



HKI Arb Webinar: “Recent Developments of the Mutual Arrangements on Arbitration Between Hong Kong and the Mainland: A Practical Perspective”

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INTRODUCTION

- History
- The Procedures
- The Practical and Theoretical Hurdles (HK \Leftrightarrow Mainland)
- The updates (HK \Leftrightarrow Mainland)

Pre 1997

- “United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (“**New York Convention**”) was application to Hong Kong through the United Kingdom
 - 21 April 1997
 - New York Convention applies

HISTORY (CON'T)

Post 1997

- “Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong SAR” “關於內地與香港特別行政區法院相互執行仲裁裁決的安排” (“**2000 Arrangement**”)
 - 21 June 1999 – Signing
- Came into effect on 1 February 2000
- A conduit to make certain that arbitral awards can continue to be enforceable
- Practical and theoretical hurdles

HISTORY (CON'T)

Post 1997

- Part 10 Division 1 – Enforcement of Arbitral Awards
- Part 10 Division 2 – Enforcement of Convention Awards
- ***Part 10 Division 3 – Enforcement of Mainland Awards***
- Part 10 Division 4 – Enforcement of Macao Awards

HISTORY (CON'T)

- “Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong SAR” “關於內地與香港特別行政區法院相互執行仲裁裁決的補充安排” (**“2021 Supplemental Arrangement”**)
 - 27 November 2020
 - Removal of major practical and theoretical hurdles
- Arbitration (Amendment) Ordinance 2021
 - Part 2
 - Came into effect 19 May 2021
 - Fully implement the 2021 Supplemental Arrangement

HISTORY (CON'T)

- To clear certain misunderstanding:
 - 2000 Arrangements
 - 香港特區法院同意執行內地仲裁機構(名單由國務院法制辦公室經國務院港澳事務辦公室提供)依據《中華人民共和國仲裁法》所作出的裁決，內地人民法院同意執行在香港特區按香港特區《仲裁條例》所作出的裁決。

HISTORY (CON'T)

- The Courts of the HKSAR agree to enforce the awards made pursuant to the Arbitration Law of the People's Republic of China by the arbitral authorities in the Mainland (the list to be supplied by the Legislative Affairs Office of the State Council through the Hong Kong and Macao Affairs Office of the State Council) and the People's Courts of the Mainland agree to enforce the awards made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR (Courtesy English Translation)
- Institution or *ad hoc* awards “made in Hong Kong” are enforceable in the Mainland under the 2000 Arrangement

THE PROCEDURES

- Hong Kong awards enforce in the Mainland
 - Arbitral awards made in Hong Kong
 - Application to the Intermediate People's Court at the place of domicile of the Respondent or where the Respondent's property is located
 - Written enforcement application, arbitral award, arbitration agreement, certificate of effectiveness issued by the relevant institution
 - Simplified Chinese
 - Respondents may raise oppositions

THE PROCEDURES (CON'T)

Intermediate People's Court – no enforcement



Higher People's Court – uphold lower court's decision



Supreme People's Court – final decision

THE PROCEDURES (CON'T)

- Mainland awards enforce in Hong Kong
 - Arbitral awards made by approved institutions
 - Application to the Court of First Instance of the High Court of Hong Kong
 - Application (Ex-Parte Originating Summons), arbitral award, arbitration agreement
 - Non English or Chinese arbitral awards, require certified translation of the arbitral awards and agreements
 - S.95 – Arbitration Ordinance (Cap.609)
- Refusal of enforcement of Mainland awards

THE PRACTICAL AND THEORETICAL HURDLES

- Simultaneous Enforcement of Arbitral Awards
 - **OLD** – S.93 – Arbitration Ordinance
 - Now **REPEALED**
 - Mainland awards **NOT** enforceable under this Division 3 if any application has been made in the Mainland for enforcement
 - “Exhaust” enforcement procedures in the Mainland before enforcement of Arbitral awards in Hong Kong

THE PRACTICAL AND THEORETICAL HURDLES (CON'T)

- Avoid double enforcement

深圳市開隆投資開發有限公司

v.

長興電業製品廠(國際)有限公司

[2002] 3 HKLRD 774 (“the Kai Long case”)

A Cheung J’s comment on “double enforcement” may cause
“annoyance or even oppression” to the award debtor

THE PRACTICAL AND THEORETICAL HURDLES (CON'T)

- Created the time limit problem
 - Mainland time limit: 3 years
 - Hong Kong time limit: 6 years
 - CL v. SCG [2019] HKCFF 398, [2019] 2 HKLRD 144; HCCT 9/2018 (18 February 2019)
 - Logics behind a Mainland award not enforceable in Hong Kong but enforceable in another jurisdiction?

THE PRACTICAL AND THEORETICAL HURDLES (CON'T)

- Restrictions for enforcement of Mainland and Macao Arbitral Awards
 - Divisions 2, 3 and 4 Arbitration Ordinance are **BROADLY** similar but there are slight differences in wording between the arrangement of enforcement of Macao award to the Mainland award which may cause confusion

THE PRACTICAL AND THEORETICAL HURDLES (CON'T)

- Security for Claims & Security for Costs
 - Article VI of the New York Convention “omitted” in Division 3

“Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”

THE PRACTICAL AND THEORETICAL HURDLES (CON'T)

- Arguably, such security for claims and security for costs arrangement is alleviated by Order 73 rule 10A of the Rules of High Court where the Court has power to grant security for claims and/or legal costs against the award
- Such decision is subject to appeal
- Guo Shun Kai v. Wing Shing Chemical Co Ltd [2013] 3 HKLRD 484
 - G. Lam J ordered security for award to put up but noted the operation of Divisions 1 and 2 vs Division 3

THE PRACTICAL AND THEORETICAL HURDLES (CON'T)

- Caused confusion and depart from Article VI of the New York Convention
- There was no arrangement for security for claims and security for costs arrangement when enforcing Hong Kong Arbitral Awards in the Mainland
- Property Preservation Order before action which requires counter security and must be urgent
- Property Preservation Order during the action
 - Claim must involve provision of property
 - Future “Judgment” cannot be executed
- A cumbersome procedure

THE PRACTICAL AND THEORETICAL DIFFICULTIES

- “Recognition” of Arbitral Awards
 - Logically, there must be “Recognition” of Arbitral Awards before “Enforcement”
 - 2000 Arrangement v. 2021 Supplemental Arrangement
- “Seat of Arbitration” v. “Place of Arbitration”
 - Arbitration Ordinance – “Place of Arbitration”
 - 2000 Arrangement:
 - “made in the HKSAR”
 - “pursuant to the Arbitration Ordinance of the HKSAR”

THE PRACTICAL AND THEORETICAL DIFFICULTIES (CON'T)

- What if an award is made pursuant to the Arbitration Ordinance with its legal seat in Hong Kong but the tribunal sits outside of Hong Kong?
- HKIAC Rules “cured” this issue but HKIAC Rules are not part of the Arbitration Ordinance (same with ICC Arbitration Rules)
- No issues arise to date!

THE UPDATES

- From a practical and theoretical perspective, there are “issues” and some of these “issues” have caused confusion and made the enforcement of awards “unpredictable”, let alone procedurally difficult

THE UPDATES (CON'T)

Emergency Arbitration

- Arbitration Ordinance s22(B) / HKIAC Article 23 and Sch. 4
- Sought prior to the constitution of the arbitral tribunal
- Enables a party to seek interim relief measures to preserve the status quo pending final determination
- HKIAC aims for appointment of an emergency arbitrator within 24 hours of receipt of application and application deposit (HKD250,000)
- Decision within 14 days from HKIAC transmitting the file to the emergency arbitrator
- The emergency arbitrator can order any interim measures it deems necessary (e.g. injunctions) but requires leave of the court for the award to be enforceable in the same manner as a court order
- The Hong Kong courts and Judiciary run on a system of minimal interference in arbitration awards, including in emergency arbitration procedures

THE UPDATES (CON'T)

- Security for Claims & Security for Costs (Interim measures)
 - Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and Hong Kong SAR 關於內地與香港特別行政區法院就仲裁程序相互協助保全的安排
 - 2 April 2019
 - Property / evidence / conduct preservation in the Mainland

THE UPDATES (CON'T)

Interim measures in Arbitral Awards – Enforcement in HKSAR & Foreign Awards)

- The Arbitration Ordinance (Cap 609) (“AO”) already allows parties to an arbitration seated anywhere to seek interim measures from the Hong Kong courts, as derived from Section 35 (Art 17 Model Law) and 56 of the AO,
 - But, parties can agree to opt out of such provisions in the arbitration agreement or subsequently
 - What if the parties opted out of this provision? Going to Court!!

GM1 and GM2 v KC: An interim anti-suit injunction was granted, requiring the defendant to withdraw or seek a stay of legal proceedings commenced by it against plaintiff & restraining the defendant from commencing or pursuing any other proceedings related to their dispute

THE UPDATES (CON'T)

Injunctions

- Court orders to preserve the status quo
- Interim or Final
- Ex parte / Inter partes application
- Prohibitory / Mandatory in effect
- Mareva Injunction / Anton Piller Order
- Undertaking to pay damages where an emergency application is made
- Used to assist with asset tracing
- Mainland China – Adoption of preservation measures (i.e. Evidence Preservation, Asset Preservation and Action Preservation)



THE UPDATES (CON'T)

- Security for cost
- Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and HKSAR – 2 April 2019

Interim Measures	
Mainland	Hong Kong
Property/evidence/conduct preservations	Injunctions/Interim measures which maintain the status quo of the parties

- Action can be taken before the institution has accepted the arbitration case.
- 2 stage process:
 1. Apply to the relevant institution in Hong Kong, specifying the particulars of the parties, details of the application, the justification on which the application is based as well as information about the property in the Mainland that will be used as security of certification of financial standing
 2. The institution will forward to the application to the relevant Mainland Chinese Court to consider whether relief should be granted under Mainland law
- Arrangement took from 1 October 2019. The qualifying arbitral and dispute resolution institutions and offices eligible for applying Mainland court interim measures in Hong Kong are:

HKIAC

eBRAM International Online
Dispute Resolution Centre

ICC (Asia Office)

Hong Kong Maritime
Arbitration Group

CIETAC

South China International
Arbitration Center (HK)

THE UPDATES (CON'T)

- 2021 Supplemental Arrangement
 - Simultaneous applications of Enforcement of Arbitral Awards
 - An award creditor may commence enforcement actions in both the Mainland and Hong Kong **AT THE SAME TIME**
 - Provided that total amount recovered by the award creditor will not exceed the amount awarded
 - The issue on time limitation may be alleviated

THE UPDATES (CON'T)

- Recognition” of Arbitral Award
 - The Mainland awards and Hong Kong awards which are now enforced under the 2021 Supplemental Arrangement are “recognized” by the Hong Kong courts and the People’s Courts respectively
 - Now the arbitral awards are “recognized” then “enforced”

THE UPDATES (CON'T)

- “Seat of Arbitration” v. “Place of Arbitration”
 - 2021 Supplemental Arrangement has now adopted the “Seat of Arbitration” approach
 - 2000 Arrangement:

“... the People’s Courts of the Mainland agree to enforce the awards *made in the HKSAR* pursuant to the Arbitration Ordinance of the HKSAR”
 - 2021 Supplemental Arrangement

“The [Supplemental] Arrangement applies to arbitral awards rendered pursuant to the Arbitration Ordinance of the HKSAR as enforced by the People’s Courts of the Mainland...”

THE UPDATES (CON'T)

- The 2021 Supplemental Arrangement makes the enforcement “procedures”
 - More effective
 - More efficient
 - More “user friendly”
 - Good for the business community



Q&A



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