be exercised "sparingly",²³ and 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.²⁴

55. The Administration has further pointed out that the Bill seeks to implement the Arrangement, the objective of which is to minimise the need

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.

²¹ For more details, please see paragraphs 22 to 26 of the Administration's response dated 8 January 2021 to the Legal Adviser to the Bills Committee (LC Paper No. CB(4)354/20-21(03)).

²² See *A v R (Arbitration: Enforcement)* (HCCT 54/2008), reported in [2009] 3 HKLRD 389, at [23].

²³ *ML v YJ* (FACV 20/2009), reported in (2010) 13 HKCFAR 794, at [124]-[125].

²⁴ *Hebei Import & Export Corporation v Polytek Engineering Co. Ltd.* (FACV 10/1998), reported in [1999] 1 HKLRD 665, at [99]-[100].

for re-litigation of the same disputes in another jurisdiction, thereby saving time and cost as well as reducing emotional stress of the parties. It follows that the requested court is not expected to conduct a substantive review into the merits of the case when considering applications for recognition and enforcement. Moreover, in respect of an application made to the Hong Kong court, registration would be set aside only where any of the grounds specified in clause 16 of the Bill has been satisfied.

Best interests of a child

56. Clause 16(2) of the Bill proposes that, if the Judgment contains a specified order which 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 for the purposes of clause 16(1)(h), the registering court must take into account the best interests of the child. Members and the Legal Adviser to the Bills Committee have enquired about the factors that would be taken into account for determining what is in the best interests of the child in this regard.

57. The Administration has responded that 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". 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 the Hong Kong court considers that a different order, or better provision, would have been made by Hong Kong courts had the substantive dispute been adjudicated in Hong Kong in contrast to the specified orders made by the Mainland courts.

58. Members and the Legal Adviser to the Bills Committee have enquired about whether similar factors would be taken into account by a Mainland court when dealing with an application for recognition and enforcement of a Hong Kong Judgment which involves a child below the age of 18 years. The Administration has pointed out that, 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 Mainland law or the social and public interests of the Mainland. This test is necessarily fact sensitive. Nonetheless, 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) of the Arrangement would be high. In the context of considering substantive applications in respect of custody or maintenance of a child, the Mainland courts would, generally, take into account the circumstances of the case when considering the best interests of a child in individual cases, as distinguished from applying a pre-established list of factors.

Court may adjourn applications for setting aside registration (clause 17)

59. Clause 17(3) of the Bill proposes that, when adjourning applications made for the registration of specified orders to be set aside, the registering court may impose any terms it considers just for any one or more of the purposes set out in clause 17(3)(a), (b) and (c), namely, maintaining or restoring the status quo during the period of adjournment, ensuring the welfare and best interests of a child under the age of 18 years or preventing an irremediable injustice. Similarly, clause 26(5) proposes that the adjudicating court may make any order for purposes similar to those set out in clause 17(3) as it considers necessary despite the pending Hong Kong proceedings being stayed. Some members have enquired about the scope of interim reliefs that could be imposed by the courts in Hong Kong in that respect.

60. The Administration has responded that clause 17(3) of the Bill seeks to cater for contingencies during an adjournment of a setting aside application by making it clear that the court may exercise its jurisdiction to grant certain reliefs. Similarly, clause 26(5) caters for contingency while the pending proceedings are stayed. It has further explained that the High Court Ordinance (Cap. 4) provides the court the power to grant interim reliefs including the temporary restraining of dissipation on assets, prohibition from performing certain acts, or interim arrangement for the care of a child.

61. In response to the enquiries of members and the Legal Adviser to the Bills Committee, the Administration has provided examples to illustrate the circumstances that would constitute an irremediable injustice under clauses 17(3)(c) and 26(5)(c) of the Bill, without limiting the applicable situations. For example, interim reliefs may be granted for preventing an irremediable injustice 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 may be where a child to a divorced couple has been suffering from acute and rare disease 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.

Division 4 of Part 2 – Effect etc. of Registration (clauses 19 - 25)

Transfer of registered orders to Court of First Instance (clause 21)

62. Clause 21(2) of the Bill proposes that a person entitled to enforce a registered order may make an ex parte application to DC for the order to be transferred to the Court of First Instance ("CFI"). Some members have requested for examples of circumstances under which a registered order would need to be transferred to CFI, and enquired about whether the amount of money involved in the relevant specified order (for example, where the specified order is a maintenance-related order) is a relevant consideration for transferring an order from DC to CFI for enforcement.

63. The Administration has responded that DC and CFI generally exercise similar jurisdictions in matrimonial and family cases. CFI can exercise certain powers under the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189) in a case of urgency. Besides, it may also be more appropriate to transfer the order to CFI in cases where complex issues or novel points of law were involved.

64. Some members are concerned that the transfer of registered order to CFI may be abused as there is no provision in the Bill setting out the circumstances for the transfer to CFI. The Administration has responded that clause 21(4) of the Bill has provided safeguard against abuse as the Registrar may direct such transfer only if the Registrar is satisfied that the registered order could not be conveniently enforced in DC.

65. The Legal Adviser to the Bills Committee has enquired as to the time when the respondent would be notified as the application for the order to be transferred to CFI would be made on an ex parte basis. The Administration has responded that the procedures for registration of specified orders and application for enforcement would allow the respondent to be notified at appropriate stage. Further, as the policy intent was to achieve an overall balance such that the entire process of registration of specified orders would not be too complex and cause delay to the whole process, the arrangement proposed is considered appropriate.

Transfer of property between parties to marriage (clause 22)

66. Under clause 22(4) of the Bill, if the transferor neglects or refuses to comply with the direction²⁵ or cannot, after reasonable inquiry, be found, the court in which the registered order is enforced, namely CFI or DC (as the case may be) may order that the relevant conveyance, contract or other document shall be executed, or that the negotiable instrument shall be endorsed, by such person as the court may nominate for that purpose. As to the Chairman's enquiry about who would actually be so nominated by the court to execute the instrument for the transfer of property, the Administration has responded that, under Hong Kong case law, the Registrar of CFI could be so nominated in the case of CFI.

²⁵ Clause 22(3) provides that if (a) the registered order requires the transfer of any property from one party to the Mainland Judgment to the other party; or (b) the registered order is taken under clause 22(2) to be an in personam order for the transfer of any property from one party to the Judgment to a transferee, the court in which the registered order is enforced may direct the party who is to transfer the property (transferor) to execute any conveyance, contract or other document or to endorse any negotiable instrument.

Effect of registration of status-related orders (clause 24)

67. Members have enquired about the rationale and appropriateness of adopting "了結" as the Chinese equivalent term of "finally disposed of" in clause 24(2) of the Bill.

68. The Administration has responded that there are examples in Hong Kong's legislation where "了結" is adopted as the Chinese rendition of "finally disposed of".²⁶ Besides, even without the prefix of "最終", "了結" itself carries the meaning of "完結" and reflects the idea of "finally" in the English text of clause 24(2) of the Bill.

Recognition of judgments under common law not affected (clause 25)

69. Clause 25 of the Bill 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 the Bill after its enactment. Members and the Legal Adviser to the Bills Committee have sought clarification on the purpose and effect of clause 25.

70. The Administration has responded that 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 in such Mainland Judgments. Clause 25 of the Bill preserves the common law position in relation to Hong Kong courts' consideration of whether such findings of laws and facts made in Mainland Judgments may be recognized as conclusive in matrimonial and family or any other proceedings in Hong Kong. In other words, clause 25 of the Bill does not preclude the court from deciding whether such findings of law or fact in Mainland Judgments may be recognized as conclusive on the basis of the applicable common law principles.

²⁶ For example, see section 508(3)(a)(ii) of the Companies Ordinance (Cap. 622).

71. The Administration has explained that upon commencement of the Bill after its enactment, 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. 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 proceeding.

72. In response to the Chairman's enquiry on whether the findings of law or facts decided in a Mainland Judgment, though not binding on the Hong Kong courts, would be considered persuasive by the Hong Kong courts, the Administration has responded that the Bill would not preclude the court from recognizing the findings of law or fact in the Mainland Judgments by applying the applicable common law principles in this regard and that a similar approach was adopted in Cap. 597.

Division 5 of Part 2 – Restriction on Hong Kong Court Proceedings (clauses 26 - 28)

Stay of Hong Kong proceedings if registration applications are made (clause 26)

73. Clause 26(1) and (3) of the Bill propose 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 (see clause 26(4)).

74. In response to members' enquiry about the purpose and effect of clause 26 of the Bill, the Administration has responded that the requirement under clause 26(3) 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.

75. Members and the Legal Adviser to the Bills Committee have enquired about whether the rules of the procedural fairness can be complied with as it seems that 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 pending Hong Kong proceedings.

76. The Administration has responded that 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. For instance, 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; besides, where pending proceedings are made under Part IIA of Matrimonial Proceeding and Property Ordinance (Cap. 192), such proceedings are not required to be stayed. Moreover, 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.

Restriction on bringing proceedings on same cause of action in Hong Kong (clause 27)

77. Clause 27 of the Bill seeks to restrict a party to a Mainland Judgment from bringing in Hong Kong proceedings in respect of the same cause of action. The Legal Adviser to the Bills Committee has enquired about whether the 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, and whether injustice will be caused.

78. In response, the Administration has explained that it has been the intention under the Arrangement that the requested court should not have the power to vary an order granted by the original court in the other jurisdiction. If the parties wish to vary a court order, they 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.

79. As to Legal Adviser's enquiry on whether it is necessary 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) of the Bill, the Administration has explained that 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.

"Cause of action" (clauses 26 and 27, and 16(1)(e), (f) and (g))

80. Clauses 26 and 27 of the Bill seek to restrict parallel proceedings in Hong Kong and the Mainland in respect of the same cause of action between the same parties by providing that proceedings pending before a Hong Kong court shall be stayed and by restricting the commencement of new proceedings in Hong Kong pending the final disposal of a registration application or an application to set aside the registration. Further, under clause 16(1)(e), (f) and (g) of the Bill, 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. Members and the Legal Adviser to the Bills Committee have sought clarification on whether the "same cause of action" in clauses 16, 26 and 27 of the Bill 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, and

requested for examples of what would constitute the "same cause of action" within the meaning of clauses 16, 26 and 27.

81. In response, the Administration has stated that the purpose of staying pending proceedings in Hong Kong as required under clause 26(3) of the Bill, restricting the bringing of new proceedings in Hong Kong as required under clause 27(1), and the grounds for setting aside the registration under clause 16(1)(e), (f) and (g), 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.

82. The Administration has also pointed out that, under Hong Kong law, a "cause of action" refers to the underlying factual basis for making a claim or seeking a remedy. 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.

83. The Administration has stressed that clauses 26(7) and 27(4) of the Bill 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. Furthermore, a party's right to take out applications under Part IIA of Cap. 192 will not be affected by the restrictions under clauses 26 and 27.

Part 3 of the Bill – Recognition in Hong Kong of Mainland Divorce Certificates (clauses 29 - 36)

Division 1 of Part 3 – Recognition Applications and Recognition Orders (clauses 29 - 30)

Requirements for recognition applications and recognition orders (clauses 29 and 30)

84. Clause 29 of the Bill proposes that a party to a divorce specified in a Mainland divorce certificate may apply to DC for an order to recognize the certificate where, pursuant to clause 30(1) of the Bill, DC may, if it is satisfied that the certificate is valid in the Mainland, order that the certificate be recognized.

85. The Chairman has enquired about whether any other documents or records issued by a Mainland authority other than Mainland divorce certificates may be recognized in Hong Kong pursuant to the Bill with the effect that one's status of having been divorced is recognized as valid in Hong Kong. The Administration has responded that it is proposed in the Bill that, in this regard, only an effective Mainland Judgment in matrimonial or family case that contains a relevant status-related order (subject to the requirements in Part 2 of the Bill) or a valid Mainland divorce certificate (which will be presumed to be valid if notarized in accordance with Mainland law pursuant to clause 30(2) of the Bill) can be recognized as valid in Hong Kong.

86. Members have requested the Administration to provide information on the relevant provisions under Mainland law stipulating that a Mainland divorce certificate (as referred to in Part 3 of the Bill) and a status-related order granting a divorce (as referred to in item 1 of Part 2 of Schedule 2 to the Bill) are to be considered as valid in the Mainland.

87. The Administration has responded that under Article 1076 of the PRC Civil Code, where parties to a marriage agree to divorce, they may sign a written divorce agreement and apply to the marriage registration authority in the Mainland for divorce registration. Where a divorce certificate has been issued by the marriage registration authority, the marriage shall be dissolved and a party may apply to DC for an order that

the Mainland divorce certificate be recognized under clauses 29 and 30 of the Bill.

88. On the other hand, where only a party to the marriage wishes to divorce, that party shall file proceedings with a relevant people's court in the Mainland pursuant to Article 1079 of the PRC Civil Code. If an order granting a divorce (i.e. item 1 of Part 2 of Schedule 2 to the Bill) is obtained in a judgment of the Mainland court and upon the judgment taking effect, the marriage shall be dissolved and a party may make a registration application under clause 7 of the Bill. A registered status-related order can be recognized as valid in Hong Kong pursuant to clause 24.

89. An extract of the relevant Mainland legal provisions in respect of the validity of Mainland divorce certificates and Mainland Judgments granting a divorce, provided by the Administration, is in Part (III) of **Appendix III**.

Division 2 of Part 3 – Setting aside recognition orders (clauses 31 - 34)

Court to specify time limit for setting aside recognition orders (clause 31)

90. Similar to clause 14 of the Bill, it is proposed in clause 31 of the Bill for DC to have discretionary power to specify a period within which an application for setting aside the order may be made when making an order for a Mainland divorce certificate to be recognized. Some members have enquired about whether it is, likewise, more appropriate to specify in the Bill a fixed period for setting aside applications to be made instead of leaving the discretion to DC in setting a time limit (see also paragraph 45 above).

91. In reply, the Administration has considered it appropriate to provide DC with the necessary flexibility for the same reasons and rationale in relation to providing a similar discretion to the registering court under clause 14(1) of the Bill (paragraphs 46 to 48 above).

Grounds on which recognition orders must be set aside (clause 33)

92. Clause 33(c) of the Bill proposes that DC 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. Members and the Legal Adviser to the Bills Committee have requested the Administration to 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.

93. In response, the Administration has responded that, 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. This is because, under Mainland law, divorce certificates may be issued by the relevant Mainland authorities only if the couple voluntarily consent to the divorce.²⁷

Effect of setting aside recognition orders (clause 34)

94. Under clause 34 of the Bill, if an order for the recognition of a Mainland divorce certificate is set aside under clause 33, the parties to the divorce specified in the certificate may not make a further application in respect of the same certificate under clause 29(1). In response to the Chairman's enquiry, the Administration has clarified that clause 34 does not preclude parties to such Mainland divorce certificate, the recognition of which has been set aside, from making a new application for an order to recognize a fresh Mainland divorce certificate that is subsequently obtained from the relevant Mainland authorities.

Part 4 of the Bill – Facilitation of Recognition and Enforcement in Mainland of Hong Kong Judgments Given in Matrimonial or Family Cases (clauses 37 - 39)

Applications for certified copy of Hong Kong Judgments and issue of certified copy of Hong Kong Judgments and certificate for Hong Kong Judgments (clauses 38 and 39)

²⁷ See Article 1076 of the PRC Civil Code, which is extracted in Part (III) of Appendix III.

95. Clauses 38 and 39 of the Bill propose that a party to a Hong Kong Judgment given in a matrimonial or family case (which includes an order granted or made in proceedings specified in Schedule 3 to the Bill by a court in Hong Kong such as maintenance order, order for transfer or sale of property, custody order etc.) may apply to the relevant court in Hong Kong for a certified copy of Hong Kong Judgment, whereupon a certificate will also be issued by the Hong Kong court certifying that the relevant Hong Kong Judgment is given in a matrimonial or family case and is effective in Hong Kong. Members and the Legal Adviser to the Bills Committee have queried about whether there are other requirements that must be satisfied for the purpose of facilitating the recognition and enforcement of such Hong Kong Judgment in the Mainland apart from certification as provided for in clauses 38 and 39. The Administration has responded that, for clauses 38 and 39 to apply, the requirement in clause 37 must be satisfied, i.e. the relevant Hong Kong Judgment must be given in a matrimonial or family case. As for 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, they will be provided in the rules to be made by the Chief Judge pursuant to clause 40.

96. In response to some members' view that the requirement for the Hong Kong court to issue a certificate in addition to issuing a certified copy of the Judgment may be redundant and unnecessary, the Administration has explained that these are the application documents required under Article 5(1) of the Arrangement. Further, the Administration has also pointed out that a similar approach has been adopted in Cap. 597.

Article 15 of the Arrangement and appeal mechanisms

97. 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 Hong Kong Special Administrative Region, lodge an appeal according to its law.

98. In response to the enquiry of the Legal Adviser to the Bills Committee, the Administration has explained that, having considered reported cases under 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.²⁸ On the other hand, the Administration has provided examples in the context of enforcement of arbitral awards. One example is where parties to the court order disagreed on the application of the public policy ground of refusal to enforce an arbitral award, and another example is where the 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.²⁹

99. The Administration has also elaborated that an appeal against a decision or an order made by DC or CFI (as the case may be) under the Bill may be made in accordance with the existing procedure under the District Court Ordinance (Cap. 336) and the High Court Ordinance (Cap. 4) and, hence, considered it not necessary to expressly provide in the Bill that appeals may be made.

PROPOSED AMENDMENTS TO THE BILL

100. The Administration has proposed amendments to the Bill (in **Appendix II**), which are mentioned in paragraphs 15 – 22, 26 – 28 and 40 – 42. The Bills Committee has no objection to the amendments proposed by the Administration and will not propose amendments to the Bill.

RESUMPTION OF SECOND READING DEBATE ON THE BILL

101. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting of 5 May 2021.

²⁸ *Hebei Import & Export Corporation v Polytek Engineering Co. Ltd.*, FACV 10/1998, reported in [1999] 1 HKLRD 665.

²⁹ *Pt First Media TBK v Astro Nusantara International B.V. and Others*, FACV 14/2017, reported in [2018] 21 HKCFAR 118.

ADVICE SOUGHT

102. Members are invited to note the Bills Committee's deliberations set out above.

Council Business Division 4
Legislative Council Secretariat
15 April 2021

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

Membership list

Chairman Dr Hon Priscilla LEUNG Mei-fun, SBS, JP

Members Hon Tommy CHEUNG Yu-yan, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Alice MAK Mei-kuen, BBS, JP
Hon Elizabeth QUAT, BBS, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Vincent CHENG Wing-shun, MH, JP

(Total : 7 members)

Clerk Mr Lemuel WOO

Legal Adviser Ms Vanessa CHENG

Date 11 January 2021

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

Committee Stage

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2	In the definition of <i>care-related order</i> , by deleting “攸關看顧命令” and substituting “看顧相關命令”.
2	In the definition of <i>maintenance-related order</i> , by deleting “攸關贍養命令” and substituting “贍養相關命令”.
2	In the definition of <i>status-related order</i> , by deleting “攸關狀況命令” and substituting “狀況相關命令”.
2	In the Chinese text, in the definition of 登記法院, by deleting “院。” and substituting “院；”.
8(1)	In the Chinese text, by deleting “攸關看顧” and substituting “看顧相關”.
8(2) and (3)	In the Chinese text, by deleting “攸關贍養” and substituting “贍養相關”.
11	In the heading, in the Chinese text, by deleting “攸關贍養” and substituting “贍養相關”.
11	By deleting subclauses (1), (2) and (3) and substituting— <ul style="list-style-type: none"> “(1) This section applies to a registration application in relation to a maintenance-related order requiring the payment of a sum of money or the performance of an act (whether periodically or not). (2) Subject to subsection (3), the registering court may only order under section 10(1) that the maintenance-related order is to be registered to the extent that it relates to a payment or an act, or a part of a payment or an act, that—

- (a) is required by the maintenance-related order to be made or performed by a date that falls before the date of the registration application (*application date*); and
 - (b) has not been made or performed.
- (3) If the maintenance-related order is an order requiring a payment or an act to be made or performed periodically, the registering court may, in addition, order that the maintenance-related order is also to be registered in relation to a payment or an act that—
- (a) is required by the maintenance-related order to be made or performed by a date that falls on or after the application date; and
 - (b) has not been made or performed.”.

- 11 By deleting subclause (4).
- 16(2) By deleting “child” (wherever appearing) and substituting “person”.
- 17(3)(b) By deleting “child” and substituting “person”.
- 19 In the heading, in the Chinese text, by deleting “攸關看顧命令或攸關贍養” and substituting “看顧相關命令或贍養相關”.
- 19(1) In the Chinese text, by deleting “攸關看顧命令或攸關贍養” and substituting “看顧相關命令或贍養相關”.
- 24 In the heading, in the Chinese text, by deleting “攸關狀況” and substituting “狀況相關”.
- 24(1) In the Chinese text, by deleting “攸關狀況” and substituting “狀況相關”.
- 26(5)(b) By deleting “child” and substituting “person”.
- Schedule 2, Part 1 In the heading, in the Chinese text, by deleting “攸關看顧” and substituting “看顧相關”.
- Schedule 2, Part 1, item 1 By deleting “child” and substituting “person”.

- Schedule 2,
Part 1,
item 2 By deleting “child, whether or not under the age of 18 years,” and substituting “person aged 18 years or above”.
- Schedule 2,
Part 1,
item 3 By deleting “child” and substituting “person”.
- Schedule 2,
Part 1,
item 4 By deleting “child” and substituting “person”.
- Schedule 2,
Part 2 In the heading, in the Chinese text, by deleting “攸關狀況” and substituting “狀況相關”.
- Schedule 2,
Part 3 In the heading, in the Chinese text, by deleting “攸關贍養” and substituting “贍養相關”.
- Schedule 2,
Part 3,
item 1 By deleting “child” and substituting “person”.
- Schedule 2,
Part 3,
item 2 By deleting “child, whether or not under the age of 18 years,” and substituting “person aged 18 years or above”.
- Schedule 3,
item 12 By deleting “child” and substituting “person”.

Extract of relevant Mainland legal provisions

The Mainland legal provisions cited in this paper are for reference only. The courtesy English translation of the Mainland legal provisions as set out in this paper is prepared by the Department of Justice and is for reference only.

Part (I): Relevant provisions in respect of the two-year time limit within which applications for execution must be made to the people's courts in the Mainland

2. Article 239 of the *Civil Procedure Law of the People's Republic of China* (《中華人民共和國民事訴訟法》) provides that,

“The time limit in respect of an application for execution shall be two years. The suspension or discontinuance of the time limit in respect of an application for execution shall be governed by the provisions of law in respect of the suspension or discontinuance of the limitation period.

The time limit prescribed in the preceding paragraph shall be calculated from the last day of the period specified in a legal document for performance of obligations. If a legal document specifies performance of obligations in stages, the time limit shall be calculated from the last day of the period specified for each stage of performance. If no period of performance is specified in a legal document, the time limit shall be calculated from the date when the legal document becomes effective.”

Part (II): Relevant provisions which cover a person other than the son or daughter of a party to a dispute

3. Article 27(2) of the *Civil Code of the People's Republic of China* (《中華人民共和國民法典》) (“PRC Civil Code”) provides that,

“If the parents of a minor are dead or lack the capability to be his guardian, any of the following persons who has the capability to be a guardian shall act as his guardian in the following sequence:

- (1) paternal or maternal grandparent;

- (2) elder brother or sister; or
 - (3) any other individual or organisation that is willing to act as guardian, provided that approval has been obtained from the residents committees, villagers committees or civil affairs department in the place of residence of the minor.”
4. Article 32 of the PRC Civil Code provides that,

“In the absence of any person who is eligible to act as guardian in accordance with the law, the relevant civil affairs department shall act as guardian, or the residents committee or villagers committee in the place of residence of the minor that possesses the qualifications to perform the responsibilities of a guardian may act as guardian.”
5. Article 1074(1) of the PRC Civil Code provides that,

“Paternal and maternal grandparents who have the capability shall bear responsibilities of custody over their paternal and maternal grandchildren who are minors and whose parents are dead or unable to do so.”
6. Article 1107 of the PRC Civil Code provides that,

“Relatives or friends of biological parents may bear responsibilities of custody over orphans or children whose biological parents are unable to do so. [...]”

Part (III): Relevant provisions in respect of the validity of Mainland divorce certificate and Mainland Judgments granting a divorce

7. Article 1076 of the PRC Civil Code provides that,

“In the case where the husband and the wife voluntarily divorce, they shall sign a written divorce agreement and apply in-person to the relevant marriage registration authority for divorce registration.

The divorce agreement shall state both parties’ intention to voluntarily divorce and their consensuses reached through consultations on matters such as the custody of their children, the handling of their properties and liabilities, etc.”
8. Article 1077 of the PRC Civil Code provides that,

“Either party who is unwilling to divorce may withdraw the application

for divorce registration from the marriage registration authority within 30 days after its receipt of the application.

The parties shall apply in-person to the marriage registration authority for the issuance of a divorce certificate within 30 days after the expiration of the time limit prescribed in the preceding paragraph; failing such application, the parties shall be deemed to have withdrawn their application for divorce registration.”

9. Article 1078 of the PRC Civil Code provides that,

“Where a marriage registration authority ascertains upon investigation that the parties voluntarily divorce and have reached consensuses through consultations on matters such as the custody of their children, the handling of their properties and liabilities, etc., the marriage registration authority shall register the divorce and issue a divorce certificate.”

10. Article 1079(1) of the PRC Civil Code provides that,

“If the husband or the wife requests to divorce, a relevant organisation may carry out mediation or the party may directly file divorce proceedings with a people’s court.”

11. Article 1080 of the PRC Civil Code provides that,

“The marriage relationship shall be terminated once the divorce registration has been completed, or the judgement or conciliatory statement on divorce has become effective.”

Department of Justice

4 March 2021