

Recognition and enforcement of Hong Kong Arbitration Awards in Mainland

June 23, 2020

Background

On 1 February 2000, the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and HKSAR came into effect (the “**Arrangement for Mutual Enforcement of Arbitral Awards**” or the “**Arrangement**”). Since this date, the Arrangement has replaced the New York Convention as the legal basis for the recognition and enforcement of HK Arbitration Awards in Mainland. It also applies retroactively to applications made after the 1 July 1997 and before the Arrangement coming into force, and all the applications rejected during this period may be made again.

The Arrangement is detailed in the Arbitration Ordinance (Cap. 609) (the “**Arbitration Ordinance**”) in Hong Kong while in Mainland it is in the form of judicial interpretation of the Supreme People’s Court.

Hong Kong Arbitral Awards

The arbitration systems differ vastly between Hong Kong and Mainland. Chinese arbitration institutions administer most international arbitrations in Mainland China. An ICC arbitration seated in the Mainland once caused great controversy as to whether a foreign institution could do so in the Mainland and this case had to be finally resolved by the Supreme People’s Court. It is very rare that an international arbitration administered by an institution outside the Mainland selects Mainland China as its seat and has its awards made pursuant to the Arbitration Law of the PRC. Thus, a Mainland arbitral award can be easily identified. By contrast, Hong Kong arbitrations are varied, either institutional or ad hoc, and administered by either a Hong Kong arbitration institution or an overseas one. Therefore, it is necessary firstly to ascertain the identity of a Hong Kong arbitral award under the Arrangement.

The preface of the Arrangement states that a Hong Kong award refers to that made in Hong Kong pursuant to the Arbitration Ordinance. There are two qualifications, i.e. (1) the seat shall be Hong Kong SAR; and (2) the award shall be made pursuant to the Arbitration Ordinance. In respect of the first qualification, according to the rules of main institutions and common principle, an award is always deemed to be made at its seat irrespective of where the hearing occurred or the award was signed. Therefore, subject to qualification (2), an award made by a tribunal either formed by a Hong Kong local institution such as the HKIAC or an overseas institution, or by an ad hoc tribunal, is enforceable under the Arrangement, only if the seat is Hong Kong. The Supreme People’s Court has recognised that the effectiveness of ad hoc arbitration agreements and awards is subject to the law of the seat rather than the law of Mainland.¹

In respect of qualification (2), it is tricky and might be confusing. The Arbitration Ordinance may not always apply to arbitrations seated in Hong Kong. The parties may choose a law other than that of the seat to be applicable to the arbitration and the tribunal may also so decide in the absence of the parties’ agreement. For an award intended to be

enforced in Mainland, the parties and the tribunal must be careful in deciding the arbitration law. In practice, the parties rarely complicate themselves in this way by selecting other laws. Therefore, the Arrangement covers most Hong Kong arbitration awards.

The Procedures of Enforcement

The applicant may apply to the intermediate people's court in the place where the respondent is domiciled or in the place where the respondent's property is situated to enforce the award. If the places of the domicile and property fall within the jurisdiction of different courts, the application must be filed with only one of them, whose rulings to secure the target property and enforce the award are enforceable throughout Mainland.

If the places to seek enforcement are in the Mainland as well as in Hong Kong, the applicant shall not file applications with relevant courts of the two places at the same time. Only when the enforcement by the court of one place is insufficient to satisfy the liabilities may the applicant apply to the court of another place for enforcement of the outstanding liabilities. It is worth noting that to apply firstly to the Hong Kong court for enforcement may mean that the respondent's action avoiding enforcement in the Mainland is out of control, because prior to starting enforcement procedure at the Mainland court the applicant is not entitled to interim relief. It is therefore advisable for the applicants to seek professional advice before determining the order of priority, when the respondent has property in both Hong Kong and Mainland.

Under the Arrangement, applications shall be made in accordance with the Civil Procedural Law of the PRC within two years from the expiry of the period that the liabilities must be discharged, or from the effectiveness of the legal instrument in the absence of the period.² The respondents or any other interested parties may raise oppositions to the enforcement in writing.³ During the process of enforcement, the parties may reach settlement⁴ and the court may seize, freeze, transfer or sell off the assets of the respondent.⁵

Circumstances in which the Enforcement may be Refused

The Mainland courts have always taken a discreet attitude. The situations that can justify refusal are confined to those expressly laid down in the Arrangement and any refusal ruling shall be subject to the review of the Supreme People's Court, which has been dedicated to an arbitration-friendly environment.

The situations where an application may be refused are basically in conformity with the New York Convention, including: a party to the arbitration agreement under some incapacity; the arbitration agreement held as invalid under the applicable law; a party not given proper notice of the appointment of the arbitrator or unable to present his case; the award falling outside the terms of submission to arbitration or containing decisions beyond the scope of the submission to arbitration; the composition of the arbitral tribunal or the arbitral procedure not being in accordance with agreement of the parties; or the award not having become binding or having been set aside or suspended by the court or in accordance with the law of the seat.

In addition, if the relevant court finds that the dispute is incapable of being settled by arbitration, or the enforcement would be contrary to public interests, then the court may refuse to enforce the award. These above situations equate to those allowing the Hong Kong court to refuse a Mainland award.

As the world's largest law firm, we have unparalleled presence and capabilities across all major jurisdictions in the world. Our Chinese team has a wealth of experience in a wide variety of litigation, mediation and arbitration matters,

and the capability to provide world-class legal services. If you are looking to enforce a Hong Kong judgment or award in the Mainland, apply for interim measures in aid of arbitral proceedings or looking for support in formulating your dispute management strategy generally, please get in touch with us.

For further details, please get in touch with the authors, Raymond Zhu (Senior Partner, Beijing), Ninon Dong (Senior Associate, Beijing) and Zelun Zhu (Associate, Beijing).

1. Fajing(1999) No.143, the Supreme People's Court ↩
2. The Civil Procedure Law Art. 239 ↩
3. Ibid Art. 225, 227 ↩
4. Ibid Art. 230 ↩
5. Ibid Art. 242 ↩

Your Key Contacts



Raymond (Yongrui) Zhu

Senior Partner and Member
of the Board, Beijing

D +86 10 5813 7229

M +86 139 1188 1971

yongrui.zhu@dentons.cn