

**For discussion
on 27 June 2016**

**Legislative Council Panel
on Administration of Justice and Legal Services**

**Proposed Arrangement with the Mainland on Reciprocal Recognition and
Enforcement of Judgments on Matrimonial and Related Matters**

PURPOSE

This paper seeks to brief Members on the consultation concerning a possible arrangement with the Mainland on reciprocal recognition and enforcement of judgments on matrimonial and related matters (“Proposed Arrangement”) and to seek Members’ views on the issues raised in the consultation.

BACKGROUND

2. The Government first briefed the Panel on the need to enter into such an Proposed Arrangement on 23 May 2011. The Panel concluded that the Government should work out the Proposed Arrangement with the Mainland. Thereafter, the two sides have held several rounds of working meetings during which issues arising out of the differences in the legal frameworks within which the two legal systems operate have been discussed thoroughly. The Government is now ready to consult Members on matters concerning the Proposed Arrangement.

THE PROPOSED ARRANGEMENT

3. There has been calls from time to time in the community to widen the scope of the current regime on reciprocal enforcement of judgments (“REJ”) between the Mainland and the Hong Kong SAR through the conclusion of a comprehensive framework for REJ arrangement, covering judgments relating to a wide range of subject matters including, but not limited to, matrimonial and related matters.

4. Nevertheless, in view of the pressing need in the community to pursue a solution to address REJ in the matrimonial context arising from the increasing number of cross-boundary marriages¹, the Government 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.

(a) *Types of judgments to be covered in the Arrangement*

5. The Government proposes that similar to the bilateral arrangement between the Mainland and the Hong Kong SAR on reciprocal recognition and enforcement of civil judgments concluded in 2006 (“2006 Arrangement”), the Proposed Arrangement will cover such issues as basic requirements for REJ, grounds for refusal, application procedures and other safeguards. The Government’s preliminary proposals for the Proposed Arrangement are summarized in the following paragraphs.

(i) Divorce decrees

6. Under Part IX of the Matrimonial Causes Ordinance (Cap. 179) (“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 Hong Kong SAR provided that the relevant statutory requirements are met. As far as the Mainland courts are concerned, the Zhuhai Intermediate People’s Court has recognised a divorce decree pronounced by a court of the Hong Kong SAR on the ground that the recognition would not contradict basic legal principles in the Mainland, nor violate state sovereignty, security and public interest in society².

7. It remains, however, uncertain as to whether all the courts in the Mainland will adopt the same approach as the Zhuhai Intermediate People’s Court. The Government considers that the 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 Hong Kong SAR are expected to be recognised

¹ For instance, of the total marriages registered in the Hong Kong SAR during the period between 2009 and 2014, the percentages of cross-boundary marriages has increased from 32% to 37%. Further, the percentage of divorce cases filed in the Family Court of the Hong Kong SAR from 2010 to 2014 in respect of marriages which took place in the Mainland ranged between 20% to 30%.

² 凌某申請認可香港法院判決案, (2011) 珠中法民確字第 4 號.

and enforced in the Mainland under the Proposed Arrangement, and *vice versa*.

(ii) Maintenance orders

8. Under the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap. 188) (“MOREO”) and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), matrimonial orders made in other jurisdictions may be enforced in the Hong Kong SAR provided certain conditions are met. However, neither of these two Ordinances is applicable to matrimonial orders made in the Mainland. Therefore, a payee under a maintenance order cannot rely on these two Ordinances to seek enforcement of maintenance orders made by the Mainland courts in the Hong Kong SAR.

9. 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 provisions³. Applying the relevant provisions, the Zhuhai Intermediate People’s Court, as referred to in paragraph 6 above, held that there is no legal basis for recognising an order for maintenance and division of assets made by a court of the Hong Kong SAR after the grant of a decree absolute given the lack of an arrangement on mutual recognition of orders on custody, maintenance and asset division⁴.

10. The Government considers that the proposal to include reciprocal recognition and enforcement of maintenance orders could help fill a lacuna in the law, enable the payees of a maintenance order of either place to seek enforcement in court more expeditiously and afford better protection to them. The Government proposes that “maintenance orders” should include orders for periodical payment and lump sum payment for spouse or children born in or out of wedlock.

(iii) Custody orders to facilitate the return of children in parental abduction cases

11. The Government has conducted some preliminary discussions with the Mainland on the feasibility of including in the Proposed Arrangement custody orders relating to children to facilitate the return of a child in parental

³ 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.

⁴ See footnote 1 above.

abduction cases and how this may be implemented in practice. At common law, there is no rule regulating the recognition and enforcement of foreign custody orders. Nor is there any rule under the Hong Kong SAR's statutory regime 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.

12. 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 the "custodial parent" (直接撫養子女的父或母) has a duty to facilitate access to the child by the "non-custodial parent" (不直接撫養子女的父或母), 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 access⁵. Given both divorced parents in the Mainland would still enjoy some form of 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.

13. Although a proposed inclusion of mutual recognition and enforcement of custody orders under the Proposed Arrangement may be viewed as a departure from the current legal regime in both jurisdictions, the Government considers that this issue is worth further exploration with the Mainland if it is considered that it is in the public interest to procure the prompt return of children having been wrongfully removed elsewhere to their place of habitual residence.

(b) *Inclusion of "divorce certificate" obtained in the Mainland*

14. The Government further proposes that apart from divorce orders obtained from 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 People's Republic of China (PRC).

⁵ 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.

15. We understand that 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 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 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.

16. On the other hand, section 55 of the MCO provides that for the purpose of recognition in the Hong Kong SAR of the validity of overseas divorces, the overseas divorces should have been obtained by means of judicial or other proceedings in any place outside Hong Kong, 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 Hong Kong⁶.

17. 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 divorces⁷.

18. In this regard, the Government 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 in the same manner as those granted by the Mainland courts, and hence achieving

⁶ 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.

⁷ 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>.

legal certainty and equal treatment to both types of divorces which have the same legal effect in the Mainland. Moreover, this will also maximise the number of persons who may benefit under the Proposed Arrangement.

19. Since a divorce certificate obtained through the registration procedure is not as a matter of law a “judicial decision” in the Mainland, it may be necessary to incorporate a specific provision in the definition of a “judgment” under the Proposed Arrangement to cater for them. In drawing up an appropriate definition to deem a divorce certificate as “judgment”, reference may be made to other international precedents. For example, “maintenance arrangement”, being a non-judicial order or agreement, may be enforced under the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007) (“the 2007 Convention”)⁸. 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.

(c) *Inclusion of orders for property adjustment*

20. The Government notes that overseas jurisprudence has acknowledged that “maintenance” is now regarded as covering property adjustment if the court’s purpose in making the order was to provide a home for the applicant in the nature of maintenance⁹.

21. The Government appreciates that an expansion of the coverage of the Proposed Arrangement to cover these orders would enhance its effectiveness. Nevertheless, it is important to note, on the other hand, that the court of the place where the land is situated will often have exclusive jurisdiction. 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

⁸ 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;”

⁹ See, for example, *Moore v Moore* [2007] EWCA Civ 361 in the context of the European Convention Regulation.

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 landed property is situated. Given the complexity involved, the Government takes the provisional view that orders for property adjustment should not be covered under the Proposed Arrangement.

(d) *Inclusion of power of variation of maintenance orders*

22. We need to consider whether a mechanism providing for a power of variation of maintenance orders should 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 the Government 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 Hong Kong SAR varying the orders made by Mainland courts and the relevant Mainland authorities, and *vice versa*, under mutually agreeable conditions. Given the complexity involved, the Government takes the provisional view that the power to vary an order made by the original court should not be included under the Proposed Arrangement.

(e) *Whether other orders should be included*

23. We have reviewed whether the Proposed Arrangement should cover other judicial decisions on matrimonial and related matters such as legal separation, nullity of marriage and orders made under the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481). The Government's proposal is to include in the Proposed Arrangement only those judicial decisions which exist under Hong Kong law and which are commonly sought in the Family Court.

(f) *Jurisdictional basis*

24. 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 Hong Kong SAR¹⁰ and internationally¹¹.

25. Taking into account the respective legal positions in the Hong Kong SAR and the Mainland, and subject to further views and suggestions, the Government 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 Hong Kong SAR and the Mainland respectively under the Proposed Arrangement.

26. The first of these approaches is to adopt the existing jurisdictional rules in the Hong Kong SAR¹² 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 Hong Kong SAR, a Hong Kong SAR permanent resident.

27. The second approach is the one 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 this 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 Arrangement¹³.

28. The Government will consider which of these two approaches is most appropriate and effective after considering the views received in the consultation.

¹⁰ Section 56 of the MCO.

¹¹ See, for example, Article 2 of the Hague Convention on the Recognition of Divorces and Legal Separations (1970).

¹² See section 56 of the MCO and *Moore v Moore* [2007] EWCA Civ 361.

¹³ 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.

(g) *Level of courts to be covered*

29. The Government suggests that the Proposed Arrangement should cover judgments of the District Court or above in the Hong Kong SAR.

30. The Government 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 the Hong Kong SAR parties. Therefore, there are merits in including judgments on matrimonial and other matters made by Basic People's Courts under the Proposed Arrangement. Hence, the Government proposes that judgments given by the Supreme People's Court, Higher People's Courts, Intermediate People's Courts, Basic People's Courts and specialised Courts in the Mainland should be covered.

(h) *Finality*

31. At common law, a judgment is only enforceable if it is final and conclusive. This means that the case to which the judgment relates cannot be reheard by the original trial court. However, in respect of orders for ancillary relief granted in the Hong Kong SAR, the very court having made such orders continues to retain 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 relevant order. This means that the notion of finality may not be appropriate in the context of reciprocal enforcement of ancillary relief orders, or at least is an issue which needs to be addressed.

32. 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 Hong Kong courts.

33. In the international context, it has long been recognised that there is

no uniform meaning of the notion of “finality” in civil and common law jurisdictions. Moreover, given the nature of maintenance orders mentioned in paragraph 31 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 Hong Kong SAR and the Mainland, the Government proposes that reference may be made to international practice to ensure that the Proposed Arrangement to be reached will be mutually satisfactory.

34. With regard to the recognition of divorce decrees, the Government proposes that recognition should be limited to decrees absolute granted by the courts of the Hong Kong SAR since a decree *nisi* may be rescinded by a subsequent 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 19 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.

ADVICE SOUGHT

35. Members are invited to give their views and support to the above proposals.

36. In view of the pressing need in society for a speedy and cost effective solution to address REJ in the matrimonial context, the Government intends to reach agreement on the Proposed Arrangement with the Mainland authorities as soon as practicable. The Government will at the same time publish a consultation paper to seek the views of the legal community, relevant stakeholders and other interested parties on the Proposed Arrangement. We will further consult Members after we have considered the views received during the consultation and before we finalize our recommendations.

37. The Proposed Arrangement will only be finalized and take effect after both jurisdictions have completed the relevant legal requirements and necessary

procedures for its implementation.

Department of Justice
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