SLAUGHTER AND MAY/

CLIENT BRIEFING

DECEMBER 2020

AN EASIER BITE OF THE ARBITRAL CHERRY:

SUPPLEMENTAL ARRANGEMENT CONCERNING MUTUAL ENFORCEMENT OF ARBITRAL AWARDS BETWEEN THE MAINLAND AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION

20 years after signing the original arrangement in respect of mutual enforcement of arbitral awards (**Arrangement**)[1], on 27 November 2020, the Vice-president of the Supreme People's Court (**SPC**) of Mainland China and the Secretary for Justice of the Hong Kong Special Administrative Region (**HKSAR**) agreed to enhance the Arrangement by way of the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR (**Supplemental Arrangement**). This client briefing will discuss the changes brought by the Supplemental Arrangement and how they improve the existing regime and make both Mainland China and the HKSAR more attractive for arbitration.

Background

Following the handover of the HKSAR in 1997, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**) which had previously applied as between the HKSAR and Mainland China could no longer apply as the HKSAR is part of China. Against this backdrop, the Arrangement was signed on 21 June 1999 and implemented on 1 February 2000 and has since provided a mechanism for reciprocal enforcement of arbitral awards in the HKSAR and Mainland China.

The Supplemental Arrangement is the result of a review of the Arrangement conducted by the Department of Justice based on 20 years of implementation experience and in consultation with the SPC. The amendments will bring the Arrangement closer in line with the New York Convention, which is implemented in both the HKSAR and Mainland China, and further refine the application of the Arrangement.

Supplemental Arrangement

Four major improvements to the existing regime are introduced. Please note that whilst two of them have come into effect since 27 November 2020, the other two will take effect only when the necessary legislative amendments are incorporated:

1. **The procedures for enforcing arbitral awards set out in the Arrangement now include the procedures for both recognition and enforcement[2].**

   Under the New York Convention and the Arbitration Ordinance (Cap 609) (**AO**) by which the New York Convention is implemented in the HKSAR, recognition and enforcement are viewed as separate concepts – the former means that a court before which proceedings are brought between the same parties and in relation to the same subject-matter will recognise the binding effect of an award on the issues before it and so treat those issues as *res judicata* whereas the latter refers to the court's execution of the terms of the award. However, previously, the Arrangement only referred to "enforcement" but not "recognition". Now that the enforcement procedures set out in the Arrangement are expressly stated to include the procedures for recognition, the Supplement Arrangement is a step in aligning the Arrangement with the New York Convention.

2. **The scope of arbitral awards to which the Arrangement applies will be expanded to include arbitral awards rendered pursuant to the Arbitration Law of China, whether or not made by the arbitral authorities in the Mainland[3].**

   Under the existing regime, only arbitral awards rendered by a prescribed list of recognised arbitral authorities in the Mainland can be enforced in the

[1] Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region.

[2] Supplemental Arrangement, art 1, which has become effective on 27 November 2020.

[3] Supplemental Arrangement, art 2.

HKSAR pursuant to the Arrangement. The list includes CIETAC and the China Maritime Arbitration Commission which were set up under the China Chamber of International Commerce, as well as domestic arbitration commissions established under the Arbitration Law of China. However, the New York Convention, to which both the Mainland and the HKSAR are signatories, focuses on the place where the arbitral award is made (i.e. the seat of arbitration), rather than the identity of the arbitral institution which administers the arbitral process.

Whilst it will become effective only after the AO has been amended, the removal of the requirement for the arbitral award to be made by the prescribed arbitral authorities in the Mainland under the Supplemental Arrangement will broaden the range of arbitral awards to which the Arrangement applies and bring it in line with the prevalent international approach of "seat of arbitration" under the New York Convention. This change also reflects the more liberal view that foreign arbitral institutions may administer arbitrations seated in China as illustrated by recent Mainland court decisions which have confirmed (i) the validity of an arbitration agreement providing for arbitration administered by a foreign arbitral institution and seated in Mainland China[4] and (ii) the enforceability of an arbitral award made in such arbitration[5].

3. **A The winning party may apply to enforce the arbitral award in the courts of the Mainland and the HKSAR simultaneously[6].**

This is a significant improvement which will be effective once the necessary amendments have been made to the AO. Under the existing regime, an applicant must choose between the Mainland and the HKSAR when filing an application for enforcement and may only file an application for enforcement with the court of the other jurisdiction when the result of the enforcement of the award by the court of the first chosen jurisdiction is insufficient to satisfy the liabilities. This prohibition of parallel enforcement could place parties in a difficult situation as demonstrated in *CL v SCG* [2019] HKCFI 398, where a subsequent application for enforcement in one place was time-barred in part due to delays in the determination of the initial application in the other (see our client briefing **here**).

Note that whilst the winning party may in the future apply to both courts for enforcement simultaneously, it cannot recover more than the amount determined in the arbitral award. For this purpose, the courts of both places will coordinate with each other in granting any enforcement orders.

4. **A party may apply for interim measures before or after the court accepts the application for enforcement of an arbitral award[7].**

This change is a welcome addition to 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 (**Interim Measures Arrangement**) which came into force on 1 October 2019. While the Interim Measures Arrangement enables parties to arbitral proceedings seated in the HKSAR to apply for interim measures from Mainland Courts and vice versa before the arbitral award is made, it does not provide for interim measures to address the risk of dissipation of assets during the period after the arbitral award is made but before it is enforced.

Effective enforcement is often a key concern for parties in international arbitration, and the lack of post-award interim measures may deprive the winning party in whose favour the arbitral award is made of any meaningful remedy. By making interim measures available before and after the court's acceptance of the application for enforcement, the Supplemental Arrangement fills the existing legal void and enhances the effectiveness of arbitration.

Takeaways

The enhancements made to the Arrangement make both Mainland China and the HKSAR a more attractive of arbitration, especially if any awards are likely to be enforced in either of the places:

1. Parties to arbitral proceedings seated in Mainland China and administered by a foreign arbitral institution will have less to worry about when it comes to the enforceability of the arbitral award in

[4] In (2020) Hu 01 Min Te No. 83, the Shanghai No. 1 Intermediate People's Court confirmed the validity of an arbitration agreement providing for arbitration administered by the Singapore International Arbitration Centre and seated in Mainland China.

[5] In (2015) Sui Zhong Fa Min Si Chu Zi No. 62, the Guangzhou Intermediate People's Court held that an arbitral award made in arbitration seated in Mainland China and administered by a foreign arbitral institution can be enforced under the Civil Procedure Law of China.

[6] Supplemental Arrangement, art 3.

[7] Supplemental Arrangement, art 4, which has become effective on 27 November 2020.

the HKSAR as the Arrangement as amended by the Supplemental Arrangement will apply to facilitate enforcement.

2. Where there are assets available for enforcement in both the HKSAR and Mainland China, the winning party in whose favour an eligible arbitral award is made will no longer have to choose between the two jurisdictions and will be able to apply for parallel enforcement in both jurisdictions.

3. Parties to an arbitration seated in Mainland China or the HKSAR may apply to the relevant courts for interim measures both before an arbitral award is made and also after the award is made. The risk of dissipation of assets pending enforcement of the arbitral award is more manageable.

It should be borne in mind that Articles 2 and 3 of the Supplemental Arrangement are not in force yet - watch this space.

CONTACT

WYNNE MOK
PARTNER
T: +852 2901 7201
E: wynne.mok@slaughterandmay.com

KATHLEEN POON
LEGAL ASSISTANT
T: +852 2901 7358
E: kathleen.poon@slaughterandmay.com

RUBY CHIK
ASSOCIATE
T: +852 2901 7292
E: ruby.chik@slaughterandmay.com

JASON CHENG
ASSOCIATE
T: +852 2901 7211
E: jason.cheng@slaughterandmay.com