

HONG KONG BAR ASSOCIATION
COMMITTEE ON FAMILY LAW

OBSERVATIONS ON
THE MAINLAND JUDGMENTS IN MATRIMONIAL AND FAMILY CASES
(RECIPROCAL RECOGNITION AND ENFORCEMENT) BILL
and RULES

INTRODUCTION

1. The Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region was signed on 20 June 2017. (“the Arrangement”) The bilateral Arrangement was aimed at addressing the increasing number of cross-boundary marriages and related matrimonial and family matters: at present there are no express provisions for the reciprocal recognition and enforcement of such Judgments.
2. Public consultation was launched on 8 February 2019, seeking views on the draft Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Bill and Rules (“Draft Bill” and “Draft Rules”), introduced with a view to implementing the Arrangement in Hong Kong.
3. The Administration has stated “*the Arrangement will be implemented in the Mainland by way of judicial interpretation and in Hong Kong by way of legislation.*”¹
4. The draft Bill applies to the registration of inward bound requests ie legally effective Mainland Judgments in respect of specified orders, namely (a) status orders ie the divorce; (b) care-related orders; and (c) maintenance-related orders.

¹ Para 4, Consultation Paper, February 2019

5. As with Hong Kong petitions for divorce, the application for registration of the Mainland Judgment is made in the District Court and the application can be transferred to the Court of First Instance.
6. Upon an application for registration, which may be ex parte, the Hong Kong Court “*must*” order a stay of pending Hong Kong proceedings. The stay remains until the adjudicating court makes an order on the application of a party for resumption or termination.
7. The Hong Kong Court may register the Mainland Judgment. The other party may apply to set aside registration on specified grounds, including the public policy of Hong Kong, which in the case of a person under the age of 18, expressly requires the registering court to take into account the best interests of that person.
8. However, the application to set aside the recognition of a Mainland divorce certificate does not include express reference to the best interests of a child.
9. Once an application has been made to register a Mainland Judgment, and even if such registration is still pending, a party is prohibited from bringing a Hong Kong proceedings relating to the “*same cause of action*”, save under Part IIA (dealing with financial relief in Hong Kong after a divorce etc outside Hong Kong); or where the registration has been set aside.
10. The Committee on Family Law of the Hong Kong Bar Association (“**HKBA**”) has reviewed the Draft Bill and Draft Rules. HKBA confirms that in principle the reciprocal recognition and enforcement of Family and Matrimonial judgments is supported.
11. However, there is some concern because to date, the provisions for reciprocal implementation of the Arrangement on the Mainland have not been disclosed and

it is not clear whether and if so to what extent the reciprocal arrangements will mirror the binding legislative provisions in Hong Kong, as proposed in the draft Bill and Rules, some of which go beyond the provisions of the Arrangement.

12. The approach proposed to be adopted in Hong Kong is contrasted with that of the Child Abduction and Custody Ordinance, Cap 512, which gives effect to the Convention on the Civil Aspects of International Child Abduction² by adopting the Convention verbatim; and then providing for the mechanism to achieve the objective³ and giving jurisdiction to the Hong Kong Court to hear such applications.
13. The HKBA takes the view that, in similar vein to the incorporation of the Hague Convention on the Civil Aspects of International Child Abduction into our local laws by the enactment of Cap. 512, the Arrangement for reciprocal recognition and enforcement of Mainland judgments could be incorporated into the domestic legislation such that the Hong Kong Courts is given power to implement the Arrangement, as has been done as regards Cap. 512. This necessitates a substantial re-drafting of the Bill but is the more desirable option, which the HKBA will recommend.
14. The draft Bill deals only with inward bound requests in respect of Mainland Orders. There is no provision in the Bill dealing with outward-bound requests ie in relation to Hong Kong Orders, whether as to substance or procedure. It is potentially far-reaching as it operates to bar not only any pending but any future Hong Kong proceedings on the same “cause of action”.
15. In this regard, the Bill is contrasted with the provisions of the Maintenance Orders (Reciprocal Enforcement) Ordinance Cap 188 which sets out the procedure for

² The Mainland is not a Contracting State

³ For example the setting up of a Central Authority in Hong Kong to deal with inward and outward bound applications

recognition and enforcement of Hong Kong orders⁴ whereby documents are sent by “*the Chief Executive with a view to their being transmitted to the Chief Executive to the responsible authority in the reciprocating country in which the payer is residing...*”

16. Further, HKBA is concerned because the effect of the draft Bill and draft Rules leaves the Hong Kong Court with little, if any, discretion, in circumstances where a mandatory stay on Hong Kong proceedings is imposed upon registration, potentially without hearing from the other party.
17. The specific areas that are of concern include the following, which are examined in greater detail below, with a Summary of HKBA’s views at the end of this Paper:
 - A. The 2-year deadline for registration of Mainland judgment in Hong Kong (cl.9);
 - B. The lack of discretion of the Hong Kong Court as to whether to order a stay of Hong Kong proceedings (cl.27(3));
 - C. The lack of power of the Hong Kong Court to order resumption or termination of Hong Kong proceedings on its own motion, as distinct from on an application of a party (cl.27(4));
 - D. The lack of power of the Hong Kong Court to hear any subsequent proceedings in the same “cause of action” or even to vary a registered Mainland judgment (cl.28);

⁴ Applying in a number of jurisdictions but other than the Mainland

- E. The use of the expression “*cause of action*” rather than “*matrimonial cause or proceedings*” and “*family proceedings*” per Practice Direction 15.12 (various clauses);
- F. The inclusion of orders in respect of “*a child, whether or not under the age of 18 years, who cannot live independently*” which is not consistent with the Hong Kong definition of a child (Schedule 2 Part 1 item (2) and Part 3 item (2));
- G. The omission of the best interests of a child under the “*public policy*” ground to set aside a recognition of a Mainland divorce certificate (cl.34); and
- H. The failure to make the Rules of the High Court (Cap.4A) (“**RHC**”) applicable to proceedings not only in the Court of First Instance but also those in the District Court / Family Court (r.3).

A. The 2-Year Deadline

A1. The relevant provisions

18. Clause 9 provides:

(1) *A registration application must not seek to register a care-related order if –*

(a) there has been non-compliance with the order; but

(b) the application is made 2 years after the date on which the non-compliance first occurred.

(2) [re maintenance-related orders other than periodical payments] ... *only if*

(a) the following conditions are satisfied –

... (iii) the application is made within 2 years after that date or the last day of that period; or

(3) [re maintenance-related orders requiring periodical payments or acts]...
only if...

*(b) the due date for payment or act falls on a day within 2 years
before the date of the application.*

19. Clause 9 of the Draft Bill therefore seeks to introduce hard deadlines of 2 years with no apparent discretion to extend or any express exceptions.

20. This is so despite the fact that there are no express time limits provided in the Arrangement.

21. Article 7 of the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region simply provides that:

“The time limit, procedures and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place.”

22. The imposition of a time limit of 2 years might be an attempt by the Administration to mirror the time limit for execution (or enforcement) under the article 215 of the Civil Procedure Law of the People’s Republic of China, which provides:

“Article 215. The time limit for submission of an application for execution shall be two years. The termination or suspension of the time limit for submission of an application for execution shall be governed by the provisions of law on the termination or suspension of the limitation of action.”

The time limit prescribed in the preceding paragraph shall be calculated from the last day of the period specified in a legal document for performance of the execution. If a legal document specifies performance of the execution in stages, the time limit shall be calculated from the last day

of the period specified for each stage of performance. If no period of performance is specified in a legal document, the time limit shall be calculated from the date when the legal document takes effect.” (emphasis supplied)

23. If the deadline has been inserted in an attempt to delineate what is a legally effective Mainland Judgment, this would no longer be correct should the limitation period be revised in the Mainland. In this regard, it is understood that consideration is being given to extending the 2-year period on the Mainland to 3 years.
24. Further, it is noted that whereas art. 215 reserves a power to terminate or suspend the time limit, cl.9 of the Draft Bill does not. Contrast s.12 of the Matrimonial Proceedings and Property Ordinance, Cap 192, which expressly provides for the Hong Kong Court to grant leave to apply for arrears not enforced during the 12 months.

A2. The Potential Effect of the 2-year Deadline

25. The hard 2-year deadline is not justifiable, whether on the basis of the Arrangement or at all and could wreak injustice.
26. Take for example the situation where there is a care-related order in respect of a child in the Mainland, and there has been ongoing non-compliance for more than 2 years (*e.g.* denial of access, denial of electronic access, failure to provide access to the child’s education documents etc). The child then relocates to Hong Kong. Prior to the child relocating to Hong Kong, there was really no reason for registering the Mainland order in Hong Kong – at that time the child was living in Mainland and may not have had any presence in Hong Kong. It is only upon the child relocating to Hong Kong that there is a reason to register the Mainland order in Hong Kong – in order to enforce it here in Hong Kong. However, the fact that

there has been non-compliance for more than 2 years would mean that the Mainland order could not now be registered in Hong Kong.

27. Take another example: the situation where there has been a Mainland maintenance-related order which has been breached in the Mainland by the defaulting party who has gone into hiding but re-emerges in Hong Kong after 2 years. Likewise, prior to that party emerging in Hong Kong, there would not have been a reason to register the Mainland order in Hong Kong but now that there is such a reason, a hard 2-year deadline renders such registration not possible.
28. It is HKBA's view that in the absence of a requirement of a time limit under the Arrangement, it is inappropriate to impose a deadline for recognition and enforcement. This is especially so in cases relating to children, for whom there might have been included a range of care arrangements that are ongoing, with varying types of breaches, some more serious than others.
29. Further, or in the alternative, HKBA is of the view that the Hong Kong Court should be provided with power to extend or grant exemption from the 2-year deadline. This also appears to be consistent with the discretion to "*terminate or suspend*" the time limit for execution provided to the Mainland courts under art.215 of the Civil Procedure Law of the PRC; and the discretion to grant leave pursuant to s.12, MPPO Cap 192.
30. The Bill / Rules could provide for non-exhaustive guidelines of matters to take into account; and/or the discretion can be developed by way of caselaw as and when such applications arise for consideration.
31. If the concern is as to certainty of what constitutes an effective Mainland Judgment, this can be dealt with by case law in Hong Kong and/or Practice Guidelines, which can easily be revised should the law on the Mainland change.

B. Discretion to Order Stay of Hong Kong Proceedings

B1. The relevant provisions

32. Article 16 of the Arrangement provides:

“If in the course of adjudicating a civil matrimonial and family case, the court of one place receives an application brought by a party for recognition and enforcement of a judgment made by a court of the other place in respect of the same dispute, the application shall be accepted, and the action shall be suspended thereafter. The action shall be terminated or resumed depending on the ruling or order made in respect of the application for recognition and enforcement.” (emphasis supplied)

33. Clause 27(3) of the Draft Bill provides that

“On receiving the notification [of a registration application], the adjudicating court [ie the Hong Kong Court] must order that the proceedings in relation to the cause of action before it be stayed.” (emphasis supplied)

34. Rule 4(1) of the Draft Rules provides that “A registration application may be made *ex parte* to the District Court”.

35. Rule 4(2) provides that “*the District Court may direct the registration application be made by way of originating summons.*”

36. The default position is an *ex parte* application for registration. Thus, without hearing from the other party, the Hong Kong Court is powerless to prevent the stay of pending Hong Kong proceedings, even if the Court were to consider that an *inter partes* hearing was necessary and to make an order to that effect.

B2. The Potential Effect of the Stay Provision

37. The combined effect of a mandatory stay on an *ex parte* application is draconian. A stay could take effect without hearing from Party B, with no discretion for the Hong Kong Court to do otherwise or control the period of the stay.
38. This is especially so in respect of claims under Part IIA of the MPPO, which had been introduced following the Court of Final Appeal's decision in **ML v YJ** (2010) 13 HKCFAR 794. Although Part IIA claims are expressly exempt from the restriction against bringing a Hong Kong proceedings under cl.28(2), the current effect of the Draft Bill would be to stay and thereby shut out such pending claims despite the party having already obtained leave under s.29AC MPPO by satisfying the Court that "*there is substantial ground for the making of an order for financial relief*".
39. It would also prevent the Hong Kong Court from giving interim relief such as under s.29AD (interim orders for maintenance) and s.29AJ (avoidance of transactions intended to defeat applications for financial relief) MPPO.
40. HKBA is of the view that the Hong Kong Court should retain discretion over whether a stay of Hong Kong proceedings should be ordered and if so, in what form and for how long. The starting point is that the word "*shall*" as provided under the Arrangement should be adopted instead of using the word "*must*" under the Draft Bill.
41. HKBA proposes that
 - a. the draft Rules be revised so that the default position should be an Originating Summons ie an inter partes application, save that the Court has power to entertain an ex parte application upon the Applicant justifying an order being made in the absence of the other party; and

b. cl.27(3) be amended to read as follows:-

“On receiving the notification, the adjudicating court ~~must~~ shall, unless it otherwise directs, at any stage, order that proceedings in relation to the cause of action before it be stayed.”

C. Power to Resume / Terminate HK Proceedings on the Court’s Own Motion

42. Clause 27(4) of the Draft Bill provides that

“When the order [ie the mandatory order for stay, made upon notification of the application for registration] is made, the proceedings in relation to the cause of action are stayed until the adjudicating court, on the application of a party to the proceedings, orders that the proceedings (or any part of them) be resumed or terminated.”

43. It is noted that the Hong Kong Court is powerless to order the resumption or termination of the mandatory stay, potentially made without hearing the other party, even if the Court were of the view that the stay was wrongly imposed. This ties the Court’s hands even in cases for example where the party who could (and should) have applied for the proceedings to resume is a Litigant in Person.

44. HKBA is of the view that the Court should be given power to resume or terminate Hong Kong proceedings on its own motion.

45. HKBA proposes that cl.27(4) be amended to read as follows:-

“When the order is made, the proceedings in relation to the cause of action are stayed until the adjudicating court, on the application of a party to the proceedings or by the Court on its own motion, orders that the proceedings (or any part of them) be resumed or terminated.”

D. Power to Vary a Registered Mainland Judgment

D1. The relevant provisions

46. Art.17 provides:

“In the course of examining an application for recognition and enforcement of a judgment, a party brings another action in respect of the same dispute, the action should not be accepted, and any such action shall be dismissed.” (emphasis supplied)

47. Cl. 28(1) provides:

“Subject to subsections (2) and (3)⁵, a party to a matrimonial or family case in relation to which a Mainland judgment was given must not bring in a court in Hong Kong proceedings in relation to the same cause of action in respect of which the judgment was given if –

(a) a registration in relation to any specified order in the judgment is pending; or

(b) a specified order or orders in the judgment is registered under section 11(1).” (emphasis supplied)

D2. The potential effect of cl.28

48. The party (who might not have been heard as the application is by default ex parte) could be debarred from bringing Hong Kong proceedings⁶ on the same “*cause of action*” even where the registration is still pending.

49. Is the term “*dispute*” used in the Arrangement synonymous with “*cause of action*” as used in cl.28. Does “*same cause of action*” encompass all further proceedings arising in respect of the breakdown of the marriage or the children of the family, as distinct from the only “*dispute*” in question?

⁵ the 2 exceptions are Part IIA and where the registration has been set aside

⁶ Save under Part IIA of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (“**MPPO**”) – cl.28(2)

50. Family proceedings involve a variety of proceedings, arising over a period of time, from a variety of disputes. For example, a child's needs may change depending on his age or the different costs of living upon relocation from the Mainland to Hong Kong. Decisions on schooling, education, medical care etc might have to be made or revised on an on-going basis in circumstances that were not foreseen by the Mainland Court.
51. Does cl.28 preclude the Hong Kong Court from making care orders years later, for a child who is now present in Hong Kong, arising out of a new "*dispute*"?⁷
52. Is the Hong Kong Court precluded even in cases where urgent intervention is required?
53. Further, does cl.28 preclude the Hong Kong Court from making orders to vary the terms of a registered Mainland judgment, even where there has been a change of circumstances?⁸
54. HKBA is of the view that it would better serve the interests of justice
- a. to retain the word "*dispute*" used in the Arrangement, rather than "*cause of action*", leaving the Hong Kong Court to adjudicate on whether this is the same "*dispute*" for which the Hong Kong Court should be debarred; and
 - b. in any event, to reserve to the Hong Kong Court the express power to vary a registered order, particularly in light of wide and long-lasting ramifications on family / matrimonial orders and the change of circumstances that might occur.

⁷ habitual residence in Hong Kong is the basis for jurisdiction but mere presence might be sufficient

⁸ the power to vary Hong Kong maintenance orders is found under s.11, MPPO, Cap 192

55. HKBA proposes that a new cl.28(4) be added to read as follows:-

“(4) This section is without prejudice to the Hong Kong Court’s power to vary an order as if made by a Hong Kong Court.”

E. “Cause of Action”

56. In various clauses elsewhere in the draft Bill, the term “*cause of action*” is used. In contrast with other civil claims, the term “*cause of action*” is not appropriate to family proceedings because generally the parties’ rights do not flow from pleaded facts. Parties need not plead or prove facts⁹ to invoke the Court’s wide discretionary power to grant ancillary relief or make care orders in respect of children.

57. By way of illustration, in *LHC v. KHS* (Unreported, FCMC 3343/2015, 7th August 2017), His Honour Judge I. Wong allowed the petitioner wife’s application to amend the petition and rejected the argument of introducing new “*cause of action*” as follows:

“29. Thus, it has always been said that there is only one ground for divorce - that the marriage has broken down irretrievably. A petitioner may obtain a decree of divorce by proving one of the five facts set out in the provision. “Unreasonable behaviour” itself is not a “cause of action” as such contended for by Ms Chong. To me, it is a misconception to say that “unreasonable behaviour” is a cause of action akin to a cause of action in contract or in tort...

⁹ Save for limited circumstances under the main suit and potentially in respect of preliminary hearings to determine third party property rights where these have been disputed.

30. Further, I indicated in the Amendment Hearing that I disagreed with Ms Chong that the particulars of facts were insufficient and it was unhelpful to import “no reasonable cause of action” ...”

58. HKBA proposes that in place of “*cause of action*”, the Draft Bill should provide a definition consistent with Practice Direction 15.12, being the terminology: “*matrimonial cause*”, “*matrimonial proceedings*” and “*family proceedings*”.

F. Reference to “Child”

59. Schedule 2 of the Draft Bill includes as specified orders in Mainland judgments those in relation to the custody and maintenance of

“a child, whether or not under the age of 18 years, who cannot live independently” (Part 1 item (2) and Part 3 item (2) respectively).

60. HKBA proposes that Part 1 item 2 should be deleted because the Hong Kong Court has no jurisdiction to grant a custody order in respect of a person above the age of 18.

61. As for maintenance of such a child, HKBA proposes that Part 3 item 2 be amended so that it is consistent with s.10(3) MPPPO and s.12A(3) of the Guardianship of Minors Ordinance (Cap. 13), namely:-

“A child receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not that child is also, or will also be, in gainful employment.”

G. “Best Interests” Principle

G1. The relevant provisions

62. Article 9 (4) of the Arrangement provides:

“Where an application for recognition and enforcement of a judgment concerns a minor child, in assessing and deciding whether to recognise and enforce a judgment in accordance with the preceding paragraph, the best interests of the minor child shall be fully considered”

63. Clause 17 (2) of the Draft Bill expressly provides that the registering court “*must*” take into account the best interests of the “*person*”, who is “*a person under the age of 18 years*”.
64. However, whereas the “*best interests*” principle is expressly spelt out at cl.17(2) of the Draft Bill, being a consideration under the “*public policy*” ground to set aside a registration, the same is omitted from cl.34 in respect of a recognition order of a Mainland certificate of divorce.
65. In Hong Kong, the child’s best interests must be considered prior to a decree of divorce being made absolute. Pursuant s.18(1) of the MPPO Cap 192, a Court
“shall not make absolute a decree of divorce or nullity of marriage or make a decree of judicial separation, unless the court, by order, has declared that it is satisfied”
(a) ... “*there are no children of the family to whom this section applies;*” or
(b) ... “*arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances;*” or “*it is impracticable for the party or parties appearing before the court to make any such arrangements;*” or
(c) ... “*there are circumstances making it desirable that the decree should be made absolute or should be made, as the case may be, without delay notwithstanding...*”
66. Further, s.18(3) provides that if the decree is made absolute without a s.18 Declaration, the decree shall be void.

G2. The potential effect of art.34

67. The effect of cl.34 is to ignore the purpose and effect of a “Section 18 Declaration” and require a Court to recognize a certificate of divorce made without considering the best interests of the child of the family.
68. HKBA proposes that the reference to “*person*” should be substituted with “*child*” as provided under art.9 of the Arrangement, the interpretation of which should adopt the definition provided under s.10(3) MPPO and s.12A(3) GMO (Cap. 13) as set out above.
69. HKBA proposes that an express adoption of the best interests principle should be included in cl.34 for the purposes of consistency with cl.17 and also in light of s.18 MPPO.

H. Applicability of RHC

70. In respect of proceedings under the new legislation, Rule 3 of the Draft Rules applies the practice and procedure of the Rules of the High Court to proceedings in the Court of First Instance; and the Rules of the District Court in respect of proceedings in the District Court.
71. The Draft Rule 3 overlooks Rule 3 of the Matrimonial Causes Rules (Cap.179A), which provides that

“Subject to the provisions of these rules and of any enactment, the Rules of the High Court (Cap. 4 sub. leg. A) shall apply with the necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Court of First Instance or in the District Court”. (emphasis supplied)

72. HKBA therefore proposes that Rule 3 of the Draft Rules should be brought in line with Rule 3 MCR – in other words, Rule 3(a), referring to RHC, should apply to proceedings in the District Court / Family Court as well as those in the Court of First Instance; and Rule 3(b), referring to RDC, should be deleted in its entirety.

I. SUMMARY

73. The HKBA recommends that the Arrangement for reciprocal recognition and enforcement of Mainland judgments be incorporated into the domestic legislation and the Hong Kong Court is given power to implement the Arrangement by judicial interpretation, as has been done as regards Cap. 512.

74. Further and/or in the alternative, HKBA's views and proposals are summarised as follows:

- (1) The 2-year deadline for registration of Mainland judgment in Hong Kong be dispensed with and/or the Hong Kong Court be provided with power to extend or grant exemption from the 2-year deadline (cl.9);
- (2) The Hong Kong Court be provided with a discretion as to whether to order a stay of Hong Kong proceedings (cl.27(3));
- (3) The Hong Kong Court be provided with power to resume or terminate Hong Kong proceedings on its own motion (cl.27(4));
- (4) The word “*dispute*” as used in art.17 of the Arrangement be retained in the context of what future proceedings are to be prohibited (cl.28);
- (5) The Hong Kong Court do retain power to vary a registered Mainland judgment (cl.28);

- (6) Save as above, the expression “*cause of action*” be replaced by “*matrimonial cause or proceedings*” and “*family proceedings*” (various clauses);
- (7) The reference to “*a child, whether or not under the age of 18 years, who cannot live independently*” (Schedule 2 Part 1 item (2) and Part 3 item (2)) be replaced with a definition consistent with the Hong Kong legislation defining a “*child*”;
- (8) The best interests of a person under the age of 18 years be spelt out as a consideration under the “*public policy*” ground for setting aside a recognition order (cl.34); and
- (9) The Rules of the High Court (Cap.4A) (“**RHC**”) be made applicable to proceedings in the Court of First Instance as well as those in the District Court / Family Court (r.3).

HONG KONG BAR ASSOCIATION

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