Legal Commentary

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Boosts to Mainland and HKSAR Arbitration – Brief Comments on the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region

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On November 27, 2020, mainland China and the Hong Kong Special Administrative Region ("**HKSAR**") signed the *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (the "**Supplemental Arrangement**"). The Supplemental Arrangement, issued on the 20th anniversary of the formal implementation of the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (the "**Arrangement**"), marks a significant step forward in cooperation in arbitral award enforcement between the Mainland and HKSAR, which bears good news for both arbitration and business circles in the Mainland and HKSAR. The Supplemental Arrangement, which is concise and comprises only five articles, provides targeted amendments to the Arrangement. In this article, we briefly comment on the Supplemental Arrangement by analyzing its relevant provisions.

Express incorporation of the recognition of arbitral awards into the ambit of the Arrangement

According to Article 1 of the Supplemental Arrangement, "[t]he procedures for enforcing arbitral awards of the Mainland or the HKSAR as specified in the Arrangement shall be interpreted as including the procedures for the recognition and enforcement of the arbitral awards of the Mainland or the HKSAR." In general, Mainland courts divide recognition and enforcement of foreign arbitral awards into two independent procedures. Specifically, the courts first issue an order granting recognition and enforcement of foreign arbitral awards before the awards would enter into the enforcement procedures. The Supplemental Arrangement maintains consistency with this practice by incorporating the recognition of arbitral awards into the scope of application of the Arrangement.

Seat of arbitration indirectly determines the scope of awards subject to the Arrangement

Arrangement, Article 1	Supplemental Arrangement Amendment
"Where a party fails to comply with an arbitral award, whether made in the Mainland or in the HKSAR, the other party may apply to the relevant court in the place where the party against whom the application is filed is domiciled or in the place where the property of the said party is situated to enforce the award."	"This Arrangement applies to arbitral awards rendered pursuant to the Arbitration Ordinance of the HKSAR as enforced by the People's Courts of the Mainland, and arbitral awards rendered pursuant to the Arbitration Law of the People's Republic of China as enforced by the Courts of the HKSAR."

The pre-amendment Article 1 in the Arrangement of "an arbitral award, whether made in the Mainland or in the HKSAR" has a certain ambiguity because it does not specify the standards by which to determine exactly whether the arbitral award is rendered in the Mainland or the HKSAR. In practice, courts have taken differing positions on this issue. The Supreme People's Court has, in different cases, determined the seat or nationality of an award based on the place where the arbitral institution is established, the seat of arbitration, or the venue of the hearing. For example, the Supreme People's Court held in its reply to the Shanxi Higher People's Court in 2004 that because the International Court of Arbitration of the International Chamber of Commerce (the "**ICC**") was established in France, an arbitral award made by the ICC in HKSAR should be regarded as a French arbitral award, the enforcement of which would be governed by the New York Convention[1]. In this case, the Supreme People's Court determined the place or nationality of the award based on the place of establishment of the arbitral institution. However, according to the *Notice on Issues Concerning the Enforcement of Hong Kong Arbitral Awards in the Mainland* (Fa [2009] No. 415), promulgated in 2009, the Supreme People's Court clarified that "the people's court shall examine the case in accordance with the provisions of the Arrangement where a party concerned applies to the court for the enforcement of an ad hoc arbitral award made in the [HKSAR] or an arbitral award made in the [HKSAR] by foreign arbitration institutions such as the [ICC]." This example indicates that the Supreme People's Court may determine the place or nationality of an award based on the seat of arbitration or the venue. However, the Supreme People's Court had not further clarified the specific criteria for making such a determination, i.e., whether it is based on the legal concept "seat of arbitration" or the geographical concept of "venue." Courts' divergence on this issue has brought uncertainty in the application of the Arrangement.

Language used in the Supplemental Arrangement such as "arbitral awards rendered pursuant to the Arbitration Ordinance of the HKSAR" and "arbitral awards rendered pursuant to the Arbitration Law of the People's Republic of China" indicates that the Supplemental Arrangement defines the scope of applicable awards from the perspective of *lex arbitri*. Because *lex arbitri* is generally the law of the seat of arbitration, it is reasonable to believe that the Supplemental Arrangement in fact adopts the seat of arbitration as the criteria for determining the applicable awards under the Arrangement. Therefore, it is foreseeable that

[1] Reply of the Supreme People's Court to the request for instructions on non-enforcement of the ICC Arbitration Court 10334/AMW/BWD/TE final ruling ([2004] Min Si Ta Zi No. 6).

arbitral awards rendered by a foreign arbitral institution but seated in the Mainland (that is, governed by the Arbitration Law of the People's Republic of China) would be deemed as Mainland awards eligible for recognition and enforcement in HKSAR, and arbitral awards rendered by HKIAC in Shanghai with HKSAR as the seat of arbitration (that is, governed by the Arbitration Ordinance of the HKSAR) would be deemed as HKSAR arbitral awards eligible for recognition and enforcement in the Mainland in accordance with the Arrangement. Similarly, arbitral awards rendered by the HKSAR branches of Mainland arbitral institutions (such as the CIETAC Hong Kong Arbitration Center) with HKSAR being the seat of arbitration (i.e., governed by Arbitration Ordinance of Hong Kong) would be deemed as HKSAR awards eligible for recognition and enforcement in the Mainland. For example, in accordance with the relevant provisions of the Arrangement, the Nanjing Intermediate People's Court ruled in [2016] Su 01 Zhi Gang Case No. 1 to enforce Item 3 of Award [2015] Zhong Guo Mao Zhong Gang Cai Zi No.0003 rendered by the CIETAC Hong Kong Arbitration Center (in this case, only Item 3 was requested for enforcement). This was the first time for a Mainland court to recognize and enforce an award rendered by the HKSAR branch of a Mainland arbitration institution. According to Article 74 of the CIETAC Arbitration Rules, "[u]nless otherwise agreed by the parties, for an arbitration administered by the CIETAC Hong Kong Arbitration Center, the place of arbitration shall be Hong Kong, the law applicable to the arbitral proceedings shall be the arbitration law of Hong Kong, and the arbitral award shall be a Hong Kong award." The Nanjing Intermediate People's Court's ruling is consistent with the relevant provisions of the CIETAC arbitration rules by determining the place of the award based upon the seat of arbitration (Hong Kong) rather than the place where the arbitration institution is located (Beijing).

Parties may concurrently apply for enforcement to the courts of the Mainland and HKSAR

Arrangement, Article 2(3)	Supplemental Arrangement Amendment
"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. The total amount recovered from enforcing the award in the courts of the two places one after the other shall in no case exceed the amount awarded."	"If the party against whom the application is filed is domiciled or has property in both the Mainland and the HKSAR which may be subject to enforcement, the applicant may file applications for enforcement with the courts of the two places respectively. The courts of the two places shall, at the request of the court of the other place, provide information on its status of the enforcement of the arbitral award. The total amount to be recovered from enforcing the arbitral award in the courts of the two places must not exceed the amount determined in the arbitral award."

One highlight of the Supplemental Arrangement is that it allows parties to apply for enforcement concurrently with both Mainland and HKSAR courts. According to Article 2(3) of the Arrangement, a party previously could apply for enforcement with the courts of the other jurisdiction only if enforcement by court in one jurisdiction was insufficient to satisfy the award. However, in practice, parties subject to

enforcement quickly transferred their assets located in the other jurisdiction as soon as an application for enforcement is filed with the first court. The Supplemental Arrangement resolves this issue and better protects the interests of applicants for enforcement. Furthermore, the Supplemental Arrangement also requires information sharing between the courts in both jurisdictions on their respective progresses of enforcement, which prevents applicants from damaging the interests of parties subject to enforcement through parallel proceedings.

Applicants may apply for preservation measures before or after the court accepts an application for enforcement of an arbitral award

The Supplemental Arrangement adds a new provision as Article 6(2): "The relevant court may, before or after accepting the application for enforcement of an arbitral award, impose preservation or compulsory measures pursuant to an application by the party concerned and in accordance with the law of the place of enforcement." Among the broad scope of the preservation measures stipulated in Article 1 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* (the "**Interim Measures Arrangement**"), signed between the Mainland and HKSAR in 2019, measures which can be applied for to Mainland courts include property preservation, evidence preservation, and conduct preservation, while measures which can be applied for to HKSAR courts include injunctions and other interim measures[2]. However, the interim measures stipulated under the Interim Measures Arrangement can be applied for only prior to the rendering of an arbitral award, resulting thereafter in a lack of protection for applicants. The Supplemental Arrangement remedies this issue and improves protections for enforcement applicants by allowing for interim measures both before and after application for enforcement.

Despite this, pre- and post-enforcement preservation measures are still implemented in accordance with the laws of the place of enforcement. Firstly, with respect to the preservation measures applied for before application for recognition and enforcement of arbitral award, according to Article 163 of the *Judicial Interpretation of the Civil Procedure Law*, "after a legal document takes effect and before it is enforced, the creditor may apply to the court of enforcement for preservation measures where any emergency situation occurs such as when the other party transfers assets and the effective legal document would become unenforceable or become difficult to be enforced if it does not apply for preservation measures under such circumstances." In theory, there is no doubt that this provision would be applicable to domestic arbitral awards, as domestic arbitral awards are generally deemed as a type of "effective legal document" (courts in different regions of the Mainland may hold different opinions in practice in terms of whether or not to approve preservation measures before the enforcement of arbitral awards). However, it remains doubtful whether this provision is applicable to HKSAR arbitral awards that have not yet been recognized and enforced. In this respect, we have noticed that the Guangzhou Maritime Court ruled in [2018] Yue 72 Cai Bao No.78 to grant the applicant's application for property preservation before it accepted the case of application for recognition and enforcement of the HKSAR arbitral award. The court did not further explain the grounds for this ruling, citing as its legal basis general clauses regarding preservation in the *Civil Procedure Law of the People's Republic of China*, namely Article 100 (Preservation in Litigation) and Article

[2] Interim Measures Arrangement, art. 1.

101 (Preservation before Litigation). Secondly, there is no explicit provision in Mainland law in respect of preservation measures after recognition and enforcement of a HKSAR arbitral award. However, some cases indicate that Mainland courts may support an application for property preservation submitted during the proceedings for application for recognition and enforcement of an HKSAR arbitral award.[3] One commonality between the two cases above is that both courts ordered the preservation measures *before* recognizing the award. In addition, with respect to preservation measures that have been implemented during the arbitration process, according to Article 168 of the *Judicial Interpretation of the Civil Procedure Law*, "a ruling on preservation that is not revoked or cancelled by a people's court in accordance with the law shall be automatically converted into a ruling on preservation measures including sealing up, distraining or freezing upon entry into the enforcement procedures of the arbitral award; the period of such preservation measures shall be calculated without interruption, and the court of enforcement need not issue a new ruling on preservation, unless the period of sealing up, distraining or freezing expires." Therefore, the safer choice for an enforcement applicant is to actively apply for preservation measures during the arbitration process in order to preserve the other party's assets in advance so as to facilitate enforcement.

[3] See (2014) Sui Zhong Fa Min Si Chu Zi No. 42 (civil ruling).

Important Announcement

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