New Arrangements Concerning Mutual Enforcement of Arbitral Awards between Mainland China and the Hong Kong Special Administrative Region (2021)

关于内地与香港特别行政区相互执行仲裁裁决的补充安排 (2021)

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Before China resumed sovereignty over Hong Kong on 1 July 1997, Hong Kong and Mainland arbitration awards were mutually enforced according to the provisions of the New York Convention (1958) as if Hong Kong and Mainland China were independent contracting parties. Once Hong Kong returned to Chinese sovereignty, however, the New York Convention could not apply to enforcement of awards within the same state, regardless of Hong Kong's status as a Special Administrative Region. This was one aspect of Hong Kong's distinct legal system that could not remain "basically unchanged".

Therefore, Mainland China ("the Mainland") and Hong Kong agreed special arrangements to allow their respective awards to be mutually enforced without the application of the New York Convention. The first of these arrangements was implemented in 2000 under the "Arrangements Concerning Mutual Enforcement of Arbitral Awards between Mainland China and the Hong Kong Special Administrative Region" ("the 2000 Arrangements").[1]

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These problems were as follows:

1. Simultaneous Enforcement of Awards and Problems of "Double Enforcement"

The 2000 Arrangements required an enforcement creditor to exhaust enforcement remedies in either the Mainland or Hong Kong before taking enforcement action in the other jurisdiction. At the time, this was thought to be a fair arrangement that would avoid the oppression of parallel enforcement proceedings. In fact, it proved to be unfair to the award creditor when the outcome of enforcement proceedings in either jurisdiction was uncertain, and time-consuming challenges to enforcement in one jurisdiction could frustrate enforcement in the other jurisdiction because of the expiry of the limitation period.

[1] In the Mainland, the 2000 Arrangements were implemented in the form of a Notice of the Supreme People's Court No. 3 of 2000. (最高人民法院关于关于内地与香港特别行政区相互执行仲裁裁决的安排). In Hong Kong it was implemented by amendments to the Arbitration Ordinance (Cap. 609).

Therefore, the 2021 Supplementary Arrangements have repealed the prohibition on simultaneous enforcement and now the courts of the Mainland and Hong Kong shall, at the request of the court of the other place, provide information on the status of its enforcement of the arbitral award to ensure that *no award creditor shall be allowed to recover more than the total amount determined in the award.*[2]

2. "Seat of Arbitration" versus "Place of Arbitration"

The Preamble of the 2000 Arrangements provided that " ... the People's Courts of the Mainland agree to enforce the awards rendered ***in the Hong Kong SAR*** pursuant to the Arbitration Ordinance of the HKSAR" (emphasis supplied). As Mainland arbitration law does not permit *ad hoc* arbitrations, it is not sensitive to the distinction between the seat of the arbitration and the place of arbitration because in the Mainland these are always the same place. By using the words "awards rendered in the Hong Kong SAR" the Preamble thus created an ambiguity between the seat of arbitration and the place of arbitration, for example, in an arbitration where the seat of arbitration was Hong Kong, but the hearings took place in the Mainland (or elsewhere).

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This ambiguity has been removed by the 2021 Arrangements, which now provide that "arbitral awards ***rendered pursuant to the Arbitration Ordinance*** of the Hong Kong SAR" shall be enforceable in the Mainland (emphasis supplied). Therefore, no matter whether the arbitration is institutional or *ad hoc* and the hearings are held in Hong Kong or elsewhere, provided that the award is rendered pursuant to the Hong Kong Arbitration Ordinance, it will be enforceable.

Similar wording has been adopted in the 2021 Arrangements to describe Mainland awards enforceable in Hong Kong and at the same time, it has removed the list of Mainland Arbitration Institutions from which awards are enforceable in Hong Kong that appeared in the 2000 Arrangements.

3. "Recognition and Enforcement" of Arbitral Awards

According to the New York Convention, arbitral awards are "recognized and enforced". "Recognition" refers to an undertaking by a state to respect an arbitration award as binding whereas "enforcement" is the next step by which a state enforces the award in accordance with its local procedural rules. In practice, this distinction is usually subtle and of little practical significance, but it is relevant where a party merely seeks to rely on an award without enforcement, for example, as evidence of a defence or a right of set off. [3]

The distinction between recognition and enforcement was not reflected in the 2000 Arrangements, which referred only to the "mutual *enforcement* of arbitral awards". Nevertheless, the

[2] 2021 Supplementary Arrangements Clause 3.

[3] This paragraph relies on Alan Redfern and Martin Hunter (1999), *Law and Practice of International Commercial Arbitration*, 3rd ed., (London: Sweet and Maxwell) at 10-09.

Hong Kong Arbitration Ordinance made it clear that a binding Mainland award could be relied on "by way of defence, set off or otherwise in any legal proceedings in Hong Kong."[4] Moreover, if that was not clear enough, "[a] reference… to enforcement of a Mainland award is to be construed as including *reliance* on a Mainland award."[5]

Although civil actions for the recognition of certain legal rights may be brought in Chinese courts,[6] such actions do not include the recognition of arbitral awards and no distinction between recognition and enforcement is made in relevant Chinese legislation or judicial notices.

Therefore, probably more as a matter of aligning practice and avoidance of doubt, the 2021 Arrangements provide that a reference in the 2000 Arrangements to enforcement shall be interpreted to include procedures for both ***recognition and enforcement of Mainland and Hong Kong arbitral awards***.[7]

> Whilst the 2021 Arrangements are an important revision after almost 20 years of enforcement practice, the powers of arbitrators to grant interim relief on the Mainland remain a stumbling block to effective enforcement and it remains to be seen how this will be addressed in the coming revisions to the Mainland's Arbitration Law.

4. Security for Claims & Costs

As a common law jurisdiction, Hong Kong has long included injunctive relief among its remedies in aid of arbitral proceedings, but the Mainland has only recently embraced the concept of injunctions for use as interim relief in civil proceedings. This created an imbalance in the conduct and enforcement of arbitral proceedings between Hong Kong and the Mainland, which the 2000 Arrangements did not address.

This imbalance was partially addressed in 2019 in the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region."[8] The 2019 Arrangement refers to three kinds of remedies available from Chinese courts: "property preservation, evidence preservation, and conduct preservation" and in Hong Kong to "injunction and other interim measure for the purpose of maintaining or restoring the status quo pending determination of the dispute".[9]

The 2021 Arrangements were revised accordingly to refer specifically to interim relief before or after an application for enforcement of an arbitral award:

"The *relevant court* may, before or after accepting the application for enforcement of an arbitral award, impose preservation or mandatory measures pursuant to an application by the party concerned and in accordance with the law of the place of enforcement."[10]

Interim relief in the Mainland under the 2019 Arrangement is only available from a court,[11] whereas in Hong Kong the Arbitration Ordinance has enacted the provisions of the UNCITRAL

[4] Arbitration Ordinance (Cap. 609) Section 92(2).
[5] Arbitration Ordinance (Cap. 609) Section 92(3).
[6] Rules
[7] Article 1. "《安排》所指执行内地或者香港特别行政区仲裁裁决的程序，应解释为包括认可和执行内地或者香港特别行政区仲裁裁决的程序。"

[8] Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administration Region "最高人民法院关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排" effective 1 October 2019.
[9] Article 1. Where Hong Kong court exercises these powers they are governed by the Arbitration Ordinance (Cap. 609) Part 6 Division 5. See also the powers of the arbitration tribunal in Hong Kong referred to below.
[10] Article 6(2) Emphasis supplied. 第六条中增加一款作为第二款："有关法院在受理执行仲裁裁决申请之前或者之后，可以依申请并按照执行地法律规定采取保全或者强制措施."
[11] See, for example, *Guidance of CIETAC Hong Kong on the Application of the 2019 Interim Measures in Arbitration* issued on 17 August 2021. 贸仲香港发布《贸仲香港仲裁案件适用内地与香港《保全安排》实务指引》－新闻－中国国际经济贸易仲裁委员会 (cietac.org)

Model Law, which gives the arbitration tribunal itself extensive powers to make preliminary orders. [12] However, powers of arbitrators in Mainland China to grant interim relief are not recognized by China's Arbitration Law and only some Mainland arbitration commissions have recognized the concept of emergency arbitrator and conferred such powers.[13]

Conclusion

In a survey of 1,218 participants of their attitudes to international arbitration, almost half expressed a wish for better enforcement of agreements to arbitrate and arbitral awards.[14] The importance of enforceability of arbitral awards is therefore at the forefront of most parties contemplating arbitration and the enforcement practices provided by the 2021 Arrangements will be a key determining factor in the success of cross-border arbitration practice between the Hong Kong SAR and Mainland China.

Whilst the 2021 Arrangements are an important revision after almost 20 years of enforcement practice, the powers of arbitrators to grant interim relief on the Mainland remain a stumbling block to effective enforcement and it remains to be seen how this will be addressed in the coming revisions to the Mainland's Arbitration Law.

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[12] Arbitration Ordinance (Cap. 609) See Part 6 Divisions 1 to 4.
[13] CIETAC Arbitration Rules (2015 ed.) Article 23.2. See also the rules of the Beijing and Shanghai arbitration commissions.
[14] University of London Queen Mary College and White and Case 2021 *International Arbitration Survey: Adapting Arbitration to a Changing World* p.8. LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf