

# Changes to Note for Parties to Hong Kong or Mainland China-seated Arbitration

## Authors:



**Peter Yuen**  
Partner, Fangda Partners  
[peter.yuen@fangdalaw.com](mailto:peter.yuen@fangdalaw.com)



**Matthew Townsend**  
Counsel, Fangda Partners  
[matthew.townsend@fangdalaw.com](mailto:matthew.townsend@fangdalaw.com)



**Eliza Jiang**  
Associate, Fangda Partners  
[eliza.jiang@fangdalaw.com](mailto:eliza.jiang@fangdalaw.com)



**Irene Ding**  
Associate, Fangda Partners  
[irene.ding@fangdalaw.com](mailto:irene.ding@fangdalaw.com)

On 19 May 2021, provisions of Hong Kong law came into force which will make it easier for arbitration users in Hong Kong SAR and Mainland China to effect cross-border enforcement of arbitral awards.

These in turn implement into Hong Kong law arrangements under a supplemental bilateral arrangement entered into by Mainland China and Hong Kong SAR authorities in November 2020. Reforms expand the terms of the preceding arrangement to cover “recognition” in addition to “enforcement” of awards, allow for court-ordered post-award preservatory measures, relax the definition of “Mainland Awards”, and introduce other pro-enforcement reforms.

## 1. Background

---

Following Hong Kong’s handover to the PRC in 1997, the two jurisdictions became the same national State. While, previously creditors to Hong Kong arbitration awards wishing to enforce in the Mainland would rely on the international enforcement mechanism contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards, this was no longer available. For this reason, Mainland China and Hong Kong SAR entered into a standalone arrangement on recognition and enforcement of arbitral awards, the “**1999 Arrangement**”.<sup>1</sup>

The 1999 Arrangement established a robust enforcement mechanism between the Mainland China and Hong Kong SAR, largely mirroring the relevant provisions in the New York Convention. In the intervening two decades, many arbitration awards have been enforced on this basis. However, certain provisions of the 1999 Arrangement required updating or amending. Accordingly, on 27 November 2020, Mainland China and Hong Kong SAR signed a 2020 Supplemental Arrangement<sup>2</sup> to further reinforce legal and judicial cooperation in civil and commercial matters between the regions.

Certain provisions of the Supplemental Arrangement came into force in November 2020, but others required amendments to the Hong Kong’s Arbitration Ordinance (Cap 609) to give effect to those provisions. Accordingly, the Hong Kong SAR authorities promulgated the Arbitration (Amendment) Ordinance 2021 (the “**2021 Ordinance**”, text [here](#)). The 2021 Ordinance came into force on 19 May 2021. This note briefly sets out the key aspects of both tranches of amendments, and explains the impact for users in Mainland China and Hong Kong SAR.

---

1. Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region signed in 1999 text [here](#)).

2. Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR (the text [here](#))

## 2. “Recognition” in addition to “enforcement”

---

The text of the 1999 Arrangement refers only to “enforcement” of arbitral awards. There is no reference to the conceptually prior concept of “recognition” of arbitral awards.

Article 1 of the Supplemental Arrangement clarifies that “*the procedures for enforcing arbitral awards*” in the 1999 Arrangement shall be “*interpreted as including the procedures for the recognition and enforcement of the arbitral awards of the Mainland or the HKSAR.*” This reform took effect as of the date of execution of the 2020 Supplemental Arrangement on 27 November 2020.

Consequently, there is no ambiguity that the procedures set out in the 1999 Arrangement now apply to recognition as well as enforcement of arbitral awards.

## 3. Post-award preservatory relief

---

It is not uncommon for award creditors to seek preservatory orders over the assets against which enforcement will be sought. While Article 6 of the 1999 Arrangement provides for the relevant court to “enforce the award according to the legal procedure of the place of enforcement”, it does not expressly allow for issue of such post-award preservatory measures. Separately, while a bilateral arrangement regarding interim relief in support of arbitration came into force in October 2019, this does not extend beyond relief awarded during the course of the arbitration itself.<sup>3</sup>

Article 4 of the 2020 Supplemental Arrangement supplements Article 6 of the 1999 Arrangement to expressly empower the relevant court to “*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.*” This reform, which took effect as of the date of execution of the 2020 Supplemental Arrangement on 27 November 2020, therefore fills the lacuna between the issuance of arbitral awards and its enforcement and allows the relevant court to issue interim measures throughout the arbitration process.

---

3. Under Article 3 of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR (the “**Interim Measure Arrangement**”, text [here](#)) which came into effect in October 2019, the relevant Hong Kong or Mainland court is only empowered to issue interim measures in support of arbitration proceedings “*before the arbitral award is made*” (see our previous post on the Interim Measure Arrangement [here](#)).

## 4. Expansion of definitions of “Mainland Award”

---

There has long been uncertainty surrounding the status under PRC law of Mainland awards rendered by foreign (i.e. non-Mainland Chinese) arbitral institutions. On the one hand, Article 10 and Article 66 of the PRC Arbitration Law set out establishment criteria for “arbitral commissions”, which stipulations are not met by foreign arbitral commissions. On the other, while Chinese law does not follow a system of judicial precedent, there are examples of Chinese courts upholding the validity of awards rendered in China by foreign arbitral institutions.<sup>4</sup> In recent years the PRC authorities have allowed foreign arbitral institutions to establish representative offices in the Shanghai Free Trade Zone (FTZ), where they carry out marketing functions.

The 1999 Arrangement appears to corroborate the narrower view when it comes to the role of foreign arbitral institutions. It provides for the enforcement in Hong Kong SAR of awards rendered “*by the arbitral authorities in the Mainland (the list to be supplied by the Legislative Affairs Office of the State Council through the Hong Kong and Macao Affairs Office of the State Council)*”.

However, Article 2 of the 2020 Supplemental Arrangement amends this preamble and removes the reference to the list of arbitral authorities. As a follow-on amendment, Section 3 of the 2021 Ordinance further amends the definition of “*Mainland award*” in the Arbitration Ordinance by removing the reference to “*recognized Mainland arbitral authority.*”

The upshot of these legislative changes appears to be that all arbitral awards made in Mainland China are now capable of being enforced under the 1999 Arrangement and there is no longer a need for the award to be made by a recognized arbitral authority in the Mainland. Having said that, until the PRC authorities expressly permit foreign arbitral institutions to accept and administer Mainland China arbitration awards, parties to commercial contracts will remain wary of choosing foreign institutions to administer their arbitrations seated in Mainland China.

---

3. Anhui Longlide Packaging Co. Ltd. v. BP Agnati S.R.L. (Longlide) [2013] Min Si Ta Zi No. 13, Daesung Industrial Gases Co. Ltd. v. Praxair (China) Investment Co. Ltd [2020] Hu 01 Min Te No. 83.

## 5. Concurrent enforcement applications before different courts

---

Article 2 of the 1999 Arrangement provided:

*“if the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated is in the Mainland as well as in the HKSAR, the applicant shall not file applications with relevant courts of the two places at the same time. Only when the result of the enforcement of the award 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.”*

This provision places significant risk of asset dissipation on the judgment creditor, in the event that the creditor wrongly commences enforcement proceedings in the less favorable jurisdiction.

Article 3 of the 2020 Supplemental Arrangement seeks to remove this restriction. It provides that parties may commence concurrent enforcement proceedings in the Mainland and Hong Kong SAR, subject to the usual rules against double recovery. It also empowers courts to share information on the status of the enforcement proceedings of the other jurisdiction.

Article 4 of the 2021 Ordinance implements this amendment by repealing Section 93 of the Arbitration Ordinance on restrictions on enforcement of Mainland awards.

## 6. Conclusion

---

Arbitration users in Mainland China and the Hong Kong SAR have long enjoyed the benefit of a robust cross-border enforcement mechanism. The passing of the 2020 Supplemental Arrangement and 2021 Ordinance allows for greater efficiency and effectiveness in for award creditors in one place enforcing in the other.

The update is prepared by members of Fangda’s Hong Kong-based commercial arbitration team.

**Beijing**

27/F, North Tower  
Beijing Kerry Centre  
1 Guanghua Road  
Chaoyang District  
Beijing 100020, China

Tel: +86 10 5769 5600  
Fax: +86 10 5769 5788

**Guangzhou**

17/F, International Finance  
Place, 8 Huaxia Road,  
Zhujiang New Town  
Guangzhou 510623, China

Tel: +86 20 3225 3888  
Fax: +86 20 3225 3899

**Hong Kong**

26/F, One Exchange Square  
8 Connaught Place, Central  
Hong Kong

Tel: +852 3976 8888  
Fax: +852 2110 4285

**Shanghai**

24/F, HKRI Centre Two,  
HKRI Taikoo Hui  
288 Shi Men Yi Road  
Shanghai 200041, China

Tel: +86 21 2208 1166  
Fax: +86 21 5298 5599

**Shenzhen**

17/F, Tower One, Kerry Plaza  
1 Zhong Xin Si Road  
Futian District  
Shenzhen 518048, China

Tel: +86 755 8159 3999  
Fax: +86 755 8159 3900