

立法會
Legislative Council

LC Paper No. CB(4)871/2022

Ref: CB4/BC/2/22

Paper for the House Committee meeting on 14 October 2022

Report of the Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill

PURPOSE

This paper reports on the deliberations of the Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill (“the Bills Committee”).

BACKGROUND

2. The arrangement titled *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* (“REJ Arrangement”) was signed between the Government of the Hong Kong Special Administrative Region (“HKSAR”) and the Supreme People’s Court of the People’s Republic of China (“SPC”) on 18 January 2019. The REJ Arrangement needs to be implemented in Hong Kong by way of legislation.

3. Prior to the REJ Arrangement, there were two arrangements in existence which provided for reciprocal recognition and enforcement of judgments in civil and commercial matters (“REJ”) between the Mainland and HKSAR, i.e. *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*¹ (“Choice of Court Arrangement”) and *Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and*

¹ Signed on 14 July 2006 and took effect on 1 August 2008, the Choice of Court Arrangement was implemented in Hong Kong through the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597).

*Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region*² (“Matrimonial Arrangement”), each only provides for a specific scope of application.

4. The Choice of Court Arrangement 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. The Matrimonial Arrangement applies to civil judgments in matrimonial or family matters. With the increasingly close interaction and cooperation between Hong Kong and the Mainland in terms of trade and economic activities as well as social interactions, the Choice of Court Arrangement and the Matrimonial Arrangement are not able to fully address the needs for a comprehensive REJ mechanism. There have thus been calls from time to time in the community to widen the scope of the REJ regime between the two places.

5. Apart from the REJ mechanism under the Choice of Court Arrangement and the Matrimonial Arrangement, money judgments given by Mainland courts may be considered for recognition and enforcement in Hong Kong at common law. This route however has been met with difficulties. Procedurally, a party seeking to enforce a non-Hong Kong judgment at common law must initiate a fresh action in Hong Kong by writ and bear the burden of proving to the court all the essential requirements for the recognition and enforcement of the non-Hong Kong judgment. Notably, Hong Kong courts have in different circumstances held that whether a relevant Mainland judgment could be regarded as final and conclusive in light of the review power exercisable under the trial supervision procedures in the Mainland would be a triable issue.

6. In formulating the REJ Arrangement, reference has been drawn to the then draft version of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters which was concluded on 2 July 2019 but still not yet in force. Taking into account the practical needs and circumstances of Hong Kong and the Mainland, and utilizing the “one country two systems” policy, the scope of application of the REJ Arrangement has been expanded by covering a wider range of judgments on contractual and tortious disputes to expressly include judgments given in respect of certain types of disputes over intellectual property rights. This major breakthrough makes Hong Kong the first jurisdiction to have an arrangement with the Mainland on REJ with

² Signed on 20 June 2017 and took effect on 15 February 2022, the Matrimonial Arrangement was implemented in Hong Kong through the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap. 639).

such a wide coverage, reflecting the unique advantages of “one country, two systems”.

7. A copy of the REJ Arrangement and a synopsis of its key features are respectively in Annex B and Annex C of the Legislative Council (“LegCo”) Brief issued by the Department of Justice (“DoJ”) on 20 April 2022 (File Ref. CPA 5041/12/3C)³.

THE BILL

8. The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill (“the Bill”) was published in the Gazette on 22 April 2022 and introduced into LegCo on 4 May 2022. The Bill seeks to provide for the enforcement in Hong Kong of judgments in civil and commercial matters given in the Mainland, and for facilitating the recognition and enforcement in the Mainland of such judgments given in Hong Kong, so as to give effect to the REJ Arrangement and to provide for related matters. In the Mainland, the REJ Arrangement will be implemented by way of judicial interpretation to be promulgated by SPC. The main provisions of the Bill are set out in Annex D of the LegCo Brief. The Bill also seeks to make consequential amendments to the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597).

9. The REJ Arrangement will come into effect simultaneously in Hong Kong and the Mainland when both sides have put in place the relevant implementation mechanism in their respective jurisdictions and will apply to judgments made on or after the commencement date of the REJ Arrangement.

THE BILLS COMMITTEE

10. At the House Committee meeting on 6 May 2022, Members agreed to form a bills committee to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix 1**. The Bills Committee has held five meetings with the Administration.

11. The Bills Committee has invited written views on the Bill and two written submissions have been received by the submission deadline on 31 May 2022. Organizations which have provided written submissions to the Bills Committee

³ The Legislative Council Brief can be accessed on the LegCo website at: https://www.legco.gov.hk/yr2022/english/brief/cpa5041123c_20220420-e.pdf

are set out in **Appendix 2**. The Administration has been requested by the Bills Committee to provide responses to the written submissions.⁴

DELIBERATIONS OF THE BILLS COMMITTEE

Policy issues relating to the Bill

Comparison with existing regime

12. Some members have enquired about how the Bill is to compare with Cap. 597, the legislation currently in force to regulate the reciprocal recognition and enforcement of Mainland judgments in Hong Kong, and the status of Cap. 597 after passage of the Bill.

13. In reply, the Administration has explained that in essence, the mechanism for the registration of Mainland judgments to be provided under the Bill will be substantially similar to that under Cap. 597. However, Cap. 597 applies only to monetary judgments made by courts in the Mainland or Hong Kong where parties to a specified agreement (i.e. a contract other than an employment contract, and a contract to which a natural person acting for personal consumption, family or other non-commercial purpose is a party) have agreed in writing that a court of one side will have exclusive jurisdiction to determine a dispute arising from that agreement (i.e. a choice of court agreement).

14. The Administration has further advised that, for the registration of judgments arising from disputes where a choice of Mainland court agreement has been made before the Bill has come into operation, the mechanism prescribed in Cap. 597 will continue to apply. For judgments made pursuant to the choice of Mainland court agreements signed on or after the enacted Ordinance has come into operation, the mechanism prescribed in the enacted Ordinance will apply. Nevertheless, the Bill will not prevent parties to a contract from agreeing in writing that a court of one side will have exclusive jurisdiction.

Implementation after passage of the Bill

15. Some members are concerned about the details of and timing for the implementation of the REJ Arrangement in the Mainland and have urged the Administration to closely liaise with SPC to acquire more information. In

⁴ The written submissions and the Administration's responses can be accessed on the LegCo website at: <https://www.legco.gov.hk/en/legco-business/committees/bills-committee.html?2022&bc102#papers-and-reports&cat=d>

response, the Administration has advised that based on its experience in the implementation of other similar comparable mechanisms including, more recently, the implementation of the Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap. 639), it will take about six to seven months after the passage of the Bill for the rules to be made by the Chief Judge of High Court under clause 35 of the Bill for the operation of the relevant provisions of the enacted Ordinance (“the Rules”). On the other hand, the Mainland authorities may take about two to three months to make preparation on their side, including the preparation of the judicial interpretation for implementing the REJ Arrangement in the Mainland.

Publicity and public education

16. Members consider that most people are not aware of the details of the REJ Arrangement, the Bill and their potential benefits. They have urged the Administration to give effective publicity to promote public understanding of the above matters. In reply, the Administration has assured members that it will attach great importance to publicity and public education relating to the Bill upon its enactment, and will make reference to the publicity efforts on the promotional work on Cap. 639 which came into operation in February 2022. Seminars would be organized for the legal profession and other stakeholders, whilst relevant information on the key features of the Bill would also be published on DoJ’s website. The Administration has also undertaken to explore how to present the information in a user-friendly way.

Preparedness of the Judiciary and the legal profession

17. A member is concerned about the potential increase in the workload of the Judiciary after passage of the Bill, considering that the Bill will be more complex and cover a much wider scope of Mainland judgments than Cap. 639. The Administration has advised that it will continue to maintain close communication with the Judiciary to monitor the implementation of various REJ arrangements in Hong Kong, and will sort out the necessary financial and manpower resource requirements in accordance with the established procedures. DoJ will also offer support relating to the implementation of the REJ Arrangement as far as practicable, such as organizing seminars to facilitate mutual exchanges on related subjects for judges and legal professionals in the Mainland and Hong Kong.

18. To facilitate Hong Kong lawyers and their clients to better understand the details of implementing the REJ Arrangement, e.g. what will constitute an effective Mainland Judgment for the purpose of the Bill, a member has enquired whether the Judiciary will issue Practice Directions in this regard. In response, the Administration has pointed out that various details for implementing the Bill,

such as the practice and procedure relating to the making of registration application and the execution of a registered judgment, will be provided for in the Rules. However, it will be a matter for the Judiciary to decide whether new Practice Directions are needed in addition to the Rules for the implementation of the Bill.

Impact of the Bill on other stakeholders in the community

19. Members note that during the public consultation on the Bill, a respondent has raised comments on the implications of the Bill on certain types of insurance policies, e.g. motor vehicles third party liability insurance. The respondent indicated that those types of policies would usually contain an exclusion clause excluding the insurer from liabilities for indemnifying the insured for liabilities arising from judgments against the insured which were not in the first instance delivered by or obtained from a Hong Kong court. The Administration is requested to comment on the respondent's remarks that the Bill will have the potential of generating inadvertently empty/unenforceable judgments on tortious liabilities if those judgments are handed down by a Mainland court. The Administration has replied that an "empty judgment" will arise only when a relevant insurance policy does not cover the claim in question and at the same time, the defendant (i.e. the insured) has no means to pay. The Bill will not create or aggravate the possibilities for "empty judgments" in relation to the relevant insurance policies as the terms of those insurance policies will not be a matter for the Bill but a commercial matter for the parties. The Administration has set out its detailed response to the comments raised by the insurance sector in Annex F of the LegCo Brief.

Clause-by-clause examination of the Bill

Part 1 – Preliminary (Clauses 1 to 9)

Short title and commencement (clause 1)

20. Noting that the REJ Arrangement will be implemented in the Mainland by way of judicial interpretation to be promulgated by SPC, some members have enquired how the legislative timetable for the Bill will dovetail the implementation of the REJ Arrangement in the Mainland, in particular the schedule for the making of the Rules and what other preparatory work is needed.

21. In reply, the Administration has explained that the public consultation on the draft version of the Rules was conducted from December 2021 to January 2022. After passage of the Bill, the Rules will be finalized in consultation with the

Judiciary and other stakeholders. The HKSAR Government will also discuss with SPC to decide on the date when the REJ Arrangement will be simultaneously implemented in both places. In the interim, the Administration will begin working on publicity and public education relating to the Bill. In response to members' enquiry, Legal Adviser to the Bills Committee ("Legal Adviser") has confirmed that the Rules will be scrutinized by LegCo through the negative vetting procedure. The Administration has further advised that the registration mechanism prescribed in the Bill will only apply to Mainland Judgments made after the enacted Ordinance has taken effect.

The meaning of effective judgments (clause 2(1))

22. For the purpose of reciprocal enforcement, it is proposed under the Bill that a Mainland Judgment and a Hong Kong Judgment must be effective in the Mainland and Hong Kong respectively. Members have requested the Administration to respond to the concerns raised by The Law Society of Hong Kong ("the Law Society") in its submission that the Bill has adopted the notion of "effectiveness" while both the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) or Cap. 597 refer to judgments being "final and conclusive" for the purpose of reciprocal enforcement, and that the drafting style of the Bill is more similar to Cap. 639 than Cap. 319 or Cap. 597, the latter two pieces of existing legislation respectively provide for the reciprocal enforcement of foreign judgments. As such, it will not be most user-friendly as practitioners will have been familiar with the format of Cap. 597 and Cap. 319.

23. In response, the Administration has explained that an important underlying principle in arrangements on reciprocal recognition and enforcement of judgments is that, a judgment to be recognized and enforced in one jurisdiction has to be effective for enforcement in the jurisdiction where it is made. This principle is also reflected in the REJ Arrangement which the Bill now seeks to implement. The Administration has further advised that Article 4(2) of the REJ Arrangement has defined "legally effective judgment" whilst the definition of "Mainland Judgment in a civil or commercial matter" ("Mainland Judgment") for the purpose of the Bill is set out in clause 3 and what would constitute an effective Mainland Judgment in clause 8. These relevant provisions will reflect the legal position under Mainland law on how a judgment will become effective.

24. In addition, the Administration has explained that various differences in terminologies used in the Bill and Cap. 597 are called for due to the underlying differences in terminologies adopted in the respective arrangements signed with the Mainland. Cap. 597 is to implement the Choice of Court Arrangement whereas the Bill is to implement the REJ Arrangement. The requirements for registration provided under clause 8 of the Bill mirror those under Cap. 597.

Specifically, clause 8(1)(a) mirrors section 5(2)(d) of Cap. 597 (i.e. the Mainland Judgment has to be enforceable in the Mainland), whilst clauses 8(1)(b) and 8(2) are substantially similar to section 6(1) of Cap. 597 (i.e. the Mainland Judgment has to be a judgment given by SPC; or a judgment of the second instance; or a judgment of the first instance in respect of which no appeal is allowed or the time limit for appeal has expired and no appeal has been filed). Despite the difference in the label used, the substantive requirements for “effectiveness” under clause 8 of the Bill are substantially similar to the requirements for being qualified as “final and conclusive” judgments for the purpose of Cap. 597.

Hong Kong Judgment and Mainland Judgment (clause 2(1))

25. Members note that as defined in clause 2(1) of the Bill, a Hong Kong Judgment does not include an order for interim relief or an anti-suit injunction while a Mainland Judgment does not include a ruling given in respect of an interim measure. Some members have enquired about the reason for excluding anti-suit injunctions from the definition of “Hong Kong Judgment”. In response, the Administration has explained that approaches relating to anti-suit injunctions may vary within the Mainland and given that complicated issues are involved, SPC and the HKSAR Government reached a consensus not to include anti-suit injunctions under the REJ Arrangement.

26. Legal Adviser has enquired about the scope of rulings which may be given in the Mainland in respect of interim measures. The Administration has explained that according to the *Civil Procedure Law of the People’s Republic of China* (“Civil Procedure Law”), a ruling on interim measures can be made before or during a court trial. Similar to the granting of interim relief by the Hong Kong courts, rulings on interim measures may be granted by Mainland courts for the preservation of evidence and assets. A measure for preservation of assets may be in the form of seal-up, seizure, freezing of property or by any other means prescribed by Mainland law. It has further explained that as interim measures were temporary in nature, it was agreed between SPC and the HKSAR Government to exclude such rulings from the REJ Arrangement. Notwithstanding the above, in response to a member’s question, the Administration has further pointed out that Article 28 of the REJ Arrangement has provided that SPC and the HKSAR Government may, after consultation, sign supplementary documents regarding the recognition and enforcement of judgments on assistance in preservation measures and interim relief referred to in Article 4.

Mainland Judgments in civil or commercial matters (clause 3)

27. Members are concerned that the complexity and wide scope of application of the Bill may be confusing to the general public and even to the legal profession. The Administration is requested to explain in clear terms the scope of application of the Bill, especially on which Mainland judgments will be registrable in Hong Kong. In reply, the Administration has advised that, taking into account the practical needs and circumstances of Hong Kong and the Mainland and the “one country two systems” policy, the scope of application of the Bill has been expanded to cover a wide range of judgments on contractual and tortious disputes and to expressly include judgments given in respect of certain types of disputes over intellectual property rights.⁵ Clause 3 of the Bill defines “Mainland Judgment in a civil or commercial matter” as a Mainland judgment that is given in proceedings that are civil or commercial in nature under Mainland law, or is given in proceedings that are criminal in nature under Mainland law, and contains an order for the payment of a sum of money in respect of compensation or damages by a party to the proceedings; and that is not an excluded judgment.

28. Some members have pointed out that a Mainland Judgment may be given on the basis of legal rights protected under the Mainland law which has no equivalent in Hong Kong, e.g. portrait rights. They have enquired whether the party who wins in such Mainland proceedings may register the Mainland Judgment in Hong Kong. The Administration has indicated that in that scenario, so long as the judgment is a Mainland Judgment as defined in clause 3 of the Bill and is not an excluded judgment (which covers excluded intellectual property case under clause 5(1)(c))⁶, it will be eligible for registration.

29. In response to members’ enquiries on whether the Bill will be applicable to matters relating to trusts and Mainland Judgments given on the basis of laws applicable to specific municipality only, e.g. the Shenzhen Special Economic Zone, the Administration has explained that the Bill is to implement the REJ Arrangement in Hong Kong and except for Mainland Judgments excluded under

⁵ Under clause 2(1) of the Bill, “specified intellectual property right” means (a) a copyright or related right; (b) a trade mark; (c) a geographical indication; (d) an industrial design; (e) a patent; (f) a layout-design (topography) of integrated circuit; (g) a right to protect undisclosed information; or (h) a right enjoyed by a person in respect of a new plant variety under subparagraph (7) of the second paragraph of Article 123 of the Civil Code of the People’s Republic of China or under the Plant Varieties Protection Ordinance (Cap. 490).

⁶ Under clause 7(1) of the Bill, a Mainland Judgment is given in respect of an excluded intellectual property case if it is given in proceedings (a) brought in respect of a tortious dispute over an infringement of an invention patent or utility model patent; (b) for a determination of the licence fee rate of a standard-essential patent; or (c) brought in respect of a dispute over an intellectual property right that is not a specified intellectual property right.

clauses 5 to 7 of the Bill, other Mainland Judgments will fall within its scope of application.

Proceedings that are civil or commercial in nature (clauses 3(1)(a)(i) and 4(1)(a)(i)(B))

30. In response to Legal Adviser's enquiry on what constitutes "proceedings that are civil or commercial in nature under the law of the Mainland" in clause 3(1)(a)(i) of the Bill, the Administration has pointed out that there is a main difference in categorization of proceedings under the laws of the Mainland and those of Hong Kong. In Hong Kong, there are two main categories, namely civil and criminal proceedings whilst there are three in the Mainland, namely civil, criminal and administrative proceedings. In the Mainland, disputes in commercial matters (say contractual disputes) would fall under general civil cases. The cause of action in a civil case in the Mainland would generally be determined in light of the nature of the civil legal relationship disputed by the parties thereto with reference to the content of the legal relationship, namely the types of civil rights as provided for primarily in the Civil Code of the People's Republic of China and the Civil Procedure Law. Whilst proceedings arising directly out of the exercise of an administrative power (e.g. judicial review) are regarded as civil proceedings in Hong Kong, they will fall under administrative proceedings in the Mainland. Therefore, "proceedings that are civil or commercial in nature under the law of the Mainland" in clause 3(1)(a)(i) will not include any administrative proceedings and indeed such proceedings have been excluded from the definition of "Hong Kong Judgment in a civil or commercial matter" under clause 4(1)(a)(i)(B).

Meaning of excluded judgments (clause 5)

31. Under clause 5 of the Bill, "excluded judgment" in respect of a Mainland Judgment or a Hong Kong Judgment in a civil or commercial matter will include a judgment that is given in respect of certain specified matters including matrimonial or family cases which are covered by Cap. 639; succession to, or administration or distribution of, an estate; certain intellectual property cases; matters relating to marine pollution; and insolvency of an entity or bankruptcy of a natural person. Considering that some of the excluded judgments under clause 5 of the Bill are commonly made by either the Mainland courts or Hong Kong courts (such as matters relating to the succession to or the administration or distribution of an estate and, for matrimonial matters, payment of maintenance between siblings which is not covered by Cap. 639), some members have enquired about the rationale for excluding such judgments from the REJ Arrangement.

32. The Administration has explained that the coverage of the REJ Arrangement reflects the consensus of both the Mainland and Hong Kong on the applicability of the REJ Arrangement, having taken into account the practical needs and the difference in the substantive laws of both sides as well as the comments of the stakeholders. The substantive laws of Hong Kong and the Mainland differ quite substantially in certain areas relating to the administration of the estate of the deceased and in some aspects of matrimonial and family matters. For instance, the grant of representation on the administration of an estate and the powers and duties vested in the administrator would be quite different in the two places. Since the existing practice for cross-boundary cases of the administration of estates will involve the use of notarized documents on inheritance and such arrangements have been operating effectively, and that Cap. 639 has already covered a wide range of Mainland judgments on matrimonial and family matters, SPC and the HKSAR Government have agreed that judgments on those relevant matters should be excluded from the REJ Arrangement.

33. In response to members' enquiries, the Administration has advised that "Hong Kong Judgment" is defined in clause 2 of the Bill to mean a judgment, order, decree, allocatur, or certificate of fixed costs, given or made by a specified Hong Kong court. The decisions made by the Guardianship Board ("GB") established under the Mental Health Ordinance (Cap. 136) and the decisions made by the Copyright Tribunal ("CT") established under the Copyright Ordinance (Cap. 528) are not Hong Kong Judgments as both GB and CT are not "specified Hong Kong courts" as defined under clause 2(1) of the Bill.⁷

34. In relation to members' enquiries about the Law Society's opinion regarding the exclusion of decisions made by CT, the Administration has explained that the Bill seeks to implement the REJ Arrangement in Hong Kong and judgments on civil or commercial matters made by a "specified Hong Kong court" are covered. These specified Hong Kong courts are the courts of justice in Hong Kong. CT is, however, not a court of justice but a quasi-judicial body and its members are not judicial officers. Despite the exclusion of the decisions of CT, the Bill undoubtedly has a more comprehensive scope of application than the existing comparable mechanisms. The Administration considers that the exclusion of CT's decisions will unlikely have any significant impact on the notable breakthrough achieved by the REJ Arrangement in expressly covering judgments made by the courts of both the Mainland and Hong Kong on certain intellectual property rights.

⁷ Under clause 2(1) of the Bill, "specified Hong Kong court" means (a) the Court of Final Appeal; (b) the Court of Appeal; (c) the Court of First Instance; (d) the Competition Tribunal; (e) the District Court, (f) the Lands Tribunal, (g) the Labour Tribunal; or (h) the Small Claims Tribunal.

Future review of the excluded judgments

35. In response to members' enquiry about whether the REJ Arrangement may be reviewed in the future to see if some or all of the excluded judgments may be brought in, the Administration has stated that it will adopt an open mind towards the possibility of amending the REJ Arrangement in future and keep on listening to the views and suggestions of the legal profession and other stakeholders in this respect. It will also keep an open mind towards the possible inclusion of those judgments currently excluded from the Bill, if so warranted.

36. In response to members' request, the Administration has provided supplementary information to the Bills Committee explaining in detail the rationale for excluding Mainland or Hong Kong Judgments in various matters set out in clauses 5, 6 and 7 of the Bill from the proposed mechanism for reciprocal enforcement.⁸

Amendments to clause 5 proposed by the Administration

37. Clause 5(1)(e) of the Bill provides that a Mainland Judgment or a Hong Kong Judgment is an excluded judgment if it is given in respect of a matter relating to the insolvency of an entity other than a natural person or the bankruptcy of a natural person. In response to members' and stakeholders' concern on the scope of the clause, the Administration has referred members to note the *Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region* ("Record of Meeting"), signed by DoJ and SPC in May 2021, which has established a mechanism for cooperation in corporate insolvency and debt restructuring matters. As those matters are covered by the Record of Meeting, they are excluded from the Bill. To enhance the formulation of clause 5(1)(e) and to put the scope of the exclusion beyond doubt, the Administration considers it appropriate to follow the language adopted in the Record of Meeting so far as it suits the context of the Bill and will propose amendments to clause 5 accordingly.

Finality and effectiveness of Mainland Judgments (clause 8(1)(b))

38. The Administration is requested to confirm members' observation that while a Mainland Judgment is effective if it is enforceable in the Mainland and if it is

⁸ The Administration's explanation on the rationale for the excluded judgments is set out in Annex A to LC Paper No. CB(4)464/2022(02), which is accessible on the LegCo website at: <https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc10220220530cb4-464-2-e.pdf>.

given by various levels of people's courts set out in clause 8(1)(b) of the Bill, there is no explicit requirement that it has to be final and conclusive under clause 8 of the Bill. A member has also enquired whether the issue of finality of a Mainland Judgment has remained unsettled in light of the trial supervision procedures in the Mainland.

39. In response, the Administration has advised that, if the judgment creditor of a Mainland Judgment applies to the Court of First Instance ("the Court") for a registration order, that party may provide a certificate issued by the original Mainland court certifying that the judgment is a judgment in a civil or commercial matter that is an effective judgment. Once the certificate is issued, pursuant to clause 13 of the Bill, an effective Mainland Judgment will be presumed to be final unless proved otherwise.

40. The Administration has further advised that insofar as the issue of appeal against a first instance Mainland Judgments is concerned, the requirements of effectiveness under the Bill are set out in clauses 8(1)(b)(iii)(A) and (B) of the Bill, which provide as follows: "a Mainland Judgment is effective in the Mainland if... 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." In addition, clause 22(1)(k) of the Bill will provide a safeguard that the Court must set aside the registration of a registered judgment if it is satisfied that the registered Mainland Judgment has been reversed or otherwise set aside pursuant to an appeal or a retrial in the Mainland.

41. In response to Legal Adviser's enquiry on whether a retrial ordered in accordance with the trial supervision procedures will render a Mainland Judgment ineffective, the Administration has responded that Article 213 of the Civil Procedure Law provides that when it has been decided by a Mainland court that the case on which the relevant judgment is based will be retried in accordance with the trial supervision procedures, the execution of that judgment will be suspended and in such cases, the judgment will no longer be enforceable in the Mainland. Further, under clause 24(1)(b), if the case on which the registered judgment is based is ordered by a Mainland court to be retried, the Hong Kong court may adjourn the relevant setting aside application. Clause 27 also states that before the disposal of the setting aside application, no action to enforce the said Mainland Judgment may be taken in Hong Kong.

42. In response to a member's enquiry on when a Mainland Judgment is regarded as effective, the Administration has explained that a Mainland Judgment of the second instance will become effective on the day it is given as so provided under Articles 182 and 158 of the Civil Procedure Law, while a Mainland

Judgment of the first instance will become effective after the expiry of a period of 15 days (for lodging an appeal) after the Judgment is served on the person against whom the judgment may be enforced as so provided under Articles 158 and 171 of the Civil Procedure Law.

Part 2 – Registration in Hong Kong of Mainland Judgments in Civil or Commercial Matters (Clauses 10 - 31)

Time limit for applying for registration of a Mainland Judgment (clauses 10(1)(b)(i) and (ii))

43. In response to a member's enquiry about whether there is a time limit for the registration of a Mainland Judgment for enforcement in Hong Kong, the Administration has advised that the judgment creditor of a Mainland Judgment can make a registration application to the Court if, in accordance with clause 10(1)(b)(i) and (ii) of the Bill, a default in complying with the requirement(s) of the Judgment has occurred within two years before the date of the registration application.

44. Members note that a judgment creditor of a Mainland Judgment may apply to the Court for a registration order to register the Judgment if a number of conditions under clause 10(1) of the Bill are satisfied. One condition is that the Mainland Judgment (or part of it) requires the payment of a sum of money, or the performance of an act, by a party to the Judgment (clause 10(1)(b)(i)). Another condition (clause 10(1)(b)(ii)) is that a default in complying with the above requirement(s) ("the default") has occurred within two years before the date of the registration application ("the two-year time limit"). In particular, clauses 11(1) and 11(3) respectively provide for how the two-year time limit is to be computed in relation to Mainland Judgments which require more than one sums of money or act(s) to be paid or performed, and Mainland Judgments which require payment or performance in stages.

45. Legal Adviser has enquired whether the Court will have a discretion to extend the two-year time limit and if not, the rationale for not providing for such a discretion. The Administration has responded that the Bill will not provide the Court with a discretion to extend the two- year time limit under clause 10. The Administration envisages that if the Court is to be provided with a discretionary power to extend the time limit for making a registration application beyond the two-year time limit, an undesirable level of uncertainty will be created as judgment creditors may be prone to apply to the Court for leave to make registration applications out of time irrespective of the circumstances and such will not be conducive to the deployment of judicial resources. Further, consistent with the existing comparable registration mechanisms under section 4(1) of Cap.

319 and section 7 of Cap. 597, the policy objective of the Bill is to provide for a simple and straightforward registration mechanism with sufficient certainty in terms of a defined time limit for registration applications.

Computation of the two-year time limit (clauses 12(a), 12(b)(i) and (ii))

46. Some members have enquired about how the two-year time limit is to be computed. In response, the Administration has explained that clause 12 of the Bill provides for how the date on which the default occurred is to be determined, which is in line with Article 246 of the Civil Procedure Law. In gist, the condition in clause 10(1)(b)(ii) will be satisfied if the registration application is made within two years from the date of the default, as ascertained through the methods stated in clauses 12(a), 12(b)(i) and (ii).⁹

47. In response to some members' request, the Administration has provided in writing hypothetical cases or examples to illustrate how the date(s) on which a default in complying with the requirement under a Mainland Judgment in a civil and commercial matter to pay a sum of money, or to perform an act, will be computed under the various scenarios where clause 12(a), 12(b)(i) and 12(b)(ii) of the Bill will be applicable, including the case in which the judgment is ordered to be retried.¹⁰

Date on which a default occurs- prohibition or restriction of performance of an act (clause 12(a))

48. According to clause 12(a) of the Bill, in relation to a prohibition or restriction on the performance of an act required by a Mainland Judgment, the date on which a non-compliance with the requirement(s) under the Judgment first occurs is to be regarded as the date on which a default has occurred for the purpose of clauses 10(1)(b)(ii) and 11(3) and (4)(a). Some members have pointed out that it may be difficult for the judgment creditor to know that a default has

⁹ For a prohibition, or a restriction, on the performance of the act, the default is to be regarded to occur on the date on which a non-compliance first occurs (see clause 12(a)). In any other case, if the Mainland Judgment specifies a date by which the sum of money is to be paid, or the act is to be performed, the default is to be regarded to occur on that date; or if the Judgment does not specify a date by which the sum of money is to be paid, or the act is to be performed, the default is to be regarded to occur on the date on which the Judgment becomes effective in the Mainland (see clause 12(b)(i) and (ii)).

¹⁰ Details of the examples are set out in LC Paper Nos. CB(4)554/2022(03) and CB(4)671/2022(02), which are accessible on the LegCo website at: <https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc10220220620cb4-554-3-e.pdf> and <https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc102cb4-671-2-e.pdf>.

occurred and it may bring uncertainty to the judgment creditor as to when the two-year time limit should be computed from.

49. Some members consider that it may be more reasonable if both objective and subjective tests can apply in deciding when a default has occurred for the purpose of clause 12(a) of the Bill. They have suggested that clause 12(a) of the Bill be amended to provide that “the date on which a non-compliance is known or ought to be known to have occurred” so that an element of “knowledge” or “awareness” about the occurrence of a non-compliance can be introduced. In response to members’ suggestion and request, the Administration has advised that if a knowledge element is added to clause 12(a), it would create undesirable inconsistencies with the position under Mainland law, particularly that, the relevant Mainland provisions would not stipulate any knowledge element in the computation of time limit for enforcement in the Mainland, pursuant to the REJ Arrangement and its consensus with SPC, of Hong Kong judgments containing restrictive orders or any other types of orders. The current formulation of clause 12 and the relevant provisions for its computation on the whole reflects the policy objectives to balance the competing interests of a judgment creditor (who wishes to have as long as possible to enforce the judgment) and a judgment debtor (who wishes to be protected from stale enforcement action), factoring in any foreseeable hardships to either party. Hence, the Bill should provide for a simple and straightforward registration mechanism with sufficient certainty in terms of a defined time limit for registration applications. Thus, the Administration sees no sufficient justification and consider it undesirable to introduce a knowledge element in clause 12(a).¹¹

Registration orders (clause 13)

50. Under clause 13(2) of the Bill, until the contrary is proved, a Mainland Judgment is presumed to be a Mainland Judgment in a civil or commercial matter that is effective in the Mainland if a certificate certifying those facts is issued by the original Mainland court. In this connection, some members have enquired whether the certificates issued by the original Mainland courts will need to be notarized and, if not, how the Court can affirm their validity. In reply, the Administration has advised that similar to the procedures for registration of judgments under Cap. 597 and Cap. 639, there is no need to notarize the certificates issued by the courts. If there is any dispute regarding the authenticity of a purported certificate, the requested court will need to decide whether to accept the certificate having regard to the circumstances in each case. The

¹¹ Details of the Administration’s response are set out in LC Paper No. CB(4)671/2022(02), which is accessible on the LegCo website at:
<https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc102cb4-671-2-e.pdf>.

Administration has added that, where appropriate, it will assist in facilitating exchanges between the Mainland and Hong Kong courts on matters relating to the certificates, such as their forms and contents.

51. Legal Adviser has enquired whether there is other evidence that a court in Hong Kong may accept as proof that a Mainland Judgment is effective if the certificate under clause 13(2) is unavailable. In reply, the Administration has explained that the Bill does not expressly provide for the use of such other evidence. However, in relation to Cap. 597, the Court held in the case of *The Export-Import Bank of China v Taifeng Textile Group Co. Ltd.* [2018] HKCFI 1840 that an “enforcement notice” issued by the Beijing No. 4 Intermediate People’s Court proved without question that the relevant Mainland judgment was enforceable and was being enforced in the Mainland. It is noted that the Court in that case also remarked that an applicant for registration of a Mainland judgment under Cap. 597 should still be advised to obtain a certificate pursuant to Cap. 597 to prevent any unnecessary argument. Furthermore, if the authenticity of the certificate submitted by the applicant is in dispute, it would be an issue to be determined by the court on the evidence adduced by the parties.

Service of a notice of registration (clause 13(3)(b))

52. Members note that clause 13(3)(b) of the Bill will require that, on the making of a registration order by the Court, “the applicant must serve a notice of registration of the Judgment or part on all persons, so far as known to the applicant, against whom the Judgment or part may be enforced.” A member considers the meaning of “all persons” in that clause too vague and will render the requirement under that clause difficult to enforce, especially due to the lack of knowledge about the procedure of serving a notice in the Mainland.

53. In response, the Administration has explained that “all persons” refers to parties to a Mainland Judgment to be registered in Hong Kong against whom civil liabilities arising from the Judgment are imposed. The parties may be natural persons or business entities, and the civil liabilities may be payment obligations, or obligations to perform certain acts. The Administration envisages that the applicant should be in the best position to know and identify the parties against whom the registered Judgment may be enforced.

54. In response to members’ request, the Administration has provided further information in writing to elaborate on the meaning of “all persons, so far as known to the applicant, against whom the Judgment or part may be enforced” in clause 13(3)(b) of the Bill and explain what constitutes effective service of a notice of registration of the Judgment, in particular, when the whereabouts of the persons on whom the notice of registration is intended to be served is unknown

to the applicant.¹² The details relating to the service of the notice will be provided for in the Rules, and under the Rules, in the case where it appears to be impracticable for any reason to serve the notice by delivering it to the recipient personally or sending it to his usual or last known address, the Court will have the discretion to direct any other way of service, e.g. substituted service, such that the notice may be brought to the knowledge of the intended recipient. In gist, the Administration is of the view that the current formulation of clause 13(3)(b) sufficiently reflects its policy intent and no amendment will be required.

55. Legal Adviser has enquired whether it is necessary to provide for a time limit within which the applicant for a registration order must serve a notice of registration. In reply, the Administration has advised that it considers the provision of such a time limit unnecessary. Clause 21(2) provides for a time limit (by default 14 days unless otherwise ordered by the Court) within which a person may make an application for setting aside a registered Mainland Judgment. In relation to this time limit, it will only start to run after a notice of registration has been served on the person against whom the Mainland Judgment may be enforced. This formulation seeks to ensure that such person will be given sufficient time in preparing and filing a setting aside registration if he/she so wishes.

Registration of certain reliefs awarded under Mainland Judgments (clause 16)

56. Clause 16 of the Bill provides for the extent to which a Mainland Judgment given in proceedings brought in respect of (i) a tortious dispute over an infringement of a specified intellectual property right; or (ii) a civil dispute over an act of unfair competition under Article 6 of the Mainland Anti-Unfair Competition Law may be registered. A member has requested the Administration to clarify whether reliefs awarded under a tortious dispute over an infringement of a right in a trade secret can be registered. In response, the Administration has explained that, in general, a Mainland Judgment given in respect of a tortious dispute over an infringement of a “specified intellectual property right” or a civil dispute over an act of unfair competition under the relevant Mainland law must not be registered to the extent it relates to relief other than monetary damages awarded in respect of an infringement or an act of unfair competition committed in the Mainland. An exception to the general rule is that Mainland Judgments or

¹² Details of the Administration’s response are set out in LC Paper No. CB(4)554/2022(03), which is accessible on the LegCo website at:

<https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc10220220620cb4-554-3-e.pdf>.

part on an infringement of a right in a trade secret may be registered even if it relates to an excluded relief as defined in clause 16(3).¹³

Registration of sums payable etc. under Mainland Judgments (clause 17)

57. For payment in stages under clause 17(3) of the Bill, upon the application for registration of the stage 1 payment, the Court may also order the registration of the stage 2 payment (which has not been paid at the date of registration application). A member has enquired whether, when registering for an unpaid stage 2 payment, the judgment creditor may also apply for registering the stage 1 payment which has not yet been paid but has not been registered before, i.e. a post hoc registration.

58. In reply, the Administration has explained that the member's suggestion may allow the judgment creditor a backdoor to circumvent the two-year time limit, say by registering stage 1 payment after five or six years (when the stage 2 payment is registered), which may bring uncertainty and will not sit well with the policy objectives. The Administration has further advised that for the relevant stages of periodic payments under clause 17, the two-year time limit will remain applicable and provisions similar to clause 17(3) of the Bill has been adopted in another comparable registration mechanism under Cap. 639.

Time limit for making setting aside registrations (clause 21)

59. A member has enquired about the rationale of setting the 14-day time limit for making an application for setting aside the registration of a registered Mainland Judgment ("setting aside application") after the date on which a notice of registration is served. The Administration has advised that this formulation of 14 days seeks to ensure that the person making the setting aside application will be given sufficient time in preparing and filing the application if he/she so wishes. The formulation also seeks to reflect the prevailing practice in comparable registration mechanisms under which the time limit is also 14 days in general. The Judiciary has also been consulted in this regard.

60. Having regard to members' comments made in relation to the Court's discretionary power in setting the time limit for making a setting aside application, the Administration has informed the Bills Committee that it will propose an amendment to clause 21 (with consequential amendment to clause 20) such that the clause will state in clearer terms to the effect that unless otherwise

¹³ Under clause 16(3) of the Bill, "excluded relief" means a relief other than monetary damages, including punitive or exemplary damages, awarded in proceedings brought in respect of a dispute over an infringement or act of unfair competition committed in the Mainland.

ordered by the Court, the time limit for making a setting aside application will be 14 days by default.

The relationship between the setting aside grounds under clauses 22(1) and 22(2)

61. Upon members' request, the Administration has explained that the grounds on which registration *must* be set aside (i.e. mandatory) have been exhaustively set out under clause 22(1), which reflects the intent of the REJ Arrangement. On the other hand, clause 22(2) provides a sole ground on which registration *may* be set aside (i.e. discretionary), being that the proceedings in the original Mainland court are contrary to a valid arbitration agreement or jurisdiction agreement entered into by the same parties on the same cause of action.

Setting aside registration which does not satisfy the jurisdictional requirement (clause 22(1)(b))

62. Clause 22(1)(b) provides that the Court must set aside the registration of a registered judgment if the applicant has proved to the satisfaction of the Court that the jurisdictional requirement is not satisfied in respect of the original proceedings for the registered judgment. A member has questioned if the ground for setting aside a registered judgment in accordance with clause 22(1)(b) (read in conjunction with clause 23(1)) will essentially be codifying the common law principles of *forum non conveniens*.¹⁴

63. In response, the Administration has explained that clause 23 is meant to provide for the jurisdictional requirement for clause 22(1)(b) and, on an application made under clause 20, the Court must set aside the registration if such requirement is not satisfied. The relevant jurisdictional requirements aim at ensuring that the Mainland Judgment will have sufficient connection with the Mainland for the purpose of enforcement in Hong Kong and, as such, is different from the common law principles of *forum non conveniens*. The provisions for the jurisdictional requirements are in line with international practice, and similar provisions are also found in Cap. 319 and Cap. 597.

Setting aside registration of a registered judgment the enforcement of which is manifestly incompatible with the public policy of Hong Kong (clause 22(1)(j))

64. The Administration is requested to explain the circumstances under which the ground set out in clause 22(1)(j) can be invoked, i.e. "the enforcement of the

14 Through the common law principles of *forum non conveniens*, a court may acknowledge that another forum or court where a case may have been brought is a more appropriate venue and transfer the case to such a forum.

registered judgment is manifestly incompatible with the public policy of Hong Kong” (“the public policy ground”). In response, the Administration has explained that whether the recognition or enforcement of a judgment will be manifestly contrary to the public policy of Hong Kong will entail a high threshold to be proved to the satisfaction of the court. In this respect, reference may be made to Hong Kong case law wherein the public policy ground may be invoked if it is proved that there is something amounting to “substantial injustice” “so shocking to the court’s conscience as to render enforcement repugnant”.

65. In response to members’ request, the Administration has provided in writing detailed explanation on the scope of application of the public policy ground in relation to setting aside registrations pursuant to clause 22(1)(j) of the Bill.¹⁵ The Administration has referred members to its written response and to note the legal principles set out therein as established in *Hebei Import & Export Corporation v Polytek Engineering Co. Ltd.* [1999] 1 HKLRD 665; (1999) 2 HKCFAR 111, a case in which the Court of Final Appeal considered the issue of refusal of enforcement of an arbitral award on the public policy ground (“the Case”). The principles include that refusal of enforcement on the ground of incompatibility with public policy is a residual remedy and that there must be compelling reasons to refuse enforcement on the public policy ground. Hong Kong courts should recognize the validity of decisions of overseas adjudicating bodies as a matter of comity and give effect to them, unless to do so would violate the most basic notions of morality and justice. It is envisaged that subject to the provisions in the Bill, these legal principles will be applicable when the Court is asked to consider whether to set aside a registered judgment under clause 22(1)(j) of the Bill.

66. Some members agree that, in order to achieve its legislative intent to implement the REJ Arrangement, the Bill should operate with as little exceptions and disruptions as possible and, as such, as a matter of principle, the public policy ground should not be widely construed nor to be used at random as a catch-all provision. There must be compelling reasons which go beyond the minimum that will justify setting aside its domestic award and judgments. In addition to comity, sensitivity to the need for predictability in the cross-border commercial system or dispute resolution may require enforcement even on the assumption that a contrary result will be forthcoming in a domestic context.

67. However, some members consider that the legal principles established in the Case are more akin to the rules of equity in common law which should not be

¹⁵ Details of the Administration’s explanation are set out in LC Paper No. CB(4)464/2022(02) which is accessible on the LegCo website at: <https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc10220220530cb4-464-2-e.pdf>.

conflated with public policy. They consider that the concept of public policy should refer to significant matters of public interest. Literally, public policy refers to health policy, housing policy, etc., rather than the principles of equity demonstrated in the arbitration-related cases as set out in the Administration's response, and the public policy ground in the Bill should not be construed to mean violation of basic notions of morality and justice.

68. Some members have expressed concerns that when considering a setting aside application on the public policy ground, the Court may need to review the merits and legal basis of the Mainland Judgment concerned, which may be tantamount to a Hong Kong court adjudicating on a Mainland Judgment and this may call into question the appropriateness of doing so.

69. In response, the Administration has pointed out that under the registration mechanism set out in the Bill, the Court will not consider the merits of a Mainland Judgment to be registered. In considering a setting aside application on the public policy ground, it is envisaged that the Court will review the evidence produced by the applicant and apply the requisite high threshold for proving the public policy ground. It stresses that the effect of setting aside a registration is that a registered Mainland Judgment cannot be enforced in Hong Kong, and it will certainly not amount to re-adjudicating the merits of the case on which the Mainland Judgment was based.

70. Some members have stressed that setting aside a registration on the public policy ground should be a residual remedy, and the decision should be made at the sole discretion of the Court in the extraordinary event where Mainland Judgments obviously contradicted specific public policies of Hong Kong. If any other ground for setting aside an application is considered necessary, it should be spelt out in clear terms similar to those listed in clause 22(1)(a) to (i), and unrestrained extension of the scope of clause 22(1)(j) should not be allowed.

Possible abuse of setting aside a registration (clause 22)

71. A member has expressed concern that clause 22 may allow a claimant to re-open a case for a review on merits when they apply for setting aside a registration on one or more of the ground(s) under clauses 22(1) and (2). In reply, the Administration has stressed that in considering a setting aside application, the Court will only consider whether these ground(s) are proved to its satisfaction and will not revisit the merits of the underlying case. This practice is in line with the prevailing practices adopted in the enforcement of judgments from another jurisdiction, including the Mainland, under the prevailing common law principles or the relevant statutory mechanisms provided under Cap. 319, Cap. 597 or Cap. 639. The Administration believes that the current way in which the Bill is drafted

has not left any room for a review of merits of the underlying case and hence there is no need to insert phrases such as “to avoid doubt, one may not re-open...” as suggested by the member.

Jurisdictional requirements (clause 23(1)(a)(ii))

72. Members note from clause 23(1)(a)(ii) of the Bill that the jurisdictional requirements for the purposes of clause 22(1)(b) will not be satisfied in respect of the original proceedings for a registered judgment if the courts in Hong Kong have exclusive jurisdiction over the proceedings. In response to a member’s enquiry about the meaning of “exclusive jurisdiction”, the Administration has explained that clause 23(1)(a)(ii) is meant to implement Article 11 of the REJ Arrangement and refers to the example of the Labour Tribunal’s exclusive jurisdiction on disputes over employers’ rights and responsibilities under the Employment Ordinance (Cap. 57).

The Court of First Instance’s decision in respect of the jurisdictional requirements (clause 23(1)(b))

73. Clause 23(1)(b) of the Bill provides that the jurisdictional requirement will be satisfied in respect of the original proceedings for a registered judgment if the Court considers that the exercise of jurisdiction by the original Mainland court over the proceedings is consistent with the law of Hong Kong. A member opines that clause 23(1)(b) of the Bill seems to provide a wide power to the Court to determine whether the jurisdictional requirement is satisfied, which may override considerations that the registration may have failed to satisfy other conditions in clauses 23(2) and 23(3) of the Bill. In response, the Administration has explained that clause 23(1)(b) is to provide a residual ground for the Court to determine if the jurisdictional requirement is satisfied when a party applies to the Court to set aside the relevant Mainland Judgment. It is the policy intent that in cases where the jurisdictional requirements under clauses 23(2) or 23(3) are not satisfied, this residual ground can be, depending on the circumstances of the case, applied by the Court and if so, the Mainland Judgment registration will not be set aside on the ground that the jurisdictional requirement is not satisfied. The Administration has further explained that under the REJ Arrangement, Hong Kong Judgments would likewise be enforceable in the Mainland under the same residual ground.

Jurisdiction by agreement (clause 23(3)(e)(ii))

74. Members note that one of the conditions for satisfying the jurisdictional requirement is, as provided in clause 23(3)(e)(ii) of the Bill, that parties to the proceedings have expressly agreed in written form that the courts in the Mainland are to have jurisdiction over the proceedings. A member has pointed out that such

an agreement in written form may constitute “jurisdiction by agreement” in the Mainland, which has been held to constitute either exclusive or non-exclusive “jurisdiction by agreement”, and enquires whether both types of “jurisdiction by agreement” will meet the requirement under clause 23(1)(a)(ii). In response, the Administration has explained that when examining whether the jurisdictional requirement is satisfied under clause 23(3)(e)(ii) of the Bill, the Court is to determine, among other things, whether Mainland courts are the one(s) as expressly agreed in the “jurisdiction by agreement”. Irrespective of whether such agreement will be regarded as exclusive or non-exclusive in nature, it will be covered.

Place of residence (clause 23(5))

75. A member considers the definition of “place of residence” in clause 23(5)¹⁶ may be too wide in scope such that a person, against whom a Mainland Judgment may be enforced, who has multiple places of residence may invoke clause 22(1)(b) of the Bill for setting aside the registration of the Mainland Judgment. The person may argue that the original court issuing the Mainland Judgment is not connected to, for instance, his domicile, thus the jurisdictional requirement is not satisfied. In reply, the Administration has advised that persons with multiple places of residence against whom a judgment may be enforced should expect that the jurisdictional requirement will be satisfied so long as an actual connection between the judgment and any of his places of residence may be established.

76. A member is concerned that the condition set out in clause 23(3)(e)(iii), i.e. “if the places of residence of all the parties to the proceedings were in Hong Kong...” is a difficult threshold to be met, and cannot cater for situations where a person as a party to the proceedings has Hong Kong permanent residency status but is not ordinarily residing in Hong Kong.

77. In reply, the Administration has explained that clause 23(3)(e)(iii) is meant to implement Article 11(5) of the REJ Arrangement. While clause 23(3)(e) mandates that the Court shall consider the relevant Mainland court to have jurisdiction over the relevant action **if** the parties to a contractual dispute or other dispute concerning interests in property have expressly agreed in writing that the Mainland courts shall have jurisdiction over the relevant proceeding, clause 23(3)(e)(iii) provides an additional condition that the Mainland should be the place where the contract is performed or signed, or where the subject matter is

¹⁶ Under clause 23(5) of the Bill, “place of residence” means – (a) for a natural person – the person’s place of household registration, place of permanent residence or place of habitual residence; or (b) for an entity other than a natural person – its place of incorporation or registration, place of principal office, principal place of business or principal place of management.

situated etc., i.e. being a place which has an actual connection with the dispute **if** the place of residence of all the parties to the judgment is in Hong Kong. Therefore, clause 23(3)(e)(iii) is to define the only special situation in which the actual connection condition will apply.

Stay of Hong Kong proceedings if registration applications are made (clause 29)

78. Clause 29 of the Bill provides that certain ongoing Hong Kong proceedings must be stayed when an application to register a Mainland Judgment in a civil or commercial matter is made. A member considers that, clause 29 if invoked, similar to the setting aside ground under clause 22(1)(e) of the Bill, will in effect remove the court's discretionary power to invoke the common law principles of *forum non conveniens*. In reply, the Administration has advised that clause 29 will address the situation where there is already a Mainland Judgment handed down by a Mainland court while there is in parallel Hong Kong proceedings on the same cause of action in progress. Clause 29 will provide guidance to the Court that in such circumstances, the Court will first handle the registration application. This is different from the situation when the common law principles of *forum non conveniens* is applicable, i.e. when there are concurrent court proceedings in two or more jurisdictions whilst a judgment has yet to be handed down in any of them. The Administration has also indicated that the Bill will not impact on the common law principles of *forum non conveniens*.

79. Legal Adviser has enquired whether it is necessary to provide, similar to section 26(5)(c) of Cap. 639, that notwithstanding that the Hong Kong proceedings are stayed, the adjudicating court may nevertheless impose any term(s) it considers just for the purpose of preventing irretrievable injustice. In reply, the Administration considers that a provision mirroring section 26(5) of Cap. 639 is not necessary for the purpose of the Bill. Parties in civil or commercial cases may, in relation to proceedings commenced or to be commenced in Hong Kong when a Mainland Judgment is to be or has been registered, apply for interim relief (e.g. a Mareva injunction) under the existing legislative regime provided for in the High Court Ordinance (Cap. 4). The existing mechanism has been operating well.

Parallel litigation arising from the registration mechanism (clauses 22 and 29)

80. Members note that the REJ Arrangement does not preclude the possibility that parties to a contractual dispute in civil and commercial matters may initiate proceedings in the Mainland courts, in the Hong Kong courts, or in both at the same time (i.e. parallel litigation) so long as the jurisdictional requirements are satisfied. They have enquired whether and how the Bill will handle parallel litigation.

81. In response, the Administration has explained that the Bill has built in a mechanism to deal with different possible scenarios of parallel litigation, as set out in clauses 22 and 29 of the Bill. Clause 29 provides that certain ongoing Hong Kong proceedings must be stayed when a registration application is made. On the other hand, clause 22(1)(e) and (f) provides that the Court must set aside a registration if the applicant of a setting aside application has proved to its satisfaction that the original proceedings for the registered judgment are accepted by a court in the Mainland after the proceedings in respect of the same cause of action between the same parties have been started in a Hong Kong court or a Hong Kong court has already given a judgment on the same cause of action between the same parties.

82. Some members have expressed the concern that parallel litigation may give rise to a situation where parties to a dispute may rush to initiate proceedings in courts of a place (e.g. Hong Kong courts) where they believe will gain an advantage over the other party(-ies). They are concerned that the Bill may encourage litigation in that legal proceedings are used for strategic purposes rather than seeking justice. The Administration has replied that while a party in the hypothetical scenario raised by members may be successful in filing a case before Hong Kong courts ahead of the registration of the Mainland Judgment on the same cause of action by the other party, one cannot guarantee that the outcome of the Hong Kong Judgment will be more favourable to the relevant party than the Mainland Judgment.

Applicants for registration to notify the Hong Kong courts (clause 29(2))

83. Some members note that clauses 29(2) and (3) of the Bill do not expressly provide for the consequences where the applicant of a registration application has failed to notify the adjudicating court of the Hong Kong proceedings of the application. They have suggested that a penalty be imposed in the statute, such as a fine or for the applicant to pay the cost on indemnity basis. In response, the Administration has advised that as Hong Kong courts operate under an adversarial system, the onus will be on the parties to a dispute to give the relevant notification, which is mandated by clause 29(2). It also believes that it will be in the practical interest of a party seeking to register a Mainland Judgment to notify the adjudicating court so that it will order the stay of the relevant Hong Kong proceedings. The existing costs regime under the Rules of the High Court (Cap. 4A) can also address members' comments on the consequence of non-compliance by the applicant. There are specific provisions under Cap. 4A providing that where in any cause or matter anything is done or omission is made improperly or unnecessarily by or on behalf of a party, the court may direct that any costs to that party in respect of it shall not be allowed to him and that any costs occasioned by

it to other parties shall be paid by him to them. In the context of the Bill, if the applicant does not comply with clause 29(2) to notify the adjudicating court of the registration application as soon as the same is made, and this results in delay in the pending Hong Kong proceedings or unnecessary costs incurred by the other party of the pending Hong Kong proceedings, the other party will be entitled to ask the adjudicating court to exercise its discretion in granting costs, including costs on an indemnity basis, in favour of him/her pursuant to the relevant costs provisions in Cap. 4A.

Restriction on bringing proceedings in respect of the same cause of action in Hong Kong (clause 30)

84. Clause 30(2) of the Bill provides that a party to the original proceedings for a Mainland Judgment may not bring in a court in Hong Kong proceedings in respect of the same cause of action on which the Judgment or part was given. Some members have enquired whether the restriction as prescribed in this clause will cover parties not involved in the Mainland Judgment concerned or, conversely, may be relaxed to cater for parties to several proceedings in respect of the same cause of action, e.g. litigations instituted by individual flat owners of a pre-sale property against the property developer for failure to complete the project. The Administration has replied in the negative and has explained that clause 30 is meant to give effect to Article 23 of the REJ Arrangement and to reflect the legal principle of *res judicata*, i.e. a matter decided by a competent judicial or other tribunal with jurisdiction over the cause of action between the same parties is final and the matter may not be re-litigated again between the same parties. As the relevant principle will be applicable to parties privy to the original proceedings, the Administration has advised that it is difficult to justify the assumption that the facts and merits of two separate proceedings involving a different party (or parties) will be the same even if the causes of action of those two proceedings may arise from the same incident.

Restriction on bringing proceedings for execution of Mainland Judgments other than by way of registration (clause 31)

85. Clause 31 of the Bill restricts the bringing of proceedings for the execution of a Mainland Judgment in a civil or commercial matter other than by way of registration. A member has suggested adding “instituted by the parties” after “A court in Hong Kong may not entertain any proceedings” in this clause to make it clear that the intended restriction of that clause will only apply to parties to the original proceedings. In its written response given to the Bills Committee, the Administration has explained that the existing formulation of clause 31 will cover proceedings instituted by a party to the Mainland Judgment, as well as a party who is not the original parties to the Mainland Judgment but in whom the rights

under the Judgment have become vested by succession or assignment or otherwise.¹⁷ Thus, it considers that the current formulation of clause 31 has sufficiently reflected the policy intent of precluding a judgment creditor of the relevant Mainland Judgment from enforcing the Judgment in Hong Kong by means other than making a registration application under the Bill and it will not be necessary or desirable to add the words as suggested by the member.

Part 3 – Facilitation of Recognition and Enforcement in Mainland of Hong Kong Judgments in Civil or Commercial Matters (Clauses 32 - 34)

86. Part 3 of the Bill (clauses 32 to 34) provides for the issue of a certified copy of a Hong Kong Judgment in a civil or commercial matter and also a certificate for the Judgment. Members have noted that this part is much less elaborate than Part 2 and asked about the reasons. In reply, the Administration has explained that as far as enforcement in the Mainland will be concerned, the REJ Arrangement will be implemented by way of judicial interpretation to be issued by SPC which will provide the framework for the enforcement of Hong Kong Judgments in Mainland. While the content of SPC's judicial interpretation will be outside the scope of the Bill, the purpose of Part 3 of the Bill is to empower Hong Kong courts to facilitate parties seeking to enforce Hong Kong Judgments in the Mainland (i.e. through the issue of certified copies of and certificates for Hong Kong Judgments). Separately, the relevant practice and procedure will be provided in the Rules which will be introduced into LegCo as subsidiary legislation for negative vetting in due course.

87. To get prepared for seeking enforcement of Hong Kong Judgments in the Mainland, a member hopes that members will be given opportunity to view the draft judicial interpretation to be promulgated by the Mainland authorities. The Administration advised that whether SPC will issue a draft judicial interpretation for consultation will be a matter for SPC to decide. Based on past practice, the content of the judicial interpretation will follow closely to that of the REJ Arrangement. As regards preparatory work, the Administration has advised that it will focus on capacity building initiatives, such as supporting the organization of briefings for both Mainland and Hong Kong judges and lawyers, and it will continue to work closely with SPC and the Judiciary in this regard.

¹⁷ Details of the Administration's response are set out in LC Paper No. CB(4)671/2022(02), which is accessible on the LegCo website at: <https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc102cb4-671-2-e.pdf>.

Application for certified copies of Hong Kong Judgments (clause 33)

88. Clause 33(1) of the Bill provides that a judgment creditor under a Hong Kong Judgment in a civil or commercial matter may apply for a certified copy of the Judgment. A member considers that as the term “judgment creditor” is used, clause 33 of the Bill may be misconstrued that a person may only apply for a certified copy of a Hong Kong Judgment if monetary judgments are involved. In reply, the Administration has referred members to clause 2 where the term “judgment creditor” is defined as follows: “in relation to a Mainland Judgment in a civil or commercial matter or a Hong Kong Judgment in a civil or commercial matter, means the person in whose favour the Judgment was given, and includes a person in whom the rights under the Judgment have become vested by succession or assignment or otherwise”. The Administration considers that the current definition of “judgment creditor” is sufficiently clear to cover not only judgments awarding monetary relief but also non-monetary relief.

89. In response to the member’s suggestion that the term “judgment creditor” throughout the Bill be replaced by an appropriate alternative, the Administration has responded that the term and its definition as provided under the Bill is appropriate and no amendment is necessary.¹⁸

Part 4 - Miscellaneous

Rules (clause 35)

90. In order to promote the connectivity between Hong Kong and the Mainland, some members consider it important that the procedures for making a registration application should be as simple and straightforward as possible. They also indicate that, while the REJ Arrangement will reduce the need for re-litigation, there are still a lot of implementation issues which need to be tackled.

91. The Administration concurs with members’ views and has advised that the Bill aims to facilitate the enforcement of Mainland Judgments in Hong Kong in a user-friendly way without the need to go through re-litigation. The Rules made under clause 35 will provide for various details of implementing the Bill, such as the practice and procedure relating to a registration application and the execution of a registered judgment. For instance, a mechanism will be provided for the application for certified copies of Hong Kong Judgments and the issuance of

¹⁸ Details of the Administration’s response are set out in LC Paper No. CB(4)671/2022(02), which is accessible on the LegCo website at: <https://www.legco.gov.hk/yr2022/english/bc/bc102/papers/bc102cb4-671-2-e.pdf>.

certificates for Hong Kong Judgments to facilitate parties seeking recognition and enforcement of Hong Kong Judgments in the Mainland.

PROPOSED AMENDMENTS TO THE BILL

92. The Administration has proposed amendments to the Bill (in **Appendix 3**), which are mentioned in paragraphs 37 and 60. 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

93. The Bills Committee has completed scrutiny of the Bill and raises no objection to the resumption of the Second Reading debate on the Bill. The Administration has indicated its intention to resume the Second Reading debate on the Bill at the Council meeting of 26 October 2022.

ADVICE SOUGHT

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

Council Business Division 4
Legislative Council Secretariat
12 October 2022

Appendix 1

Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill

Membership list*

Chairman (Vacant)

Deputy Chairman Hon LAM San-keung, JP

Members Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Hon Paul TSE Wai-chun, JP
Dr Hon Junius HO Kwan-jiu, JP
Hon YUNG Hoi-yan, JP
Hon Doreen KONG Yuk-foon
Hon Rock CHEN Chung-nin, SBS, JP
Hon CHAN Yung, BBS, JP
Hon Judy CHAN Kapui, MH
Hon Maggie CHAN Man-ki, MH, JP
Hon TANG Fei, MH
Hon TANG Ka-piu, BBS, JP
Hon LAI Tung-kwok, GBS, IDSM, JP
Hon Carmen KAN Wai-mun

(Total : 14 members)

Clerk Mr Lemuel WOO

Legal Adviser Ms Vanessa CHENG

* Change in membership is shown in Annex to Appendix 1

Annex to Appendix 1

Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill

Change in membership

Member	Relevant date
Hon CHEUNG Kwok-kwan, JP (Chairman)*	Up to 18 June 2022

* Pursuant to section 15(1)(a) of the Legislative Council Ordinance (Cap. 542), Mr CHEUNG Kwok-kwan ceased to hold office as a member of LegCo upon his resignation on 19 June 2022.

Appendix 2

Bills Committee on Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill

List of organizations which have submitted written views to the Bills Committee

1. The Law Society of Hong Kong
2. Guangdong-Hong Kong-Macao Greater Bay Area Socialist Research Institute (Chinese version only)

Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Bill

Committee Stage

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
5(1)(e)	By deleting “the insolvency of an entity other than a natural person” and substituting “a specified corporate process”.
5(2)	By adding in alphabetical order— <i>“specified corporate process</i> (指明法團程序)— (a) in relation to a Mainland Judgment—means a reorganization, compromise or bankruptcy liquidation mentioned in Article 7 of the Enterprise Bankruptcy Law of the People’s Republic of China (a translation of “《中華人民共和國企業破產法》”); and (b) in relation to a Hong Kong Judgment, means— (i) the winding up of an entity other than a natural person; or (ii) an arrangement or a compromise sanctioned by the Court under section 673(2) of the Companies Ordinance (Cap. 622);”.
20	By deleting “specified under section 21(1) or mentioned in” and substituting “mentioned in section 21(1) or specified under”.
21	By deleting subclauses (1) and (2) and substituting— (1) An application to set aside the registration of a registered judgment, or any part of such a judgment, may be made by a person within 14 days after the date on which a notice of registration is served on the person under section 13(3)(b). (2) However, the Court may, when making a registration order for a Mainland Judgment in a civil or commercial matter, or any part of such a Judgment, to be registered, specify a longer or

shorter period within which an application for setting aside the registration may be made.”.

21(3)(a) By deleting “specified under subsection (1) or mentioned in” and substituting “mentioned in subsection (1) or specified under”.