A NEW ERA FOR CROSS-BORDER RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS BETWEEN THE MAINLAND AND HONG KONG

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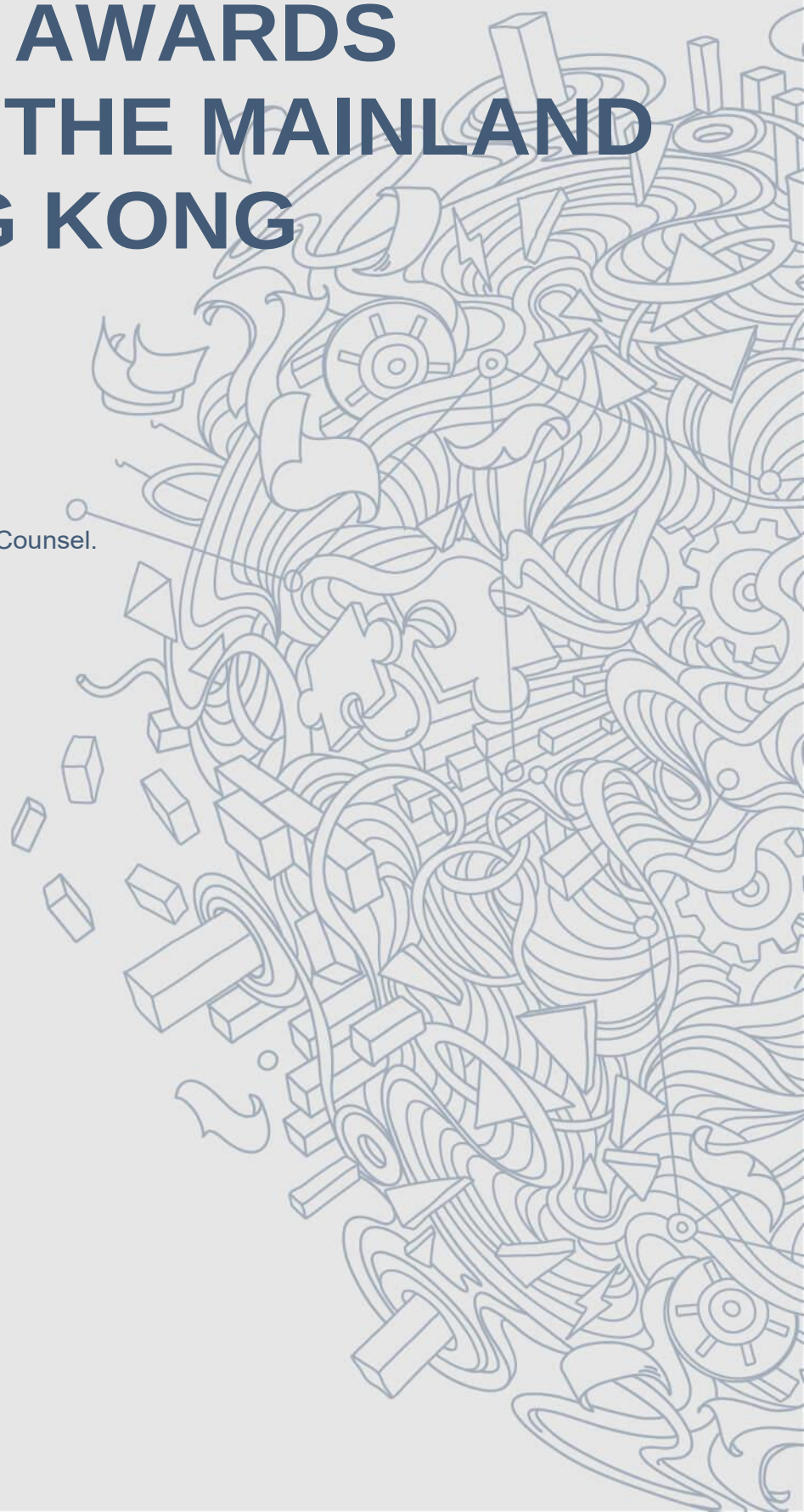

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GENERAL

Prior to 1997, awards made in Mainland China were enforced in Hong Kong on the strength of the New York Convention, of which the United Kingdom extended its application to Hong Kong with effect from 21 April 1977. After unification, the New York Convention was no longer applicable to the enforcement of Mainland awards in Hong Kong. In order to alleviate the problems arising from the cross-border enforcement of arbitral awards, the Supreme People's Court and the Hong Kong Government signed the Arrangement Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong SAR (the "**Arrangement**") in 1999 for mutual enforcement of arbitral awards. In order to perform the Arrangement, amendments have been made to the Arbitration Ordinance by introducing a new Division 3 in Part 10 for the enforcement of Mainland awards.

The implementation of the Arrangement has greatly facilitated the cross-border enforcement of arbitral awards of the Mainland and Hong Kong. Now, after passing of 20 years, some practical issues will inevitably arise. On 27 November 2020, the Supreme People's Court and the Hong Kong Government signed the Supplemental Arrangement Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong SAR (the "**Supplemental Arrangement**") to clarify some issues and enhance the enforcement process. More important, it brings the enforcement of Mainland awards more in line with the provisions of the New York Convention.

"RECOGNITION" OF ARBITRAL AWARDS

The full name of the New York Convention is "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" ("**New York Convention"/ "Convention**"). Article I of the Convention provides, amongst others, that:

"1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

One will note that the words "*recognition*" and "*enforcement*" are being used in pair, with the connecting conjunction "and" (13 times) or "or" (3 times), throughout the Convention. In *Jowitt's Dictionary of English Law (5th Ed., Sweet & Maxwell*):

"*Recognition of judgments*" means:

"A short hand for where a court recognizes the existence of a foreign judgment. This might be necessary for a variety of reasons, including as a preliminary step to the judgment being enforced, to establish *res judicata* and to establish title to goods or the validity of a divorce."

"*Enforce; Enforcement*" mean:

"In the civil context, to compel observance (of a legal obligation) by way of legal proceedings; the act or process of such compulsion. There are two stages – before and after judgment – to both of which the term "enforcement" can be applied. (i) Before judgment, enforcement describes the bringing of legal proceedings to compel observance of, for example, the terms of a contract (by way of an order for the payment of a debt or for specific performance), a property right, the rights of a holder of a bill of exchange … or an obligation to pay taxes. (ii) After judgment, enforcement means action to compel observance of a court judgment where the person against whom it is given has not complied with it…"

It should be noted that there are some authorities of the view that the steps taken before judgment, such as commencement of the enforcement action, are only steps taken to enforce, rather than "enforcement". This is however not important for our present purposes.

Despite the fact that the two words "*recognition*" and "*enforcement*" are used in pair, they are held to be construed disjunctively in Re H (*A Child*) (*Foreign Order*), *The Times, 19 November 1993*. Although this case concerns about the use of the words "recognition and enforcement" in article 10(1) of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children, there is no good reason why the same words used in the New York Convention will be construed in a different manner. If this understanding is correct, recognition of an arbitral award is not necessarily followed by enforcement of the award. However, an award which is being enforced by a Court must first be recognized by the Court.

The Arrangement deals with the cross-border enforcement of arbitral awards, without referring to the preliminary step of recognition of the arbitral awards. As stated at the beginning of the Arrangement:

"… 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 … and the People's Court of the Mainland agree to enforce the awards made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR …"

Nevertheless, since an award which is enforced by a Court must have first been recognized by the relevant Court, the lack in reference to "*recognition*" in the Arrangement will not create any practical problems. However, for the sake of clarity, it has now been clarified in the Supplemental Arrangement that the Mainland awards and HK awards which are enforced under the Arrangement are recognized by the HK Courts and People's Courts respectively.

PRESERVATION MEASURES – PRE AND POST ENFORCEMENT OF ARBITRAL AWARDS

One should recall that, on 2 April 2019, the Supreme People's Court and Hong Kong Government signed an 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 (the "**Interim Measure Arrangement**"). This Interim Measure Arrangement allows the parties of one side to apply to the Courts of the other side for pre-award interim measures in aid of arbitral proceedings to be commenced or commenced in the other side. In the case of the Mainland, the interim measures refer to property preservation, evidence preservation and conduct preservation. The interim measures which may be granted by the Hong Kong Courts are mainly in the form of injunction, such as *Mareva* injunction, Anton Pillar order, mandatory injunction, prohibitory injunction, and so forth.

The availability of preservation measures which may be used in aid of the arbitral proceedings raises a question as to whether these measures are also available for the cross-border enforcement of arbitral awards.

According to the Arbitration Ordinance (Cap. 609) ("**AO**"), a Mainland award can be enforced in the same manner as a judgment (sections 84 and 92, AO). Under section 21L of the High Court Ordinance (Cap.4), the Court of First Instance may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the Court to be just or convenient to do so, and such order may be made either unconditionally or on such terms and conditions as the Court thinks just (sections 21L(1) and (2), High Court Ordinance (Cap. 4)). Insofar as Hong Kong Courts are concerned, the power to grant injunctive relief is very wide, which clearly covers pre- and post-enforcement of arbitral awards, including Mainland awards.

In any case, for the sake of clarity, the authorities of the Mainland and Hong Kong have now clarified this issue in the Supplemental Arrangement that preservation measures are available in aid of the cross-border enforcement of arbitral awards. A Hong Kong award creditor who wishes to enforce a Hong Kong award against the award debtor in the Mainland may now apply to the relevant People's Court for preservation measures against the award debtor or its assets before or after the People's Court's acceptance of the application for enforcement of the arbitral award. Similarly, a Mainland award creditor may also apply to the relevant Hong Kong Court for injunctions against the award debtor or its assets in Hong Kong before or after the Hong Kong Court's acceptance of the enforcement application.

SEAT OF ARBITRATION

The seat of arbitration is important in determining (i) the procedural law which governs the conduct of the arbitration, which is also called the "*lex arbitri*" or *"curial law*", (ii) the rights of the parties in the arbitration, and (iii) the Court which is competent in exercising supervisory jurisdiction over the conduct of the arbitration. Although the "*seat of arbitration*" is usually referred to as the "*place of arbitration*" in many legislations, including the AO, it refers to the legal seat of the arbitration, distinguishing from the "*venue of arbitration*", which is the physical place where the arbitration is being held. The difference of "*seat of arbitration*" and "*venue of arbitration*" is shown in many arbitration rules. For example, article 14 (Seat and Venue of the Arbitration) of the HKIAC 2013 Administered Arbitration Rules provides:

"14.1 The parties may agree on the seat of arbitration. Where there is no agreement as to seat, the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate.

"14.2 Unless the parties have agreed otherwise, the arbitral tribunal may meet at any location outside of the seat of arbitration which it considers appropriate for consultation among its members, hearing witnesses, expert or the parties, or the inspection of goods, other property or documents. The arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the seat."

Such provisions are also found in other arbitration rules, such as article 18 of the ICC 2017 Arbitration Rules. The importance of the legal seat of an arbitration can be illustrated in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara [2003] HKCFI 390; [2003] 4 HKC 488; HCCT 28/ 2002 (27 March 2003*). In this case, the Court granted leave to the plaintiff, ex parte, to enforce an arbitral award against the defendant. The defendant applied to the Court to set aside the order on, amongst others, the ground that the award had been set aside by the Indonesian Court (i.e. paragraph 1(e) of Article V of the New York Convention). It was undisputed that the arbitration was conducted under Swiss law. After examining the relevant facts and law, the Court found that the legal seat of the arbitration was Geneva, Switzerland, albeit the tribunal, for convenience, sat in Paris. Although the award had been set aside by the Indonesian Court, since the Indonesian Court was not "*the competent authority of the country in which, or under the law of which, the award was made"* as referred to in the New York Convention, the defendant's set aside application was dismissed by the Court. The defendant's appeal was also dismissed by the Court of Appeal.

The Arrangement states at the beginning that "… *the People's Court of the Mainland agree to enforce the awards made in the HKSAR pursuant to the Arbitration Ordinance of the HKSAR*..." It therefore appears that, for a Hong Kong award to be eligible for enforcement in the Mainland, there are 2 conditions required to be satisfied, namely the award (i) is "*made in the HKSAR*" and (ii) is made "*pursuant to the Arbitration Ordinance of the HKSAR*". The phrase "made in the HKSAR" is not a term of art and is arguable that it refers to the place where the award is physically made. Section 5(1) AO provides, amongst others, that:

"… this Ordinance applies to an arbitration under an arbitration agreement, whether or not the agreement is entered into in Hong Kong, if the place of arbitration is in Hong Kong."

The "*place of arbitration*" in the legal sense refers to the "*seat of arbitration*". Accordingly, the legal seat of the arbitration under which an award (i) is "made in the HKSAR" and (ii) is made "*pursuant to the Arbitration Ordinance of the HKSAR*" must be "*Hong Kong*". However, an award made in an arbitration, "*pursuant to the Arbitration Ordinance of the HKSAR*", with its legal seat in Hong Kong may not be "*made in the HKSAR*", since the tribunal may sit outside of Hong Kong. This problem has been avoided in article 14.2 of the HKIAC 2013 Administered Arbitration Rules that the arbitration conducted by the tribunal outside of Hong Kong "*shall nonetheless be treated for all purposes as an arbitration conducted at the seat*." However, the Rules are not part of the AO. This problem may create a peculiar situation for a Hong Kong award to be enforced in the Mainland Courts, albeit there is apparently no such problem arises to date.

The Supplemental Arrangement has now clarified the position by adopting the "*seat of arbitration*" approach in defining arbitral awards. Accordingly, the People's Courts agree to enforce an award which is made in an arbitration with its seat in Hong Kong. On the other hand, the Hong Kong Courts agree to enforce an award which is made in an arbitration with its seat in the Mainland.

SIMULTANEOUS APPLICATIONS OF ENFORCEMENT OF ARBITRAL AWARDS

Contrary to the 3 points above, which basically clarify the current position, this last point is important that it enhances the practicality of the Arrangement.

Section 93 AO provides:

"93. Restrictions on enforcement of Mainland awards

(1) A Mainland award is not, subject to subsection (2), enforceable under this Division if any application has been made on the Mainland for enforcement of the award.

(2) If a Mainland award is not fully satisfied by way of enforcement proceedings taken in the Mainland, or in any other place other than Hong Kong, that part of the award which is not satisfied in those proceedings is enforceable under this Division."

Pursuant to section 93 AO, if a party commences enforcement action in Mainland, he cannot enforce the Mainland award at the same time in Hong Kong, or vice versa. This restriction reflects Article 2 of the Arrangement, which provides, amongst others, that "… *the applicant shall not file applications with relevant courts of the two places at the same time* …" The purpose of this is to avoid "*double enforcement*".

In practice, since the limitation period for enforcement of an arbitral award under the PRC law is shorter than the 6 years under Hong Kong law, an award creditor usually commences enforcement action in the Mainland first, so as to avoid the potential time-bar issues under the PRC law. In addition, the legal proceedings in the Mainland are generally moving quicker. After completion of the enforcement proceedings in the Mainland, the award creditor will generally still have time to commence enforcement action in Hong Kong, if required. Accordingly, the restriction generally will not cause much practical problems, except in some special

circumstances, as demonstrated in *CL v SCG [2019] HKCFI 398; [2019] 2 HKLRD 144; HCCT 9/2018 (18 February 2019*). In that case, the plaintiff applied to the Shenzhen Court for enforcement of a Hong Kong arbitral award in 2011, but was rejected in 2015. The plaintiff's appeal to the Guangdong Higher People's Court for a retrial was also rejected in 2016. After two years, in 2018, the plaintiff commenced legal action to enforce the award in Hong Kong. The defendant opposed on the ground that the enforcement was time-barred. The plaintiff argued that the accrual of the cause of action should be suspended during the time of its application to the Shenzhen Court for enforcement of the Hong Kong award. The Hong Kong Court disagreed and set aside the enforcement order. Since the time will continue to run during a party's enforcement action in the Mainland, if the award debtor drags out the enforcement action in the Mainland, the award creditor's potential enforcement action in Hong Kong may be statutorily time barred by the Limitation Ordinance (Cap.347).

In 深圳市開隆投資開發有限公司 訴 長興電業製品廠（國際）有限公司 [2003] 3 HKLRD 774 ("the Kai Long case"), A Cheung J. commented that "double enforcement" may cause "annoyance or even oppression" to the award debtor and "in the context of reciprocal enforcement of awards, there is nothing unreasonable in designating double enforcement as a potential mischief and enacting provisions to stop that mischief." However, from the award creditor's standpoint, is the award debtor obliged to settle the outstanding award debt from the first place? Most of the award creditors will not want to spend legal costs in enforcing outstanding awards. If an award debt can be satisfied by an enforcement action commenced in one jurisdiction, a reasonable award creditor will not commence unnecessary enforcement actions in other jurisdictions. It is only in the situation that an award debtor is elusive and tries to hide his assets to evade enforcement of the award that an award creditor is required to trace the award debtor's assets and commence enforcement actions in different jurisdictions.

This problem is now finally resolved in the Supplemental Arrangement that an award creditor may commence enforcement actions in both Mainland and Hong Kong at the same time, provided the total amount recovered by the award creditor will not exceed the amount awarded. This will no doubt greatly facilitate cross-border enforcement of arbitral awards of the Mainland and Hong Kong.

CONCLUSION

To bring the operation of the Arrangement to be more in line with the provisions of the New York Convention will certainly be greatly welcome by the legal practitioners of both jurisdictions. The Supplemental Arrangement not only clarifies some practical concerns, but also facilitates cross-border enforcement of arbitral awards by allowing the parties to make enforcement applications to the People's Courts and Hong Kong Courts at the same time. Hopefully, this will lessen the potential problems caused by the statutory time bar.

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