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Hong Kong and Mainland China supplement their Arrangement on Enforcement of Arbitration Awards

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Introduction

It has been 20 years since the Hong Kong and Mainland authorities signed the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR on 21 June 1999 ("**Arrangement**").

On 27 November this year, representatives of the Hong Kong and PRC authorities signed a "*Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*" (the "**Supplemental Arrangement**")

The two-page Supplemental Arrangement makes some important clarifications regarding the way in which the Arrangement is to be relied upon in practice.

Background

The original Arrangement was necessary to facilitate the reciprocal recognition and enforcement between Hong Kong and the Mainland, following the 1997 handover of Hong Kong SAR from the United Kingdom to the PRC.

Prior to the handover, Hong Kong awards had been enforceable in the Mainland by virtue of the mechanism contained in the New York Convention on the Recognition and Enforcement of Arbitration Awards, to which both the PRC and United Kingdom were both signatories ("**Convention**"). Subsequently Hong Kong and the PRC Mainland became part of the same sovereign unit, with the Convention mechanism no longer applicable between them. The Arrangement was intended to fill that gap.

The Arrangement put in place a mechanism which is similar to that provided for by the New York Convention. For example, Article 7 of the Arrangement, sets out narrow grounds for refusal of enforcement, which are notably similar to those set out in Article 5 of the Convention. Article 11 of the Arrangement provides that "*[a]ny problem arising in the course of implementing this Arrangement and any amendment to this Arrangement shall be resolved through consultations between the Supreme People's Court and the Government of the HKSAR*".

Separately, last year, in a significant development for the region, the Mainland China and Hong Kong authorities brought into force a bilateral arrangement by which the Chinese courts will recognize and enforce interim measures in support of institutional arbitration seated in Hong Kong. This meant that, for the first time, parties to Hong Kong-seated arbitration proceedings had a formal mechanism to obtain interim relief in the mainland.

The Supplemental Arrangement

The two-page Supplemental Arrangement makes four amendments to the existing Arrangement.

Arrangement now expressly covers both execution and arrangement phases

Under Article 1 of the Supplemental Arrangement, the Arrangement shall be amended to include the term “*recognition*” when referring to enforcement of arbitral awards in the Arrangement.

In its press release regarding the Supplemental Arrangement, the Hong Kong department of justice stated that this clarification was to allow “*greater certainty*”. The wording adopted now reflects wording in the Convention which also recognizes this two-stage approach.

Arrangement to no longer reflect concept of recognised Mainland “arbitral authorities”

Article 2 of the Supplemental Arrangement, amends the preamble and Article 1 of the Arrangement to remove the concept of recognized PRC “*arbitral authorities*”.

A distinctive feature of PRC-seated arbitration is that cases must be accepted and administered by a qualifying arbitration institution. Article 10 of PRC’s Arbitration Law provides for the establishment, qualifications and registration of such institutions. There have recently been apparent relaxations in this area with China’s State Council releasing a plan to allow foreign arbitral institutions to establish in the new Linggang area of the China (Shanghai) Pilot Free Trade Zone. Certain recent PRC cases have treated an arbitral award rendered in Mainland China under the auspices of a foreign arbitral institution as a Chinese award. In its press release, the Hong Kong Department of Justice wrote that the purpose of the amendment to the Arrangement is “*aligning the definition of the scope of arbitral awards with the prevalent international approach of “seat of arbitration” under the New York Convention*”.

The mere fact an arbitral award has been rendered in the PRC will be enough for it to be considered enforceable in the Hong Kong SAR. It remains to be seen what this means for the enforceability of ‘ad hoc’ (i.e. un-administered) arbitration awards in the Mainland. At the time of writing, it is the authors’ understanding that ad hoc arbitration is still not considered permitted under PRC law.

Arrangement accounts for post-award interim measures

Article 3 of the Supplemental Arrangement, amends Article 6 of the Arrangement to confirm that “*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.*” This amendment, is intended to allow greater certainty as to the powers of Mainland courts to order post-award interim measures for awards made in Hong Kong.

Arrangement now allows for parallel enforcement

Article 4 of the Supplemental Arrangement amends Article 2 of the Arrangement to expressly allow for a Hong Kong or Mainland award to be enforced in both jurisdictions at the same time.

In its press release, the Hong Kong Department of Justice explained that the amendment is required to remove *“the current restriction of the Arrangement to allow parties to make simultaneous application to both the courts of the Mainland and the HKSAR for enforcement of an arbitral award”*. Award creditors will be able to avoid the delay arising from consecutive enforcement applications in each territory, a delay which may result in enforcement being time barred in the second jurisdiction.

The first and fourth changes above, will take effect on 27 November 2020, and following the completion of the relevant procedures in the HKSAR, both sides shall announce a date on which the second and third amendments will be given effect.

Conclusion

The Supplemental Arrangement is a welcome clarification of procedures for reciprocal enforcement of arbitration awards between Hong Kong and the Mainland. It is a sign that judicial authorities in the PRC continue to emphasise promoting Hong Kong’s role as a centre for resolving China-related disputes.

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