



HKI Arb Webinar:

“Extraterritorial Effects in Cross-Border Litigation: Enforcement of Foreign Judgments and Foreign Arbitral Awards in Hong Kong”

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Outline

1. Enforcement of foreign judgments: Common law vs Statutory regime
2. Enforcement of foreign arbitral awards: Convention awards vs enforcement other than by registration
3. Common grounds of refusal to enforce foreign judgments and foreign arbitral awards
 1. Unfair procedures / No opportunity to present case, and Compositional or procedural non-compliance
 2. Lack of jurisdiction
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 4. Lack of finality / Not binding, set aside or suspended
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4. Other grounds of refusal to enforce foreign judgments
 1. Private rights and public law
 2. Comparability of issues
5. Other grounds of refusal to enforce foreign arbitral awards
 1. Incapacity
 2. Invalidity
 3. Non-arbitrability

Enforcement of foreign judgments: Common law vs Statutory regime

- **Two regimes:**
 - **Statutory regime:** for enforcing judgments of "superior courts" in a small number of foreign countries (as well as Mainland judgments).
 - **"Common law" regime:** (i) recognition of judgments from any court anywhere in the world, (ii) enforcement of judgments of all courts in most countries and (iii) enforcement of judgments of non-"superior" courts in the "statutory regime" countries (see below)
- Statutory regime mandatory so far as it applies: it excludes the possibility of invoking the common law regime.

Enforcement of foreign judgments: Common law

- Foreign judgment for a debt or definite sum of money
- Final and conclusive
- Given by a foreign court with jurisdiction to give such judgment
- Possible defence: lack of jurisdiction, fraud, public policy or against natural justice
- Not open to to impeach a foreign judgment based on the underlying merits; error is not a ground for denying enforcement or recognition

Enforcement of foreign judgments: Common law

- Onus on the party **seeking** enforcement or recognition (*e.g.* the winning claimant) to plead and prove that the foreign judgment in question is:
 - Final and conclusive on the merits.
 - Between the same parties (or their privies) as those before the Hong Kong court.
 - Determinative of the relevant substantive (non-procedural) issues before the Hong Kong court (in the context of enforcement, this simply means that the foreign judgment provides for the Hong Kong defendant to pay a certain money sum to the Hong Kong plaintiff).
 - Rendered by a court which had competent jurisdiction in Hong Kong terms.

Enforcement of foreign judgments: Common law

- Onus on the party **resisting** enforcement or recognition (*e.g.* the losing defendant) to plead and prove that the foreign judgment should be denied enforcement or recognition on any of the following grounds:
 - Procured by a fraud which it is not an abuse of process to raise before the Hong Kong court.
 - Obtained by a procedure which offends against Hong Kong notions of substantial justice.
 - Merely resolves issues to which no regard should be had before a Hong Kong court, being of a public as opposed to private law nature.
 - Offends against Hong Kong notions of public policy.

Enforcement of foreign judgments: Common law

- Writ endorsed with, or accompanied by, a very short statement of claim providing details of the judgment, the sum adjudged and addressing the matters which he has to prove.
- The plaintiff would typically issue a summons for summary judgment, supported by a short affidavit and exhibiting the essential documents, including the foreign judgment.
- In cases where there is a significant question mark over a particular aspect of foreign law (*e.g.* finality), expert opinion will also be required.
- The basis on which competent jurisdiction is alleged must also be demonstrated if not obvious on the face of the judgment.
- The defendant has an opportunity to file evidence in response as with any other summary judgment application and the plaintiff may file evidence in reply. The court then has to decide whether there is any *bona fide* defence to the claim to enforcement.

Enforcement of foreign judgments: Common law

- In theory, an enforcement action can be ordered to go to trial
- Reality = a denial of summary judgment is usually equivalent to a denial of meaningful enforcement
- Key limit: Writ in Hong Kong must be issued within 12 years after the date on which the foreign judgment became enforceable
- Most unlikely to give leave to execute more than six years after entry of judgment in Hong Kong upon the foreign judgment

Enforcement of foreign judgments: Statutory Regime

- Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (“**FJREO**”)
- Applicable to final and conclusive monetary judgments of superior courts of:
 - Australia and Australian External Territories
 - Bermuda
 - Brunei
 - India
 - Malaysia
 - New Zealand
 - Singapore
 - Sri Lanka

(Each of the above subject to actual reciprocal arrangements being in place between that jurisdiction and Hong Kong: see section 2A(2)(b), Interpretation and General Clauses Ordinance (Cap 1))

- Belgium
- France
- Federal Republic of Germany
- Republic of Italy
- Republic of Austria
- Kingdom of the Netherlands
- Israel

Enforcement of foreign judgments: Statutory Regime

- If the statutory regime applies it is exclusive: attempts to enforce such judgment at common law regime are liable to be struck out.
- Judgment creditor files *ex parte* application supported by affidavit demonstrating that:
 - It is a judgment of a superior court of a foreign country to which the statutory regime has been applied after the giving of the foreign judgment.
 - It is "final and conclusive as between the parties thereto"; "judgment shall be deemed to be final and conclusive notwithstanding that an appeal is pending against it, or that it may still be subject to appeal, in the courts of the country of the original court".
 - "[T]here 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 penalty".
 - The judgment has not been wholly satisfied.
 - It could be enforced by execution in the country in which it was rendered.
- If the criteria are satisfied, the court will register the judgment. It is then enforceable as if it were a Hong Kong judgment.

Enforcement of foreign judgments: Statutory Regime

- Onus then lies on the judgment debtor, after service of notice of the registration, to apply to set aside registration, on one or more of these grounds:
 - The requirements for registration were not in fact met.
 - The foreign court had no jurisdiction.
 - “[T]he judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear”.
 - “[T]he judgment was obtained by fraud”.
 - “[T]he enforcement of the judgment shall be contrary to public policy in” Hong Kong.
 - “[T]he rights under the judgment are not vested in the person by whom the application for registration was made”.
- If any of these grounds is made out to the court’s satisfaction, the court must set aside registration.
- A further discretionary ground: judgment “may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter”.

Enforcement of foreign judgments: Statutory Regime

- Pending appeal: CFI, “if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal”
- Setting aside of registration for remedial defects does not preclude future registration
- Time limits:
 - Application for registration must be made to the Hong Kong court within six years after the date of the foreign judgment
 - Subsequently, for the purpose of execution, time runs from that date as if judgment in Hong Kong had been given on the date of registration. Thus, the absolute limitation period for execution is 12 years from the date of registration

Enforcement of foreign judgments: Statutory Regime

- **Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (“MJREO”)**: provides for the enforcement and recognition in Hong Kong of **(a)** Mainland Chinese judgments rendered pursuant to **(b)** written exclusive jurisdiction agreements **(c)** entered into on or after 1 August 2008.
- **“Choice of Mainland court judgment”**: "an agreement concluded by the parties to a specified contract and specifying the courts in the Mainland or any of them as the court to determine a dispute which has arisen or may arise in connection with the specified contract **to the exclusion of courts of other jurisdictions**"
- The MJREO applies to judgments rendered by **the Supreme People’s Court, any Higher or Intermediate People’s Court, and certain "recognized" Basic People’s Courts.**
- **“Specified contract”** = essentially **commercial contracts.**
- The judgment creditor under a Mainland judgment may, upon paying an application fee, apply to the Court of First Instance for an order that the judgment be registered under the MJREO.

Enforcement of foreign judgments: Statutory Regime

- The CFI must order such registration if the applicant judgment creditor proves that:
 - (i) The judgment was given on or after 1 August 2008 by the chosen Mainland court.
 - (ii) The relevant choice of Mainland court agreement was made on or after 1 August 2008.
 - (iii) The judgment is final and conclusive between its parties.
 - (iv) The judgment is enforceable in Mainland China (rebuttably presumed if certified by the Mainland court which delivered the judgment).
 - (v) The judgment orders the payment of 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 penalty.
- Applications for registration must be made within two years from the later of (i) the last day of any period specified for performance in the judgment (ii) the date from which the judgment takes effect.
- May be made *ex parte*
- To be supported by an affidavit addressing a number of specified issues

Enforcement of foreign judgments: Statutory Regime

- Once registered under the MJREO, a Mainland judgment is, for execution purposes, of the same force and effect as if it had been a judgment originally given in the CFI and entered on the day of registration.
- However, automatic stay of execution until deadline for applying to set aside the registration / that application has been finally disposed of
- The judgment creditor is responsible for serving a notice of registration of the judgment on the judgment debtor (although the actual Order of the CFI need not be served unless the application was by Summons).
- The judgment debtor may apply to set aside the registration by summons, supported by affidavit.

Enforcement of foreign judgments: Statutory Regime

- The CFI is required to set it aside if satisfied of any one of the following:
 - (i) The judgment is not a Mainland judgment which satisfies the five requirements for registration.
 - (ii) The judgment has been registered in contravention of the MJREO.
 - (iii) The relevant choice of Mainland court agreement is invalid under Mainland law.
 - (iv) The judgment has been wholly satisfied.
 - (v) The courts of Hong Kong have exclusive jurisdiction over the case according to the laws of Hong Kong.
 - (vi) A judgment debtor who did not appear in the Mainland court to defend the proceedings was not summoned to appear in accordance with Mainland law, or was not given the requisite time to defend the proceedings under Mainland law.
 - (vii) The judgment was obtained by fraud.
 - (viii) A judgment on the same cause of action between the parties has been given by a court in Hong Kong, or an arbitral award on the same has been made by an arbitration body in Hong Kong.
 - (ix) A judgment on the same cause of action between the parties has been given by a court in a place outside Hong Kong, or an arbitral award on the same has been made by an arbitration body in a place outside Hong Kong, and the judgment or award has already been recognized in or enforced by the courts in Hong Kong.
 - (x) The enforcement of the judgment is contrary to public policy.
 - (xi) The judgment has been reversed or otherwise set aside pursuant to an appeal or retrial under Mainland law.
- CFI has a discretion to set aside a registration or to adjourn the application until after the expiration of such period as appears to the Court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal or retrial disposed of by a competent designated court.

Enforcement of foreign judgments: Statutory Regime

- **NEW: Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) (“Cap 645”)**
- **Not yet in force; expected to take effect within the first half of this year**
- Covers the following types of Mainland judgments:
 - Judgments enforceable in the Mainland and made in proceedings that are civil or commercial in nature (according to Mainland law)
 - Judgments providing for monetary or non-monetary relief, including interest due under the judgment up to the time of registration and costs as duly certified by the court issuing the judgment
 - Judgments for payment of sums of money in respect of compensation or damages awarded in criminal proceedings.
- Does **not** cover the following types of Mainland judgments:
 - Corporate and individual insolvency, bankruptcy and compromise matters
 - Succession and administration or distribution of estate matters
 - Certain matrimonial and family cases
 - Certain intellectual property cases and rulings
 - Certain maritime matters
 - Interim measures
 - Punitive or exemplary damages other than those awarded in certain intellectual property proceedings

Enforcement of foreign judgments: Statutory Regime

	The existing Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597)	Cap 645
Requirement for exclusive choice of court agreement in favour of Mainland courts	Yes	No. Only a connection with the Mainland is required, e.g. (i) the defendant's place of residence; (ii) the defendant's representative office, branch, office, place of business or other establishment; (iii) the place of performance of the disputed contract; (iv) the place of commission of the alleged tort; or (v) a written exclusive or non-exclusive jurisdiction agreement in favour of the Mainland courts accompanied by, if the place of residence of all the parties is in Hong Kong, a connection between the dispute and the Mainland.
Which arrangement applies?	Exclusive jurisdiction agreement made before the commencement date of Cap 645 (TBC)	Judgments given on or after the commencement date (TBC) of Cap 645
Type of matter	Contractual disputes other than those arising from: <ul style="list-style-type: none"> • employment contracts • contracts to which a natural person acts for personal consumption, family or other non-commercial purposes 	Not limited to contractual disputes, but see previous slide for excluded categories of judgments
Monetary versus non-monetary relief	Monetary relief only	Monetary and non-monetary relief
Applicability to criminal judgments	N/A	Judgments for payment of sums of money in respect of compensation or damages awarded in criminal proceedings
Courts	In specified circumstances: <ul style="list-style-type: none"> • The Supreme People's Court • A Higher People's Court • An Intermediate People's Court • A designated Basic People's Court 	Same as 2006 Arrangement but Basic People's Courts no longer need to be specifically designated

Enforcement of foreign arbitral awards: Summary Enforcement vs Action on the Award

- For basically all Awards: either summary enforcement or action on the Award
 - Procedure for enforcing a New York Convention Award is essentially the same as that of enforcing an Award made in a jurisdiction which is not party to the New York Convention and under the UNCITRAL Model Law – *i.e.* either summary enforcement or an action on the Award
 - Mainland Awards can be enforced in a similar manner to a Convention Award
 - MOU on the Arrangement between the Mainland and Hong Kong on the Mutual Enforcement of Arbitration Awards: where a party fails to comply with an arbitral award, the other party can take action to enforce this award in the Mainland or in Hong Kong (as appropriate), by applying to the "relevant court" in the place where the party against whom the application is filed is domiciled, or in the place where the property of said party is situated, so as to enforce the award.

Enforcement of foreign arbitral awards: Summary Enforcement vs Action on the Award

- "Relevant court", in the case of the Mainland, means the Intermediate People's Court of the place where the party against whom the application is filed is domiciled or the place in which the property of said party is situated. In Hong Kong, it means the Court of First Instance in Hong Kong.
- Summary enforcement: Arbitration Ordinance (Cap 609) ("**AO**"), section 84(1)
 - An arbitral award is enforceable in the same manner as a judgment of the Hong Kong Court of First Instance that has the same effect, but only with the leave of the court.
 - Only available to a successful party where the Award arises out of a written arbitration agreement.
- Action on the Award: a party can always seek to enforce a foreign arbitral award by bringing fresh proceedings in Hong Kong on the basis that the award constitutes a debt due by the defendant to the claimant.

Enforcement of foreign arbitral awards: Summary Enforcement

- Initial application for leave to enforce should be made *ex parte*
- Made to the Judge in charge of the Construction and Arbitration List, not to a Master, for leave to enforce the award in the same manner as a judgment or order of the Court
- Must be supported by an affidavit, exhibiting (1) the authenticated arbitration agreement and (2) the original award, or in either case, a certified copy thereof. The affidavit should state (3) the name and (4) the usual or last known place of abode or business of the applicant, (5) the person against whom it is sought to enforce the award, and as the case may require, (6) whether the award has been complied with, or the extent to which it has not been complied with as at the date of the application.
- The party seeking enforcement must ensure that the award and agreement are in either of the official languages in Hong Kong. If either document is in another language, the affidavit should (7) exhibit a translation of the award / the agreement in either of the official languages. The translation must be certified by an official, a sworn translator, a diplomatic or a consular agent.

Enforcement of foreign arbitral awards: Summary Enforcement

- Applicant must make full and frank disclosure of the facts which are against him, as well as those in his favour.
- Subject to the claimant complying with RHC O 73 and the AO, the Hong Kong courts will presume granting leave to enforce
- The Court may refuse to enforce an award if, for example, **(a)** one of the parties to the arbitration agreement was under some incapacity, **(b)** the arbitration agreement was not valid, **(c)** the party against which the award is being enforced was not given proper notice of the appointment of the arbitrator or the proceedings, or **(d)** unable to present their case, **(e)** the award dealt with matters falling beyond the scope of the submission to arbitration, **(f)** the composition of the tribunal or the procedure was not in accordance with the parties' agreement, or **(g)** the award was not binding or had been set aside.
- Even then, the conduct must be sufficiently serious before the court will find an error undermining the arbitral procedure.

Enforcement of foreign arbitral awards: Summary Enforcement

- The Court may also refuse to enforce if the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong, if it would be contrary to public policy to enforce the award, or for any other reason the court considered it just to refuse enforcement.
- The Court does not, however, look into the merits of the award or at the underlying facts.
- A right to equitable set-off or mutual debts arising out of the same transaction may provide grounds for limiting or refusing enforcement of an Award.
- Procedure inappropriate where an objection is legitimately taken to the award which cannot be properly disposed of without a trial

Enforcement of foreign arbitral awards: Action on the Award

- A separate and independent action in the Hong Kong Courts enforcing the implied promise in every arbitration agreement that the parties will perform the Award
- The applicant can claim the amount of the Award (provided that a monetary sum is due under the Award), a declaration that the Award is binding, specific performance (in appropriate cases), damages for failure to perform the award, and/or an injunction restraining the unsuccessful party from disobeying the award.
- The applicant, who bears the burden of proof, must prove: **(a)** the contract which contains the submission to arbitration; **(b)** that the dispute was within the terms of the submission; **(c)** that the tribunal was duly appointed in accordance with the arbitration agreement; **(d)** the Award itself; and **(e)** that the amount awarded has not been paid or the Award has not otherwise been performed.
- Defendant also has wide range of defences

Enforcement of foreign arbitral awards: Action on the Award

- ***Xiamen Xinjingdi Group Co Ltd (廈門新景地集團有限公司) v Eton Properties Ltd (裕景興業有限公司) (2020) 23 HKCFAR 348, [2020] HKCFA 32: the Hong Kong Court as enforcing court has the power to award damages in an action to enforce a foreign arbitral award at common law despite this relief going beyond the terms of the Award.***
- Based on an implied promise to perform the Award
- Unlike summary enforcement, a common law action is not *ex parte* in nature and requires a plaintiff to prove his case.
- “In order to sue on an award, it is, I think, necessary for the plaintiffs to prove, **first** that there was a **submission**; **secondly**, that the **arbitration** was conducted **in pursuance of the submission**; and, **thirdly**, that the award is a **valid award**, made pursuant to the provisions of the submission, and valid according to the *lex fori* of the place where the arbitration was carried out and where the award was made.”

Enforcement of foreign arbitral awards: Action on the Award

- Clear illustration: *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9 (Comm); *Dalmia Dairy Industries v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA)
- Dalmia, an Indian company, obtained arbitration awards which it sought to enforce against the defendant Bank in London, invoking the statutory summary procedure. The awards directed the Bank to pay the amounts to the plaintiff “in India”.
- Kerr J held that the summary procedure was unavailable; “[the] appropriate remedy of the plaintiff... would be an action for the payment of damages here on account of the defendant's breach in not making payment abroad”.
- That would obviously involve bringing an action seeking relief going beyond the terms of the award, which is precisely what Dalmia then did.
- In contrast with the summary procedure, those proceedings involved a trial which lasted over two months where various arguments attacking the validity of the award were advanced. Dalmia's action succeeded and the judgment was upheld in the Court of Appeal.

Common grounds of refusal to enforce foreign judgments and foreign arbitral awards

- Unfair procedures / No opportunity to present case, and Compositional or procedural non-compliance
- Lack of jurisdiction
- Fraud
- Lack of finality / Not binding, set aside or suspended
- Public policy

Unfair procedures

- A **foreign judgment** may be impeached if it offends against Hong Kong views of substantial justice.
- **Must demonstrate a "substantial miscarriage of justice" in the procedural sense**
- Reasonable notice and opportunity to be heard (although not necessarily orally)
- Section 6(1)(a)(iii), FJREO: the registration of a foreign judgment must be set aside if the court is satisfied that "the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear."

Unfair procedures

- Successful example: Canadian Court refused to enforce this Hong Kong summary judgment
- D was a litigant in person who had "limited knowledge of the English language"
- P's application for summary judgment included a notice, in English, requiring D to serve affidavit evidence not less than three days before the return date
- D filed a "statement of defence" but did not serve his evidence in opposition to summary judgment and instead turned up at court on the return date with his documentary evidence
- Foreign court (the Hong Kong court on that occasion) entered judgment without regard to these documents
- Judgment was given against D, without consideration of the merits of the defence even though D was present and wished to speak to the issues in dispute.
- D subsequently failed to appeal in ignorance of his right to do so.

No opportunity to present case

- Enforcement of an **arbitral award** may be refused if the losing defendant was not given proper notice of the appointment of the arbitrator or of the arbitral process, or was otherwise unable to present his case.
- Ultimately, the question is one of fairness in the arbitral process
- Successful examples:
 - *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707 (CFI): Award findings on certain conversion claims made based on Chinese law set aside; no evidence on Chinese law had been adduced as the parties had argued the matter on the basis of Illinois law
 - *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] 5 HKLRD 221 (CFI): Sun had been unable to present his case because he had been imprisoned and it was found that the notice of arbitration had not been properly served on him; plus, claimant found to have acted in bad faith for its failure to inform the tribunal of the failure to serve the notice of arbitration (documentary arbitration in Sun's absence assuming proper service)
 - *X v Y* [2020] HKCFI 2782: Y had not been given a reasonable opportunity to present its case and to meet the Claimants' new case that Taiwanese law governed the validity of the pledge; the tribunal's findings involved a departure from the cases presented by both sides, nor did the tribunal indicate or suggest that Taiwanese law could render the pledge void

Compositional or procedural non-compliance

- Must be shown that the composition of an arbitral tribunal or the arbitral procedure in question is **not in accordance with**:
 - First, the mandatory provisions of the AO
 - If no provisions are applicable, then the parties' agreement
 - If no agreement was made, then the non-mandatory provisions of the AO
- Alleged procedural or compositional non-compliance should normally have been previously challenged by the appropriate channels in the arbitration itself, or a waiver will readily be found.
- Examples:
 - Failure by an arbitrator's non-compliance with the obligation of disclosure
 - Award contains no reasons (if *e.g.* the arbitration is governed by the HKIAC Rules which require the award to state reasons)
 - *American International Group, Inc v X Company* (unrep, HCCT 60/2015, 30 August 2016): there appears to be some recognition that an award may be set aside under art 34 / s 81 and/or under s 64—tribunal required to decide dispute in accordance with rules of law chosen by parties—if it can be shown that the tribunal had consciously disregarded the governing law of the contract chosen by the parties in coming to its decision

Lack of jurisdiction

- Enforcing a **foreign judgment at common law** – competence of a foreign court to assume jurisdiction in only two cases: **(i)** where the defendant was present in the foreign jurisdiction at the time of commencement of proceedings and **(ii)** where the defendant submitted to foreign jurisdiction.
- **(i) D's presence:** the voluntary presence of the person against whom recognition or enforcement is sought in the territorial jurisdiction of the foreign court at the time when the foreign proceedings were commenced
- Alternatively, *residence* of D in the foreign country when the foreign proceedings were commenced
- **(ii) D's submission:** the voluntary submission of a defendant to foreign jurisdiction is certainly sufficient.
- A party will be deemed to have submitted if they:
 - (a) Pursued a claim or counterclaim in the foreign proceedings which gave rise to the judgment.
 - (b) Contested the foreign proceedings on their merits.

Lack of jurisdiction

- **Foreign Judgments (Restriction on Recognition and Enforcement Ordinance) (Cap 46), section 3:** "a judgment given by a court of an overseas country in any proceedings shall **not** be recognized or enforced in Hong Kong if:
 - (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and
 - (b) the person against whom the judgment was given:
 - (i) did not bring or agree to the bringing of those proceedings in that court; and
 - (ii) did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court."
- **Enforcing a foreign judgment under the FIREO:** section 6(1)(a)(ii) – "the registration of the judgment... shall be set aside if the registering court is satisfied... that the courts of the country of the original court had no jurisdiction in the circumstances of the case".
- **Competent *in personam* jurisdiction:** section 6(2) – a court shall be deemed to have had jurisdiction "in the case of a judgment given in an action *in personam*" in the following instances:
- **Submission-based jurisdiction:**
 - "(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
 - (ii) if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court; or
 - (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court."

Lack of jurisdiction

- **Residence-based jurisdiction:**

- "(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
 - (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place."
- Section 6(2) also provides that a court shall be deemed to have had jurisdiction "in the case of a judgment given in an action of which the subject matter was **immovable property or in an action *in rem* of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court**".
- No competent jurisdiction: section 6(3) prescribes two cases in which a foreign court shall be deemed **not** to have had jurisdiction:
 - **Immovables** – "if the subject matter of the proceedings was immovable property outside the country of the original court."
 - "[I]f the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was **entitled to immunity** from the jurisdiction of the courts of the country of the original court **and did not submit to the jurisdiction** of that court."

Lack of jurisdiction

- **Arbitral award:** the Award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.
- Also, where an arbitral tribunal has failed to deal with a matter submitted to it
- A plea that an arbitral tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of authority is raised during the arbitral proceedings
- Examples:
 - *Wah Chang International (China) Co Ltd v Tiong Huat Rubber Factory (Sdn) Bhd* [1991] 1 HKC 28 (CA): submission to arbitration only covered disputes on condition or quality, not disputes regarding alleged failure to open letters of credit.
 - *X v Y* [2020] HKCFI 2782: the arbitration agreement only covered disputes on the rights and obligations of the parties under the investment management agreement and not disputes regarding the validity of the security created by the pledge which provided for non-exclusive jurisdiction of the courts of Singapore, with an option for Y to bring proceedings in the courts of other jurisdictions.

Lack of jurisdiction

- *S Co v B Co* [2014] 6 HKC 421 (CFI):
 - Whether under art 16(3) (after a tribunal's preliminary ruling on jurisdiction) or art 34(2)(a)(iii) (after final award), the standard of scrutiny of the court is to conduct an independent *de novo* review of the tribunal's ruling on jurisdiction.
 - A challenge to jurisdiction should not be a mere guise for challenging the tribunal's findings on the merits. The courts should be circumspect in their approach to determine whether an error alleged is a true question of jurisdiction and carefully limit the issue they address to ensure they do not stray into the merits of the question decided by the tribunal.
- Court may enforce those aspects of the Award which were submitted to arbitration insofar as separable from those which were not
- Contention that an Award is so "irrational" as to fall outside the scope of the submission to arbitration rejected as being an impermissible attempt to re-open the merits

Fraud

- A relevant fraud for resisting enforcement of a **foreign judgment** must be that of the party seeking enforcement, or of the court itself.
- Examples: giving knowingly false evidence, procuring knowingly false evidence, and other forms of deceiving the foreign court; intimidation by violence or other illegal acts
- A foreign court which acts corruptly, for example by accepting a bribe, acts fraudulently, even if the party relying on the judgment is not implicated in the corrupt acts.
- **Must "particularise** the fraud with precision **and then establish** it to the appropriate standard" – *i.e.* with "plausible evidence" to establish a *prima facie* case for the matter to be sent to trial in Hong Kong:
- **Causation:** suggested approach is **(a)** to consider whether the person raising the allegation of fraud has had a reasonable opportunity to raise it abroad, and only if not, **(b)** to consider whether the alleged fraud would in all probability have had a material effect upon the judgment.

Fraud

- A party resisting enforcement of an **arbitral award** on the ground of fraud must demonstrate that it has a "real prospect of success" in persuading the court to find that the award was obtained by fraud
- As to the meaning of "fraud" itself, it is suggested that the matter relied upon must be **(i)** new (not reasonably available during the arbitration to the party seeking to resist enforcement), **(ii)** material to the outcome of the arbitration and **(iii)** such as to show dishonesty by the successful party. Otherwise, there is a real risk of the successful party having, in effect, to make out the case on its merits all over again.
- It has also been held that "fraud" for this purpose encompasses duress.
- Must be reprehensible or unconscionable conduct or serious impropriety supported by cogent evidence
- ***The Marie H*** [2001] 1 All ER (Comm) 398 (Comm Ct): complaint **rejected** that the Award had been issued when the parties were negotiating, and the other party had induced the applicant into believing that steps would be taken to ensure that no award was made; held that there had been no devious, underhanded or unconscionable conduct on the part of the other party, which amounted to conduct in procuring the award contrary to public policy.

Lack of finality

- **Foreign judgments:** a hybrid question of Hong Kong law and foreign law:
 - It is ultimately for Hong Kong law to define the criteria which a foreign judgment must satisfy in order to be regarded as "final".
 - The enquiry into whether these criteria are satisfied will typically, however, by its very nature, require the Hong Kong court to address questions of foreign law.
- Specific criteria:
 - The judgment must have "conclusively, finally and forever established the [matter] of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties".
 - Clearly, a judgment or order which is expressly "interim" or "*nisi*" is not final.
 - Where a foreign "judgment" is entered after summary ("re-mate") proceedings, with the defendant being free, as a matter of ordinary practice, and without having to show exceptional cause, to institute "plenary" proceedings in which the matter would be decided after a more thorough enquiry before the same judge: not final
 - If the foreign court, retains a wide discretion to review an otherwise final judgment before it is perfected (*i.e.* drawn up in writing, sealed and entered in the court records): not final until order perfected

Lack of finality

- However, a judgment or order may be final notwithstanding that it was delivered or made by way of consent or on procedural grounds.
- **Appeal** against foreign judgment: *China NPL Holdings Pte Ltd v Mo Haidan* [2021] 1 HKLRD 344, [2020] HKCA 1014
 - Not by itself a sufficient ground for resisting a claim based on that judgment as a cause of action, but a Hong Kong judgment based on a foreign judgment under appeal may possibly have to be revisited when the appeal in the foreign appellate court succeeds (§26).
 - Hong Kong Court can take account of the developments in the foreign jurisdiction from which the judgment emanated in deciding what is the proper relief to be granted and the course to take in an action in Hong Kong based on such foreign judgment (§53).
 - Spectrum of possible scenarios

Lack of finality

- **First scenario:** the foreign judgment can as a matter of the foreign law be capable of being appealed against but no appeal has actually been brought.
- **Second scenario:** the foreign judgment is actually subject to a pending appeal which has been duly filed – judgment can be entered under the common law, though the enforcing court may consider granting a stay of execution pending the determination of the appeal in the foreign court (§54).
- **Third scenario:** foreign court actually stayed enforcement of the judgment pending the appeal – Hong Kong Courts should have regard to how the stay came about in the foreign court in deciding if the foreign judgment should be enforced pending the determination of the appeal by the foreign court (§56).
- **Fourth scenario:** foreign judgment subsequently overturned on appeal in the foreign appellate court – (save in exceptional circumstances) Hong Kong courts would not enforce the overturned foreign judgment. If judgment has already been entered in Hong Kong based on the overturned foreign judgment, that Hong Kong judgment should be set aside (§57).

Lack of finality

- **Other particular cases**
- **Default judgments:** in principle to be regarded as final and conclusive on the merits
- **Consent judgments:** clear on principle that they should also be regarded as final and conclusive on the merits
- **Summary determinations of substantive issues:** a judgment allowing an application for summary judgment, or to strike out a claim for failure to state a reasonable cause of action, will be final and conclusive on the merits
- **Judgment entered by virtue of procedural defaults:** where a defence was struck out, and judgment entered, on the ground of failure to give discovery, Canadian and Australian courts have held that such a judgment is "on the merits"

Not binding, set aside or suspended

- Enforcement of an **arbitral award** may be refused if it has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- A refusal of enforcement in the place of arbitration which does not involve a setting aside or suspension does not fall within this case.
- If the award has been set aside in the place of arbitration, the Hong Kong court has discretion still to allow enforcement, but will normally refuse to allow enforcement, unless the order to set aside is not entitled to recognition.
- However, the dismissal of an application to set aside by the court of the place of arbitration does not prevent the unsuccessful party from arguing the same, or different, points to resist enforcement in Hong Kong, but the Hong Kong court will "normally" give considerable weight to the court's decision.

Public policy

- **Foreign judgments:** residual role for public policy.
- Mere fact that the liability adjudged is of a type entirely unknown to Hong Kong law should not, without more, render its enforcement a violation of Hong Kong public policy
- Nor should the fact that a foreign court applied a law which a Hong Kong court would not have applied, even, it seems, in cases where the Hong Kong court would, if deciding the matter itself, have regarded the application of Hong Kong law as mandatory
- However, a foreign judgment obtained in violation of a Hong Kong anti-suit injunction will not be enforced.
- Moreover, a foreign judgment inconsistent with a previous decision of a competent Hong Kong Court in proceedings between the same (or privy) parties will not be enforced (in other words, the principle of *res judicata* is one of public policy).

Public policy

- **Arbitral award: enforcement of the award would be “contrary to the fundamental conceptions of morality and justice of the forum”:** *Hebei Import & Export v Polytek Engineering* (1999) 2 HKCFAR 111
- “Public policy” means the public policy of the Hong Kong forum
- Hong Kong Courts construe the public policy ground narrowly and will only refuse enforcement of (or set aside) awards on such a ground in rare instances.
- ***A v R* [2009] 3 HKLRD 389 (CFI): “there must be... a substantial injustice arising out of the award which is so shocking to the Court’s conscience as to render enforcement repugnant.”**
- Examples:
 - *Sun Tian Gang*: the Respondent was in prison and thus unable to present his case; enforcement would be contrary to public policy and repugnant.
 - *W v AW* [2021] HKCFI 1707: tribunal’s findings inconsistent with an earlier award rendered in a separate arbitration involving the same parties and with one of the arbitrators appointed by AW in both proceedings; Court opined that it was likely that W’s application to set aside the subsequent award on public policy would succeed as W was entitled to expect the second tribunal to deal with the question of issue estoppel after the first award was handed down; failure of AW’s party appointed arbitrator to deal with and explain the inconsistent findings constitutes injustice and grave unfairness to W; the fact that AW had appointed the same arbitrator in both proceedings was material
 - *JJ Agro Industries (P) Ltd v Texuna International Ltd* [1994] 1 HKLR 89 (HC): allegation that a major witness had been kidnapped and forced to make a false affidavit; evidence regarding allegation of kidnapping ordered to be taken

Other grounds of refusal to enforce foreign judgments

- **Private rights and public law:** *Autonomous Non-Commercial Organization "Organizing Committee of 2014 Sochi Winter Olympics" v Pico Projects (International) Ltd (筆克策劃制作(國際)有限公司)* [2021] 5 HKLRD 754, [2021] HKCA 1798:
 - Whether, in bringing the claim, the judgment creditor was directly or indirectly doing an act which was of a sovereign character or which was done by virtue of sovereign authority, and whether the claim involved the exercise or assertion of a sovereign right extra-territorially.
 - Involves a question of characterisation for the Hong Kong court to decide; by reference to Hong Kong conflict of laws rules, whether, given its substance, a claim falls foul of “a well-established and almost universal principle of private international law” that “English [and Hong Kong] courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or (2) founded upon an act of state” (Rule 3).
 - An unsatisfied tax claim is a necessary condition for the application of Rule 3, but it is not sufficient as there are other conditions that must be fulfilled for Rule 3 to apply
- Comparability of issues
 - Foreign judgments may in principle be **recognised** on an issue-by-issue basis.
 - Care however needs to be taken to ensure that the foreign court in fact decided the issue which is now relevant in the Hong Kong proceedings.
 - In practice, the courts have on several occasions concluded that the foreign court was in fact deciding a somewhat different issue or that the precise issue decided was unclear, and that the party resisting recognition should be given the benefit of the doubt.

Other grounds of refusal to enforce foreign arbitral awards

- **Incapacity and Invalidity:** “a party to the arbitration agreement... was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State”
- **Incapacity limb:** worded slightly differently from art V of the New York Convention
- Article V provides that to determine the incapacity (or otherwise) of the party in question, the relevant law is one which applies to the party, namely, the law of the nationality, domicile or residence of the party.
- The UNCITRAL decided that this approach was inappropriate because it relied on a conflict of laws rule which was either incomplete or misleading. Possible applicable laws are the law of the nationality, domicile or residence of the party in question, or the law of the place or seat of arbitration, or the substantive law governing the relevant contract. If a party is a corporation, its capacity is usually governed by its constitution and the law of the place where the corporation is incorporated. If a party is a state or state agency, the state may have laws governing the capacity of the state to enter into contracts.
- **Invalidity limb:** applicable law = law to which the parties have subjected the arbitration agreement
- Not necessarily the same as the governing law of the contract which incorporates the arbitration clause. If the parties fail to provide for the law governing the arbitration agreement (as is often the case), there is a strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement.

Other grounds of refusal to enforce foreign arbitral awards

- **Non-arbitrability:** a ground where the Court may examine on its own motion, to be determined in accordance with Hong Kong law.
- Generally, issues which may have public interest elements may not be arbitrable. The AO does not provide for a list of matters that are not arbitrable under Hong Kong law
- **Insolvency: *Lasmos* approach** (*Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 (CFI), per Harris J) – save for exceptional circumstances, a creditor’s petition should generally be dismissed if: (i) a company disputes the debt relied on by the petition; (ii) the debt arises under a contract which contains an arbitration clause that covers any dispute relating to the debt; and (iii) the company takes the steps required under the arbitration clause to commence the mandated dispute resolution process (which may include mediation) and files an affirmation to demonstrate this
- But subsequent to *Lasmos* were two Court of Appeal cases— *But Ka Chon v Interactive Brokers LLC* [2019] 4 HKLRD 85, [2019] HKCA 873 ([57] – [73]); *Sit Kwong Lam v Petrolimex Singapore Pte Ltd* [2019] 5 HKLRD 646, [2019] HKCA 1220 ([33]-[39]). In both cases, the Court of Appeal made *obiter* reservations regarding the correctness of the approach in *Lasmos* in which the court’s discretion is limited to either staying or dismissing the winding-up petition. The correctness of the *Lasmos* approach remains to be determined by the Court of Appeal.



Q&A



HKI Arb Webinar: “Extraterritorial Effects in Cross-Border Litigation: Enforcement of Foreign Judgments and Foreign Arbitral Awards in Hong Kong”

16 February 2023 | 6:00pm (HKT)



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