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# Enforcing arbitration awards in Hong Kong and mainland China

**Louise Barrington** investigates how arbitration awards can be enforced in the Hong Kong SAR and mainland China following reunification

IT IS NOW JUST A MATTER of time before the People's Republic of China (PRC) is admitted into the World Trade Organisation (WTO). The effects of China's entry will be enormous and wide-reaching. With 1.2 billion people on the mainland, China is the most populous nation in the world. Put simply, there is going to be much more trade between China and other nations. More trade inevitably engenders more disputes, and arbitration is now the usual mechanism for resolving international commercial disputes.

Hong Kong, traditionally the gateway to China, with its arbitration-friendly legislation, supportive judiciary, and excellent infrastructure, is well placed to benefit from an increase in arbitration traffic. As Asian entrepreneurs become more familiar with arbitration, many are now looking to arbitrate in the region instead of travelling to Europe or America. They want to settle disputes in Asia, without the cost and inconvenience of travelling half way round the world.

But any dispute resolution procedure is only as good as the end result, and the question clients will ask is, can the awards be turned into cash? Paradoxically, in these terms, it was Hong Kong's proximity to China that worked against it after the handover.

## The anomaly of the handover

On 1 July 1997, Hong Kong was returned to Chinese rule, after a century and a half of British rule. But the handover (or as the Chinese prefer, the reunification) brought about a curious and rather embarrassing state of affairs. Prior to reunification, Hong Kong arbitration awards were, theoretically at least, enforceable in mainland China, and those from the mainland were enforceable in Hong Kong. The handover temporarily changed the situation for the worse.

As of 1 July 1997, the PRC established Hong Kong as a special administrative

region (SAR) under Article 31 of its Constitution, incorporating the principle of 'one country, two systems'. The capitalist regime was to stay in place for 50 years, despite Hong Kong's new status as part of the PRC. The Basic Law, enacted by the Chinese National People's Congress, is frequently referred to as a 'mini Constitution', as it establishes the basis for the social and economic system, rights and freedoms of residents, and administration, legislation and judiciary of the SAR. Hong Kong's legal system remains quite distinct from that of mainland China.

Prior to July 1997, Hong Kong was a party to the New York Convention as a territory of the United Kingdom. Before the handover, mainland China and the UK agreed that Hong Kong would continue to honour the Convention. As of 1 July 1997, the PRC assumed responsibility for the performance of Hong

Kong's Convention obligations. Awards from other Convention states continued to be enforceable in Hong Kong, but the status of non-Convention awards became doubtful, as the reciprocity reserve now applied in Hong Kong.

Awards from Hong Kong were still enforceable elsewhere, but were no longer enforceable in mainland China because, as an international treaty, the New York Convention does not apply between two jurisdictions of the same state. This was confirmed by judges on the mainland, who refused enforcement of ten Hong Kong awards.

Many jurists, both in Hong Kong and elsewhere, had predicted the problem. It was the decision of Findlay J, as he then was, in *Ng Fung Hong Ltd v ABC* [1998] which brought the situation to a head. In January 1998, Findlay J held that a mainland award could not be enforced under the Hong Kong Arbitration Ordinance. In obiter, Findlay J did point out that the award could be enforced by an action for recovery of a debt on the basis of the award, but suggested that a simple mechanism be created to facilitate mutual enforcement. (An action on the award, aside from being a cumbersome process, opens the door to review by Chinese courts. Under mainland law, grounds for refusal of enforcement are broader than those under the New York Convention.)

A subsequent judgment, *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (No 2) [1998], held in obiter that an award made in the PRC would not be considered domestic in Hong Kong, and so the New York Convention should apply. But the damage was done, and only clear action by the Hong Kong and Beijing authorities could remedy it.

**'It had become easier to enforce an award from Europe or America than one from another jurisdiction in the same nation.'**

Potential arbitration parties began to stay away from Hong Kong in droves. No one wanted to risk obtaining an award that could not be readily executed in Hong Kong or on the mainland. It had, in fact, become easier to enforce an award from Europe or America than one from another jurisdiction in the same nation.

## 'The Arrangement'

It took two years, but finally the Hong Kong Secretary for Justice and the Judicial Committee of the Supreme People's Court in Beijing signed a Memorandum of Understanding (MOU)

on 21 June 1999 to clear up the problem. The Arrangement, as it has become known, came into force seven months later, on 1 February 2000.

In basic terms, the MOU and implementing legislation restore the pre-handover situation. Under the Arrangement, grounds for refusal to enforce an award are nearly identical to those set out in Article V of the New York Convention<sup>1</sup>. To compensate for the lacuna between the handover and the implementation of the Arrangement, the MOU provided for the enforcement of awards rendered between 1 July 1997 and 1 February 2000.

### Legislative structures: mainland China

The basic arbitration legislation in mainland China is the Arbitration Law of 1994, in force since September 1995.

### Legislative structures: Hong Kong

The Hong Kong Arbitration Ordinance, Chapter 341 of the Laws of Hong Kong, covers both domestic (Part II) and international (Part IIA) cases. The legislation is based on the UNCITRAL Model Law. Parties to a domestic arbitration may choose to use the international regime, and international parties may choose to use the domestic system. Enforcement comes under Part IIIA (which implements the Arrangement concerning mainland China awards)<sup>2</sup> and Part IV (Convention awards).

### On the ground

Under the Arrangement, enforcement proceedings cannot be brought simultaneously in the courts of both mainland China and Hong Kong. One venue must be exhausted first. If the assets in the first jurisdiction fail to satisfy the award, the enforcing party can proceed in the second. The documents

institutions do not figure on the list, it remains to be seen whether Hong Kong authorities will use the Arrangement to enforce an ICC award made in the territory of mainland China. To date, no ICC arbitration has been completed in mainland China. (Two cases with the PRC mainland as the venue have been instituted with the ICC, but neither proceeded.)

### Mainland China

A party seeking enforcement applies to the Intermediate People's Court in the province of the respondent's residence or assets. In response to complaints that some local courts were improperly refusing enforcement, the Supreme People's Court had previously issued a Practice Direction requiring a judge who intended to refuse enforcement to notify the Supreme People's Court before issuing the decision<sup>4</sup>.

Under Article 269 of the Civil Procedure Law, ad hoc arbitration awards can be enforced in mainland China under the New York Convention or a bilateral treaty, under the principle of reciprocity. However, an ad hoc award from a non-Convention jurisdiction may not be recognised, since it is not made by a 'foreign arbitration institution'. The attitude of the Supreme People's Court on this issue has yet to be tested, so parties from non-Convention jurisdictions are well-advised to stick to institutional arbitration if they need to enforce the award in China.

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## 'Enforcement proceedings cannot be brought simultaneously in the courts of both mainland China and Hong Kong.'

Chapter 7 covers economic, trade, transportation or maritime cases involving a foreign partner. The law is not based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, but does represent a substantial improvement over the former system.

Mainland China ratified the Convention of New York on the Recognition and Enforcement of Foreign Arbitration Awards, subject to both the 'commerciality' and 'reciprocity' reservations. The Convention has been in force in mainland China since 1987.

Enforcement comes under the Civil Procedure Law of 1991. Article 269 divides awards into Convention awards and non-Convention awards. This distinction becomes interesting when an award is the result of an ad hoc procedure, as we shall see below.

Article 16 of the Arbitration Law requires arbitration to be 'institutional', and further goes on to refer to two Chinese institutions, China International Economic and Trade Arbitration Commission (CIETAC), and China Maritime Arbitration Commission (CMAC). This has raised doubts about the validity of other institutional arbitration proceedings, should they take place in mainland China territory.

and procedure under the Arrangement are similar to those under the New York Convention. Local statutes of limitations of the enforcing jurisdiction apply.

We have seen that only 'institutional' arbitration is recognised under PRC legislation. Since CIETAC and CMAC are referred to in that provision, but no other institutions are mentioned, a question remains as to whether international arbitration organisations such as the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), and others qualify in Chinese terms as 'institutions'.

Whereas originally only CIETAC and CMAC were empowered to hear 'foreign-related' arbitrations in the PRC, since June 1996, scores of local arbitration commissions have been allowed to accept these cases<sup>3</sup>.

Hong Kong negotiators of the Arrangement had expressed some concern about the quality of the awards from these local commissions, and the result was a list of commissions whose awards Hong Kong would enforce. The list currently includes over 140 arbitral bodies, and may be amended from time to time. Interestingly, since the ICC Court of Arbitration and other venerable but non-Chinese

### Footnotes

1. A notable difference is the use of 'public interest' where Article V(2)(b) of the New York Convention uses 'public policy'. In view of the extensive interpretations devoted to the term 'public policy' over the 42-year life of the Convention, this is unfortunate, as it raises the issue of whether public interest is narrower, broader, or the same as policy.
2. Succeeds and replaces Part III, repealed by Ord. No 2 of 2000.
3. State Council General Office Notice of 8 June 1996 (see Moser, Reference Materials for Third IBA International Arbitration Day, 18 February 2000).
4. The notorious *Revpower* case was a glaring example. The reaction came in the Notice of the Supreme People's Court concerning Handling of Certain Issues of Foreign Related Arbitration, 28 August 1995, in *Collection of Judicial Interpretations*, volume 2 1993-96, Beijing 1997.

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### Hong Kong

Since June 2000, s2GG(2) of Hong Kong's Arbitration Ordinance effectively makes even non-convention awards summarily enforceable in Hong Kong. This cleared up doubts about the status of non-Convention awards, which did not previously come under Article 2GG.

A party wishing to enforce brings an ex parte application before the judge in charge of the Construction and Arbitration list, for leave to enforce an award and enter judgment in terms of the award. Authenticated originals or certified copies of the award and the arbitration agreement upon which it is based, plus sworn translations if necessary, are the supporting documents. Once leave is granted, the other party must apply within 14 days to set aside the leave. The burden of proof is on the party resisting enforcement, and grounds are limited to those available under Article V of the New York Convention.

In contrast to mainland China, Hong Kong's law provides for an appeal if enforcement is denied. Hong Kong courts favour arbitration<sup>5</sup>, discouraging unmeritorious technical points and endeavouring to uphold Convention awards. If the attack

does not materialise or is unsuccessful, the enforcing party can obtain enforcement, using the usual mechanics available to Hong Kong creditors.

### Is the award enforceable?

The Arrangement has restored the situation between Hong Kong and the mainland to substantially the same as it was before reunification (although there is some concern that only enforcement and not recognition is mentioned in the Hong Kong Arbitration Ordinance). The June 2000 amendment to Hong Kong's Ordinance resolved residual doubts about the treatment of non-Convention awards – effectively restoring the pre-reunification situation, particularly for Macau and Taiwan (awards from Taiwan have been enforceable for a decade or more in mainland China). Requirements for enforcement, and grounds for denying it, are nearly identical to those under the New York Convention.

### Conclusion

The post-reunification years were inauspicious for Hong Kong's status as the arbitration capital of the region. Despite early warnings, it took three years to patch up the potholes on the road to enforcement. However, the Arrangement

– hopefully – opens the way for Hong Kong to reclaim its position as the arbitration hub of Asia.

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### Case references

*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (No 2) [1998] 1 HKC 192

*Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213

### Footnotes

5. See examples: *Chun Wo Building Construction Ltd v China Merchants Tower Co Ltd* [2000] 2 HKC 255; *Cheng Hang Chu & Ors v China Treasure Enterprise Ltd* [2000] 2HKC 814; and *Medison Co Ltd v Victor (Far East) Ltd* [2000]: 'Generally it is not open to the enforcing court to revisit the issues at arbitration unless there are allegations of fraud... the enforcing court will not give the defendant a chance to argue the merits of its case for a second time.'