

**PROPOSED ARRANGEMENT WITH THE MAINLAND
ON
RECIPROCAL RECOGNITION AND ENFORCEMENT
OF JUDGMENTS
ON MATRIMONIAL AND RELATED MATTERS
CONSULTATION PAPER**

June 2016



Department of Justice

PURPOSE

The Department of Justice (“DoJ”) would like to invite views from the community, including the legal profession, the relevant stakeholders and other interested parties, on a proposal to enter into an arrangement with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters (“Proposed Arrangement”).

BACKGROUND

2. In recent years, the number of marriages registered in the Hong Kong Special Administrative Region (“HKSAR”) between residents of the HKSAR and those of the Mainland has been on the rise. Of the total marriages registered in the HKSAR from 2009 to 2014, the percentage of these “cross-boundary marriages” has increased from 32% to 37%¹.

3. In addition, the percentage of divorce cases filed in the Family Court of the HKSAR from 2010 to 2014 in relation to marriages which took place in the Mainland ranged between 20% to 30%².

4. A further relevant consideration is the enhanced mobility of residents of both places. The parties to a cross-boundary marriage might have obtained a divorce and a maintenance order granted by the Family Court of the HKSAR. The party ordered to pay maintenance might have since moved to work or reside in the Mainland and has thereafter ceased

¹ For the calculation of the percentages from 2009 to 2013, reference was made to the *Hong Kong Monthly Digest of Statistics – “Marriage and Divorce Trends in Hong Kong, 1991 to 2013”* issued by the Census and Statistics Department in January 2015 (<http://www.statistics.gov.hk/pub/B71501FA2015XXXXB0100.pdf>). The percentage was arrived at by dividing the total number of Mainland-Hong Kong marriages registered in the HKSAR (Table 5) by the number of all marriages as set out in Table 4. On the basis of this calculation, the percentages of cross-boundary marriages from 2009 to 2013 are: 2009 (32%), 2010 (36%), 2011 (35%), 2012 (36%) and 2013 (38%). The calculation of the percentage in 2014 (37%) was made with reference to Table 2.3 and Table 2.4 of the *Woman and Men in Hong Kong – Key Statistics (2015 edition)* issued by the Census and Statistics Department in July 2015 (<http://www.statistics.gov.hk/pub/B11303032015AN15B0100.pdf>).

² The figures were provided by the Judiciary to DoJ on 9 September 2015 and reflected divorce cases (including matrimonial causes and joint applications) filed in the Family Court which relate to marriages in the Mainland and not specifically to Mainland parties. The respective figures from 2010 to 2014 are: 2010 (28%), 2011 (27%), 2012 (27%), 2013 (25%) and 2014 (23%).

to comply with the maintenance order in favour of the other party in the HKSAR. In such circumstances, an issue arises as to whether the order made by the court of the HKSAR on divorce, maintenance and related matters can be recognised and enforced in the Mainland, and *vice versa*. This has become a topical issue arising from cross-boundary marriages.

5. Although the HKSAR and the Mainland concluded a bilateral arrangement on reciprocal recognition and enforcement of civil judgments in 2006³ (“2006 Arrangement”), it is limited in scope. In short, it only applies to monetary judgments made by the courts of the HKSAR or the Mainland where the parties to a commercial contract have agreed in writing that the court of either place will have exclusive jurisdiction. Family matters are specifically excluded from the scope of the 2006 Arrangement.

6. The existing legal regime for recognition and enforcement in the HKSAR of matrimonial and custody orders obtained outside the HKSAR, including those obtained in the Mainland, are set out at the Appendix. As regards judgments obtained in the Mainland, save for the recognition of a divorce granted by the Mainland court under section 56 of the Matrimonial Causes Ordinance (Cap. 179)(“MCO”)⁴, maintenance orders and custody orders granted by a Mainland court are not automatically recognised and enforceable in the HKSAR. The same applies to the recognition and enforcement in the Mainland of maintenance orders and custody orders granted by a court of the HKSAR.

7. Under the current regime, parties to cross-boundary marriages would inevitably incur extra time, costs as well as suffer emotional

³ The 2006 Arrangement is implemented in the HKSAR by the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597) and in the Mainland by a judicial interpretation issued by the Supreme People’s Court.

⁴ Section 56 of the MCO provides that:

“ (1) The validity of an overseas divorce or legal separation shall be recognized if, at the date of the institution of the proceedings in the place in which it was obtained-

(a) either spouse was habitually resident in that place; or
(b) either spouse was a national of that place.

(2) In relation to a place the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce or legal separation, subsection (1)(a) shall have effect as if the reference to habitual residence included a reference to domicile within the meaning of that law.

(3) (Repealed 20 of 2010 s. 7)”

distress in seeking to enforce in the HKSAR matrimonial judgments obtained in the courts of the Mainland, and *vice versa*.

8. Since the coming into effect of the 2006 Arrangement in August 2008, there have been calls for an extension of the reciprocal recognition and enforcement of civil judgments (“REJ”) regime between the HKSAR and the Mainland, particularly in relation to matrimonial and related matters. DoJ considers that the Proposed Arrangement would benefit judgments holders by providing a more expeditious and cost effective way of seeking reciprocal recognition and enforcement in the HKSAR of judgments on matrimonial and related matters obtained in the Mainland, and *vice versa*.

9. In seeking to widen the scope of the present REJ regime, one approach that has been suggested is to aim at concluding a comprehensive framework for REJ arrangement which will cover judgements of a range of subject matters, with details of specific subject matters to be contained in specific annexes to the framework arrangement. Given the wide range of issues that would need to be considered, much more time would inevitably be required before such a general approach can be achieved. On the other hand, given the pressing need in the society to pursue a solution to address REJ in the matrimonial context, DoJ considers that the preferred approach is to aim at first concluding a specific standalone REJ arrangement on matrimonial and related matters as a matter of priority. It is on the basis of the latter approach that DoJ now invites public discussion for the conclusion of a specific standalone arrangement.

ISSUES FOR CONSULTATION

10. We set out in the following paragraphs the issues that we would like to invite your views.

(I) TYPES OF JUDGMENTS TO BE COVERED IN THE PROPOSED ARRANGEMENT

11. DoJ proposes that similar to the 2006 Arrangement, the

Proposed Arrangement will cover such issues as basic requirements for REJ, grounds for refusal, application procedures and other safeguards. Besides, we suggest that the Proposed Arrangement will principally cover the following types of judgments:

(a) *Divorce decrees*

12. Under Part IX of the MCO, subject to exceptions set out in section 61 thereof, foreign orders on divorce, including divorces obtained in the Mainland, shall be recognised in the HKSAR provided that the relevant statutory requirements are met. Further details can be found at the **Appendix**. So far as the Mainland is concerned, the Zhuhai Intermediate People’s Court has recognised a divorce decree granted in the HKSAR on the ground that the recognition does not contradict basic legal principles in the Mainland nor violate state sovereignty, security and public interest in the society⁵.

13. It remains, however, uncertain if all the courts in the Mainland will adopt the same approach as the Zhuhai Intermediate People’s Court. DoJ considers that our proposal to include reciprocal recognition and enforcement of divorce decrees is in line with our domestic legal regime. Besides, such arrangement will bring certainty to the public that divorce decrees obtained in the HKSAR may be recognised and enforced in the Mainland under the Proposed Arrangement, and *vice versa*.

14. DoJ also proposes to explore with the Mainland authorities whether any of the principles under the Hague Convention on the Recognition of Divorces and Legal Separations (1970)⁶ could be suitably adopted or adapted for inclusion in the Proposed Arrangement.

(b) *Maintenance orders*

15. Under the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap. 188) (“MOREO”) and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), matrimonial orders

⁵ 凌某申請認可香港法院判決案，(2011)珠中法民確字第4號。

⁶ This Convention is applicable to the HKSAR but not the Mainland.

made in other jurisdictions may be enforced in the HKSAR provided certain conditions are met. However, neither of these two Ordinances is applicable to matrimonial orders made in the Mainland. Therefore, a payee of a maintenance order cannot rely on these two Ordinances to seek enforcement of maintenance orders made by the Mainland courts in the HKSAR.

16. Similarly, in the Mainland, orders made outside the Mainland on division of matrimonial assets, ancillary relief and custody may not be recognised under the relevant legal provisions⁷. Applying the relevant provisions, the Zhuhai Intermediate People’s Court, as referred to in paragraph 12 above, held that there is no legal basis for recognising an order for maintenance and division of assets made by a court of the HKSAR after the grant of a decree absolute given the lack of an arrangement on mutual recognition of orders on custody, maintenance and asset division⁸.

17. DoJ considers that our proposal to include reciprocal recognition and enforcement of maintenance orders could help fill a lacuna in the law, enable the payee of a maintenance order of either place to seek enforcement in court more expeditiously and afford better protection to them. We also propose that “maintenance orders” will include orders for periodical payment and lump sum payment for spouse or children born in or out of wedlock.

18. DoJ also proposes to explore with the Mainland authorities whether any of the principles under the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007)⁹ (“the 2007 Convention”) could be suitably adopted or adapted for inclusion in the Proposed Arrangement.

⁷ See Article 2 of 《最高人民法院關於中國公民申請承認外國法院離婚判決程序問題的規定》 promulgated on 13 August 1991.

⁸ See footnote 5 above.

⁹ The 2007 Convention is not applicable to the Mainland or the HKSAR. Given that Hague Conventions were drafted with different legal systems in mind, and largely represented a reasonable compromise between the civil law and common law systems, they may assist in overcoming the differences between the civil law and common law legal systems between the Mainland and the HKSAR.

(c) Custody orders for the purpose of return of children in parental abduction cases

19. DoJ suggests that the Proposed Arrangement should cover custody orders relating to children for the purpose of return of children in parental abduction cases. At common law, there is presently no rule regulating the recognition and enforcement of foreign custody orders. Nor is there any rule under the present statutory regime of the HKSAR to regulate the recognition and enforcement of the same. Any order affecting children would only be made having regard to the best interests of a child as the first and paramount consideration.

20. From the Mainland law perspective, “custody” includes, among others, the daily care and control of a child and the provision of financial support towards the upbringing of a child. Under the relevant Mainland laws, we understand that custody of the child of the family may be granted to one parent (直接撫養子女的父或母) (“custodial parent”) while the other parent (不直接撫養子女的父或母) (“non-custodial parent”) shall enjoy a right to visit the child upon divorce. The law further provides that guardianship (監護權) of the “non-custodial parent” shall not be relinquished by the “custodial parent” (與子女共同生活的一方無權取消對方對該子女的監護權) except by order of the court under certain circumstances. Under the relevant provision of the Marriage Law of the PRC, the “custodial parent” has a duty to facilitate access to the child by the “non-custodial parent”, failing which the Mainland courts may order compulsory measures (including detention and fine) but would not otherwise make any order directing the child to be handed over for access¹⁰. Given divorced parents in the Mainland would nonetheless enjoy custody (whether “direct” or “indirect”) and guardianship of the child in the Mainland, there are academic views that parental child abduction is not being recognised from the Mainland law perspective.

21. Although the proposed inclusion of mutual recognition and enforcement of custody orders under the Proposed Arrangement may be

¹⁰ See Article 38 of the Marriage Law of the PRC revised on 28 April 2001 and Article 32 of 《最高人民法院關於適用〈中華人民共和國婚姻法〉若干問題的解釋(一)》 promulgated on 25 December 2001.

viewed as a departure from the current legal regime in both jurisdictions, it would appear that such recognition and enforcement is necessary for the purpose of return of children in parental abduction cases so as to ensure the prompt return of children having been wrongfully removed to their place of habitual residence. Such return is also internationally accepted to be in the best interests of the children¹¹.

22. Further, DoJ proposes to explore with the Mainland authorities whether any of the principles under the Hague Convention on the Civil Aspects of International Child Abduction (1980)¹² and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996)¹³ could be suitably adopted or adapted for inclusion in the Proposed Arrangement.

(II) INCLUSION OF “DIVORCE CERTIFICATE” OBTAINED IN THE MAINLAND

23. DoJ further proposes that apart from divorce orders obtained from the Mainland courts, the Proposed Arrangement should also cover divorce certificates obtained through registration with the relevant Mainland administrative authorities as provided under Article 31 of the Marriage Law of the PRC.

24. As we understand it, a divorce certificate would only be issued by the relevant Mainland authority if it could be proved that both parties consent to the divorce and that appropriate arrangements have been made in respect of the children (if any) of the family as well as the family assets. This is generally in line with section 18 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) which provides, *inter*

¹¹ It is the underlying basis for the Hague Convention on the Civil Aspects of International Child Abduction (1980) that save in exceptional circumstances, such wrongful removal or retention of children would not be in the interests of the children, and that the return of the children to the jurisdiction of the habitual residence will promote their interests by vindicating the right of the children to have contact with both parents, by supporting continuity in their life, and by ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence.

¹² This Convention is applicable to the HKSAR but not the Mainland.

¹³ This Convention is not currently applicable to the Mainland or the HKSAR.

alia, that the court shall not make absolute a divorce decree unless it is satisfied that the arrangements made for the welfare of the children of the family are satisfactory or are the best that can be devised in the circumstances.

25. On the other hand, section 55 of the MCO provides that for the purpose of recognition in the HKSAR of the validity of overseas divorces, these overseas divorces should have been obtained by means of judicial or other proceedings in any place outside the HKSAR, and are effective under the law of that place. A pertinent issue arising from that section is that in the absence of any court endorsement, it is uncertain whether a divorce obtained through the registration procedure, which is an administrative procedure, would constitute a divorce obtained overseas by means of “judicial or other proceedings” for the purpose of its recognition in the HKSAR¹⁴.

26. In this regard, DoJ considers that divorces obtained through the registration procedure in the Mainland should be covered under the Proposed Arrangement so as to give parties to the divorce under such registration procedure the assurance that their divorces would be treated as those granted by the Mainland courts alike, and hence achieving legal certainty and equality to both types of divorces which have legal effect in the Mainland.

27. Besides, statistics show that the majority of divorces in the Mainland are obtained through the registration procedure instead of court proceedings. For example, the total number of divorces registered with the administrative authorities in 2014 was about 2.957 million whereas the court processed about 0.679 million divorces¹⁵. DoJ considers that divorces obtained through the registration procedure should be covered

¹⁴ Cf the decision of the House of Lords in *Quazi v Quazi* [1980] AC 744 that “other proceedings” under section 2 of the Recognition of Divorces and Legal Separation Act 1971 were not to be limited to quasi-judicial proceedings by being construed ejusdem generis with “judicial” proceedings, that they referred to any proceedings, other than judicial proceedings, which were officially recognised in the country in which they were taken, and that a divorce obtained by talaq in Pakistan in accordance with the requirements of Pakistani law was a divorce obtained by such “other proceedings”. The decision was applied in *Chaudhary v Chaudhary* [1985] FLR 476.

¹⁵ 中華人民共和國民政部《民政部發佈 2014 年社會服務發展統計公報》(“2014 年依法辦理離婚 363.7 萬對.....。其中：民政部門登記離婚 295.7 萬對，法院辦理離婚 67.9 萬對。”)
<http://www.mca.gov.cn/article/zwgk/mzyw/201506/20150600832371.shtml>.

under the Proposed Arrangement in order to maximise the number of persons who may benefit under the Proposed Arrangement.

28. Nevertheless, it is noted that a divorce certificate obtained through the registration procedure is not equivalent to a “judicial decision” in the Mainland where it is the latter which the Proposed Arrangement is intended to cover. One possible way to deal with the matter is to incorporate a specific provision in the definition of a “judgment” under the Proposed Arrangement so as to cater for the specific nature of divorce certificates. In drawing up the definition, reference may be made to the definition of “maintenance arrangement” under Article 3(e) of the 2007 Convention¹⁶ under which a “maintenance arrangement”, being a non-judicial order or agreement, may be enforced. Reference may also be made to Article 1 of the Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance 2000 under which the Agreement is applicable to decisions made by an administrative or judicial authority.

(III) INCLUSION OF ORDERS FOR PROPERTY ADJUSTMENT

29. DoJ wishes to seek views on whether orders for property adjustment should also be covered under the Proposed Arrangement. DoJ appreciates that expansion of the coverage of the Proposed Arrangement to cover these orders would enhance the effectiveness of the Proposed Arrangement. Overseas jurisprudence has acknowledged that “maintenance” is now regarded as covering property adjustment if the court’s purpose in making the order is to provide a home for the applicant in the nature of maintenance¹⁷. It is important to note that the court of the place where the land is situated will often have exclusive jurisdiction.

¹⁶ Article 3(e) of the 2007 Convention provides as follows:
“For the purposes of this Convention –

.....
(e) “maintenance arrangement” means an agreement in writing relating to the payment of maintenance which –
i) has been formally drawn up or registered as an authentic instrument by a competent authority; or
ii) has been authenticated by, or concluded, registered or filed with a competent authority, and may be the subject of review and modification by a competent authority;”

¹⁷ See, for example, *Moore v Moore* [2007] EWCA Civ 361 in the context of the EC Regulation.

Further, *lex situs* (the law where the property is situated) will often govern the transfer and division of property. When dealing with interests in land, there will also be formal requirements in order to give effect to the transfer such as registration or other conveyancing requirements. Thus, there could be wide implications on areas outside the sphere of family law. Co-operation of the court where the landed property is situated will be required for the enforcement of judgments given by a court other than of the place where the same is situated. Given the complexity involved, DoJ takes the provisional view that orders for property adjustment should not be covered under the Proposed Arrangement. However, DoJ welcomes views in this regard.

(IV) INCLUSION OF POWER OF VARIATION OF MAINTENANCE ORDERS

30. DoJ wishes to seek views on whether a mechanism providing for a power of variation of maintenance orders may be introduced in the Proposed Arrangement. It is noted that sections 6 and 10 of the MOREO provide for the variation of maintenance orders, subject to the conditions therein. While DoJ considers that such a mechanism would enable parties to a maintenance order to seek speedy assistance from the court of the place where enforcement is sought, it would entail the courts of the HKSAR varying the orders made by Mainland courts and the relevant Mainland authorities, and *vice versa*, under mutually agreeable conditions. Given the complexity involved, DoJ takes the provisional view that the power to vary an order made by the original court should not be included under the Proposed Arrangement. However, DoJ welcomes views in this regard.

(V) WHETHER OTHER ORDERS SHOULD BE INCLUDED

31. DoJ also invites views on whether the Proposed Arrangement should cover other judicial decisions on matrimonial and related matters. These includes, among others, judicial decisions on :

- (i) disputes over gifts between engaged couples;
- (ii) pre-nuptial and post-nuptial agreements;

- (iii) matrimonial property disputes;
- (iv) financial disputes upon and post dissolution of marriage;
- (v) claims for damages (due to fault on the part of a party to the marriage);
- (vi) financial support for parents and siblings;
- (vii) disputes on property or maintenance of children arising from cohabitation;
- (viii) legal separation;
- (ix) nullity of marriage;
- (x) orders made under the Inheritance (Provision for Family and Dependents) Ordinance (Cap. 481);
- (xi) access to children;
- (xii) guardianship;
- (xiii) wardship;
- (xiv) declaration of parentage;
- (xv) adoption; and
- (xvi) household division and family property distribution.

32. We understand that while most of the above judicial decisions can be made under the laws of the Mainland, certain types of judicial decisions identified above do not exist under the law of the HKSAR. Our preference is to include in the Proposed Arrangement only those judicial decisions which exist under the law of the HKSAR and which are commonly sought in the family court. DoJ invites views on the particular types of judicial decisions that should be included in the Proposed Arrangement.

(VI) JURISDICTIONAL BASIS

33. Under the relevant Mainland laws, a party to the marriage who is a Chinese national or whose spouse is a Chinese national may apply to the court for recognition of a foreign divorce. The law however does not provide for the recognition of foreign divorces on the ground of habitual residence of either spouse in the place where the divorce was obtained which is generally the approach adopted in the HKSAR¹⁸ and

¹⁸ Section 56 of the MCO.

internationally¹⁹.

34. Taking into account the respective legal positions in the HKSAR and the Mainland, and subject to further views and suggestions, DoJ proposes two possible ways in which divorces granted by the courts in both jurisdictions and also divorces obtained through registration with the relevant Mainland administrative authorities shall be recognised in the HKSAR and the Mainland respectively under the Proposed Arrangement. The first of these approaches is to adopt the existing jurisdictional rules in the HKSAR²⁰ such that divorces obtained in one place would be recognised in the other if, at the date of institution of the relevant judicial proceedings or registration procedure in the place in which the divorce was obtained, either spouse was habitually resident in that place, or, in the case of the Mainland, a Chinese national or in the case of the HKSAR, a permanent resident of the HKSAR. Alternatively, it is suggested that the approach adopted in the 2006 Arrangement, which does not provide for any jurisdictional requirement concerning the nationality of the parties to the application for reciprocal recognition and enforcement, may be followed. There are views that the latter approach would facilitate recognition of orders made by courts of the two places, thereby maximising the number of persons who may benefit under the Proposed Arrangement²¹. DoJ will consider which of these two approaches is most appropriate and effective after considering the views received in this consultation.

(VII) LEVEL OF COURTS TO BE COVERED

35. DoJ suggests that the Proposed Arrangement will cover judgments of the District Court or above in the HKSAR, whereas in the Mainland, judgments given by Mainland courts covered under the 2006 Arrangement should be covered. These Mainland courts are: the Supreme People's Court, Higher People's Courts, Intermediate People's Courts

¹⁹ See, for example, Article 2 of the Hague Convention on the Recognition of Divorces and Legal Separations (1970).

²⁰ See footnotes 4 and 17.

²¹ On 30 June 2015, the Supreme People's Court promulgated two pieces of judicial interpretations concerning mutual recognition and enforcement of civil judgments and arbitral awards with Taiwan which provide, among others, relaxation of the relevant rules on jurisdictional requirements.

and designated Basic People's Courts authorised to exercise jurisdiction on civil and commercial cases of first instance involving foreign parties, or the HKSAR, the Macau SAR and Taiwan parties.

36. In addition, DoJ notes that in the Mainland, civil proceedings are generally administered by Basic People's Courts unless otherwise provided in the law. We further note that the Mainland laws make no specific provision in relation to the jurisdiction of Mainland courts over matrimonial cases involving parties of the HKSAR. Therefore, there are merits in including judgments on matrimonial and other matters made by the Basic People's Courts under the Proposed Arrangement.

(VIII) FINALITY

37. At common law, a judgment is only enforceable if it is final and conclusive. This means that the case cannot be reheard by the original trial court. However, in respect of orders for ancillary relief granted by the courts of the HKSAR, the court retains jurisdiction under the law to vary, discharge, suspend or revive an order for financial provision for a party to a marriage or the child of the family based on change of circumstances subsequent to the making of the order. This means that the notion of finality may not be appropriate in the context of ancillary relief orders.

38. In respect of judgments involving claims for spousal and child maintenance in the Mainland, it is noted that under the trial supervision procedures, a case may be retried by the same court that made the original judgment although the original judgment will remain legally enforceable. This raises issues as to whether a Mainland matrimonial judgment on the matter may be considered as final and conclusive under the common law rules applied by the courts of the HKSAR.

39. In the international context, it has long been recognised that there is no uniform meaning of the notion of "finality" in the civil and common law jurisdictions. Moreover, given the nature of maintenance orders mentioned in paragraph 37 above, reference may be made to the 2007 Convention on whether a maintenance arrangement made in a

Contracting State shall be entitled to recognition and enforcement in another Contracting State. This is determined by considering whether the maintenance arrangement has effect and is enforceable in the State of Origin under the 2007 Convention, without any requirement on finality. Given the difference between the legal systems of the HKSAR and the Mainland, it is proposed that reference may be made to international practice so as to ensure that the Proposed Arrangement to be reached will be mutually satisfactory.

40. With regards to the recognition of divorce decrees, DoJ proposes that recognition should be limited to decrees absolute granted by the courts of the HKSAR since a decree *nisi* may be rescinded by order of the court. As for the Mainland, since the Mainland laws provide that the parties to a marriage may not apply for retrial with respect to a legally effective judgment or conciliation statement on dissolution of marriage, subject to the considerations in paragraph 28 above, we propose that both court orders for divorce as well as divorce certificates issued under the registration procedure by the relevant Mainland authority would be covered.

IMPLEMENTATION

41. In the case for the HKSAR, implementing legislation will be required to implement the Proposed Arrangement. This would require amendments to individual ordinances and regulations or the enactment of new legislation. The Proposed Arrangement will only be finalised after both jurisdictions have completed the relevant legal requirements and necessary procedure for its implementation.

SUMMARY OF ISSUES

42. In summary, DoJ wishes to invite your views on the following issues:-

- (a) principal types of judgments (including divorce, maintenance and custody orders) to be covered in the Proposed Arrangement;
- (b) whether to include “divorce certificate” obtained through the

- registration procedure in the Mainland in the Proposed Arrangement;
- (c) whether to include orders for property adjustment;
 - (d) whether to include power of variation of maintenance orders by the courts in the place where the orders are sought to be enforced;
 - (e) whether other orders should be included in the Proposed Arrangement;
 - (f) jurisdictional basis of the parties to an application for REJ;
 - (g) level of courts to be covered in the Proposed Arrangement; and
 - (h) finality of judgments.

43. Please send your views in writing to the China Law Unit of the Legal Policy Division of DoJ on or before 15 August 2016 –

Address: China Law Unit,
Legal Policy Division,
Department of Justice,
5/F, East Wing, Justice Place,
18 Lower Albert Road,
Central,
Hong Kong SAR

Fax number: 3918 4799

E-mail address: matrimonial@doj.gov.hk

Website: www.doj.gov.hk

44. The names and views of individuals and organisations which send in submissions in response to this consultation document may be published, in whole or in part, for public viewing after conclusion of this consultation exercise. The Government may use, adopt or develop any views put forward without seeking permission or providing acknowledgement of the party submitting the views. The Government may, either in discussion with others or in any subsequent report, whether privately or publicly, attribute comments submitted in response to the consultation document. If you do wish to remain anonymous or keep your comments submitted in relation to all or part of a submission

confidential, please state so when making your submission.

**Legal Policy Division
Department of Justice
June 2016**

**Current Legal Regime for Recognition and Enforcement
in the Hong Kong SAR of Matrimonial and Related Orders
Obtained Outside the Hong Kong SAR**

Divorces

1. Section 55(1) of the Matrimonial Causes Ordinance (Cap. 179) (“MCO”) provides that sections 56 to 58 shall have effect, subject to section 61, as respects the recognition in the HKSAR of the validity of overseas divorces and legal separations. “Overseas divorces” is defined in section 55(2) to mean divorces which (a) have been obtained by means of judicial or other proceedings in any country outside the HKSAR; and (b) are effective under the law of that country. The grounds of recognition as set out in section 56 are that at the date of the institution of the proceedings in the country in which it was obtained (a) either spouse was habitually resident in that country or (b) either spouse was a national of that country. Two exceptions from recognition are set out in section 61²²: the exception provided in subsection (1) being mandatory and the exception provided in subsection (2) being discretionary.

²² Section 61 of the MCO provides :

" 61 (1) The validity of a divorce or legal separation obtained outside Hong Kong shall not be recognized in Hong Kong if it was granted or obtained at a time when, according to the law of Hong Kong (including its rules of private international law and the provisions of this Part), there was no subsisting marriage between the parties.

(2) Subject to subsection (1), recognition by virtue of this Part or of any rule preserved by section 59 of the validity of a divorce or legal separation obtained outside Hong Kong may be refused if, and only if-

(a) it was obtained by one spouse-

(i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken; or

(ii) without the other spouse having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given; or

(b) its recognition would manifestly be contrary to public policy.

(3) Nothing in this Part shall be construed as requiring the recognition of any findings of fault made in any proceedings for divorce or separation or of any maintenance, custody or other ancillary order made in any such proceedings. "

2. It has been held by the Court of Final Appeal in *ML v YJ* (2010) 13 HKCFAR 794 that while any part of the Mainland cannot be regarded as another “country” as referred to in section 55(2), the court should adopt a purposive construction of the relevant provisions of the MCO and it is clear that section 55(2) should be wide enough to cover Mainland divorces. The court in *ML v YJ*, by a majority, held that a divorce granted by the Shenzhen Intermediate People’s Court should be recognised under section 56 of the MCO. The court pointed out that it is plain from the scheme of Part IX of the MCO (which is underpinned by the principle of comity) that the residual discretion to refuse recognition where “recognition would be manifestly contrary to public policy” under section 61(2) (b) is to be sparingly exercised.

Maintenance Orders

Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap. 188)

3. The Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap. 188) (“MOREO”) contains provisions for facilitating both the recovery of maintenance by and recovery from persons in the HKSAR and also recovery by and from other persons in reciprocating countries.

4. Under section 4(1) of the MOREO, where the payer under a maintenance order²³ made by a court in the HKSAR is residing in a reciprocating country, the payee under the order may apply for the order to be sent to that reciprocating country for enforcement. Alternatively, under section 7(1), a maintenance order made in a reciprocating country may be registered in the HKSAR.

5. A “reciprocating country” is designated as such under section 3 of the MOREO by the Chief Executive. The Schedule to Maintenance Orders (Reciprocal Enforcement) (Designation of Reciprocating

²³ A “maintenance order” is defined under section 2 of MOREO. It includes, amongst others, an order which provides for the periodical payment of sums of money towards the maintenance of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain and includes a maintenance order which has been varied.

Countries) Order (Cap. 188B) sets out the list of reciprocating countries which include the United Kingdom, Australia, New Zealand, Bermuda, Brunei, Sri Lanka, Singapore and provinces of Canada. The Mainland is not designated as a “reciprocating country”.

6. From 2000 to 2012, there were a total of eight outgoing cases to Australia, Singapore and the UK, and sixty incoming cases from Canada, Singapore and the UK under the MOREO. The low numbers of cases may be due to the limited number of jurisdictions covered by the MOREO and the inherent limitations of the current mechanism²⁴.

Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319)

7. The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) (“FJREO”) provides that a civil judgment given by certain foreign countries may be enforced in the HKSAR provided that such countries will afford reciprocal treatment to judgments given in the HKSAR.

8. Under section 2 of the FJREO, “judgment” is defined to include judgments or orders given in any civil proceedings and under section 3, the Ordinance applies to foreign judgments which are, among others, final and conclusive as between the parties and there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty²⁵.

9. Countries which are listed in the First and Second Schedules to Foreign Judgments (Reciprocal Enforcement) Order (Cap 319A) include parts of the Commonwealth and certain European countries. The

²⁴ *Enforcing Foreign Maintenance Decisions in the Hong Kong Special Administrative Region of the People’s Republic of China and the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance from an Asian Perspective* in Paul Beaumont, Burkhard Hess, Lara Walker and Stefanie Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide*, (Hart Publishing, 2014) p.81.

²⁵ See, however, the case of *Lai Ling Ling v Chun Foo Keung* (HCMP 263/2003) which relates to the registration of an order made by a Singaporean court for ancillary relief in divorce proceedings in Singapore. Thus, it appears that a foreign maintenance order may also be registered in Hong Kong provided that the relevant requirements under the FJREO can be satisfied.

Mainland is not one of them.

10. According to the information provided by the Judiciary, from 2009 to 2014, there were a total of forty-five approved cases relating to Australia, France, Germany, Italy, Malaysia and Singapore under the FJREO.

Custody Orders

11. The Hague Convention on the Civil Aspects of International Child Abduction (1980) (“Abduction Convention”) seeks to protect children from the harmful effects of cross-border abductions (and wrongful retentions) by providing a procedure designed to bring about the prompt return of such children to the State of their habitual residence. The Child Abduction and Custody Ordinance (Cap. 512) was enacted in 1997 to implement the Abduction Convention in the HKSAR.

12. Article 8 of the Abduction Convention provides that any person claiming that a child has been removed or retained in breach of custodial rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child. Save in exceptional circumstances, the child will be returned to his or her habitual place of residence.

13. The Secretary for Justice is designated as the Central Authority in the HKSAR and will assist in securing the return of a child under 16 years of age if: (i) his or her habitual residence was the HKSAR but has been wrongfully removed to or retained in a Contracting State or territory having a Convention relationship with the HKSAR; or (ii) his or her habitual residence was a Contracting State or territory having a Convention relationship with the HKSAR but has been removed to or retained in the HKSAR.

14. The Secretary for Justice may apply to the Court of First Instance to declare that there has been wrongful removal or retention of a

child on the ground that the rights of custody granted by a foreign jurisdiction have been breached. The court shall then consider whether to make an order for the return of the child under the Abduction Convention.

15. As at 16 December 2015, the number of Contracting States to the Abduction Convention is 93. The Abduction Convention is only applicable to the HKSAR (and the Macau SAR) but is not applicable to the Mainland. Since the Mainland and the HKSAR are parts of the same country, the Abduction Convention will in any event not be applicable as between the HKSAR and the Mainland²⁶. If a child has been removed to and retained in the Mainland in breach of the custody order granted by a court of the HKSAR, it is unlikely that the affected party could seek assistance from the Mainland court for the return of the child by relying on the Abduction Convention even if the Convention has been applied to the Mainland.

²⁶ Article 33 of the Abduction Convention provides that “[a] State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so”.