

Enforcing Hong Kong Arbitral Awards in Mainland China



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The People's Republic of China (PRC) is party to the New York Convention. Hong Kong, as a special administrative region of the PRC, is not a separate party to the New York Convention. However, from 1 July 1997, the PRC's rights and obligations under the New York Convention have been extended to cover Hong Kong as well.

Nonetheless, as Hong Kong and Mainland China are now part of the same sovereign entity (the PRC), the New York Convention no longer applies as between them. As between Hong Kong and Mainland, an arrangement has been put in place since 1 February 2000 for the mutual enforcement of arbitral awards. This arrangement, the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (otherwise known as the Arrangement), was amended on 27 November 2020 by the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards (the Supplemental Arrangement).

The Supplemental Arrangement amended the original Arrangement in two important aspects:

- Through an interim measures arrangement which came into effect on 1 October 2019, Hong Kong and Mainland courts were given power to order interim measures before the making of arbitral awards to preserve the position of the parties to the arbitration. The Supplemental

Arrangement extended this to provide for applications in the enforcement stage, thus allowing the interim measures to be available both before and after the application to the relevant courts for enforcement of the awards. This Supplemental Arrangement came into effect on 27 November 2020.

- Under the original Arrangement, it was not permissible for a person who has been granted an arbitral award to enforce the arbitral award at the same time in both Hong Kong and Mainland. The Supplemental Arrangement now made it possible to do so provided that the total amount to be recovered does not exceed the amount determined in the arbitral award. This arrangement came into effect on 27 May 2021.

The importance of Hong Kong as the dispute resolution centre of the PRC has recently been elevated by the Chinese leadership. In the Outline Development Plan for the development of Greater Bay Area (GBA) of China released in February 2019, Hong Kong was given the specific role of establishing itself as a centre for international legal and dispute resolution services. It is thus envisaged that going forward, more and more disputes involving Chinese and international parties will be arbitrated in Hong Kong, all with the sanction of the Chinese leadership.

This article recaps the arrangements in place in respect of mutual enforcement of arbitral awards by the Mainland and Hong Kong, as applied to enforcement of Hong Kong arbitral awards in the Mainland.

Where the application should be made

For the enforcement of a Hong Kong arbitral award in the Mainland, the applicant may apply to the Intermediate People's Court of (i) the place where the party against whom the application is filed is domiciled, or (ii) the place in which the property of the said party is situated.

Where more than one Intermediate People's Courts has jurisdiction, the applicant may apply to any one of the People's Courts to enforce the award. However, the applicant must not apply to more than one International People's Court at any time.

Following the Supplemental Arrangement becoming effective, 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 in both the Mainland and Hong Kong, the applicant may file in both the Mainland and Hong Kong at the same time, provided the total amount to be recovered does not exceed the amount determined in the arbitral award.

With effect from June 2022, parties to sizeable international commercial arbitrations administered by the Hong Kong International Arbitration Centre (HKIAC) can also apply directly to the China International Commercial Court¹ (CICC) for (i) preservation and mandatory measures covering preservation of property, evidence and conduct, and/or (ii) enforcement of arbitral awards in the Mainland.

¹ The China International Commercial Court was launched by the Supreme People's Court in June 2018 to provide judicial support for the PRC's Belt & Road Initiative (BRI). However, its remit goes beyond the BRI. Two CICC courts have so far been established, one in the southern city of Shenzhen and the other in the northern city of Xi'an.

The CICC will only deal with international commercial disputes over RMB 300 million (USD 44.5m) or disputes with a "significant influence"². In addition, it deals only with international commercial disputes in which (i) at least one party is foreign or habitually resident outside the Mainland, or (ii) the subject matter of the dispute is outside the Mainland, or (iii) the commercial relationship originated outside the Mainland.

For those disputes which qualifies for enforcement by the CICC, the prevailing party now has a choice of either applying to the Intermediate People's Court or the CICC. The Intermediate People's Court, being a local court and the second lowest court in the Mainland, is probably more suitable for cases where the assets and/or the respondents are concentrated in a particular district. The CICC, being an organ of the Supreme People's Court, is probably more suitable for cases where assets and/or the respondents are widely distributed in the Mainland.

Therefore, where an applicant wishes to take enforcement actions which fall within the jurisdiction of several Intermediate People's Courts and the applicant can have access to the CICC, the applicant will be better off making the application directly to the CICC, as its rulings will bind all lower courts including the Intermediate People's Courts.

While this may be less relevant to enforcement proceedings, as the enforcement of arbitral awards cannot be easily challenged in the Mainland courts, the CICC is likely to have better qualified judges to adjudicate the matters. Hearings before the CICC are heard before a panel of at least three senior judges capable of working in both Mandarin and English. They must also be familiar with international treaties and customs and practices of international trade and investment.

Documentary requirements

The applicant shall submit, inter alia, the following documents to the People's Court (i) an application for enforcement, (ii) the duly authenticated original arbitral award or duly certified copy of the award, (iii) the arbitration agreement, and (iv) power of attorney.

All documents shall be in the Chinese language. If any of the documents are not in Chinese, the applicant must also submit duly certified Chinese translations of those documents. While there is no mandatory certification requirements for Chinese language translators, in practice, parties tend to select translators who are recommended by the People's Court when the applicant requests international judicial assistance. If the documents are originated outside Mainland China, they need to be duly notarised and legalised before submission to the court.

Application to the CICC can also be done online through the CICC's "one-stop" platform³.

Based on our understanding, the court should be able to make a decision within two months of accepting the application.

² The meaning of "significant influence" has not been defined.

³ The "one-stop" platform is an online platform introduced by the Supreme People's Court to deal with international commercial disputes. It enables both Chinese and foreign parties to participate in the whole process of dispute resolution online, including case filing, mediation, evidence exchange, and court trials. The platform operates in both Chinese and English. The parties can access the platform either through the CICC's official website or the WeChat applet, "China Mobile Mini Court" on cellphones.

Limitation period

The enforcement of the arbitral award must be submitted within two years of the last day for performance stipulated in the award. If no time for performance is stipulated, the two-year limitation period begins the day the award takes effect.

Grounds for refusing to enforce awards

The court has very limited grounds for refusing to enforce Hong Kong arbitral awards. However, it may do so if it is proved that any of the following circumstances apply:

- A party to the arbitration agreement was, under the law applicable to him/her, under some incapacity.
- The arbitration agreement is not valid against the party, either under the law upon which that party is subject or under Hong Kong law.
- The party against whom the application is filed has not been given proper notice of arbitration or was otherwise unable to present his/her case.
- The award deals with a dispute not contemplated by the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration. However, if it is possible to sever decisions outside the submission from decisions within the submission, the part that can be separated from those not so submitted may continue to be enforced.
- The composition of the tribunal or the arbitration proceedings was not in accordance with the agreement of the parties, unless such agreement conflicted with a mandatory provision of the Hong Kong Arbitration Ordinance.
- The award has not yet become binding on the parties or has been set aside or suspended by the Hong Kong court.

The court may also refuse to enforce an arbitral award if:

- The dispute is incapable of being settled by arbitration under the PRC laws.
- Enforcement would be contrary to the public interests of the Mainland.

The Intermediate People's Court may only deny an application for recognition of a foreign arbitral award with the approval of the Higher People's Court and Supreme People's Court. The CICC, being an organ of the Supreme People's Court, requires no such further approvals. The court has the power to require the party disputing the recognition or enforcement of the arbitral award to post security.

Delay to enforcement

Normally, the prevailing party can enforce the arbitral award in the Mainland as soon as the award has been given. However, if the prevailing party applies to the Mainland court to enforce the arbitral award, but the opposing party applies for the cancellation of the award in Hong Kong, the Mainland court has the discretion to decide whether to suspend the recognition and enforcement proceedings pending the resolution of the cancellation hearing. Based on our understanding, the Mainland court has not adopted a consistent approach on this.

Conclusion

Hong Kong is an ideal place for arbitration involving both the PRC and foreign business elements. Hong Kong's legal system (a legal system inherited from the British rule) is common law based and is very closely aligned to other international norms. It is a familiar system to the international community.

Giving its position in the PRC, many of its arbitrators, lawyers and other professionals are proficient in both Chinese and English. This is particularly important if enforcement proceedings may take place in the Mainland.

As set out earlier, Hong Kong has recently been tasked by the Chinese leadership to further enhance itself as an international dispute centre. To help Hong Kong differentiate itself, the Chinese leadership has also granted to Hong Kong certain flexibilities not available to other jurisdictions.

For example, pursuant to the Supplemental Arrangement, parties to Hong Kong arbitration proceedings using an eligible arbitration institution⁴ may apply directly to a Mainland court for preservation of property and evidence. More recently, the inclusion of HKIAC in the CICC dispute resolutions platform further enhances the reach of the HKIAC in asset, evidence and conduct preservations and enforcements in the Mainland for larger international commercial disputes.

As is often the case, winning an arbitral award is pyrrhic if there is nothing valuable left for the prevailing party to enforce against. Therefore, it is especially important to prevent dissipation of assets before the disposal of the arbitration proceedings. The ability to seek interim judicial assistance to preserve assets at an early stage of the arbitration is therefore crucial. This is an aspect where Hong Kong, particularly the HKIAC, has a clear upper hand over arbitration institutions in other jurisdictions.

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⁴ These eligible arbitration institutions currently include the Hong Kong International Arbitration Centre, the Hong Kong Arbitration Centre of the China International Economic and Trade Arbitration Commission, the Asian Affairs Office of the International Chamber of Commerce, the CMAC Hong Kong Arbitration Centre, the Shenzhen Court International Arbitration, and the eBRAM International Online Dispute Resolution Centre.