

ARBITRATION (AMENDMENT) BILL 2021

ONE STEP CLOSER TO THE FULL IMPLEMENTATION OF THE SUPPLEMENTAL ARRANGEMENT CONCERNING MUTUAL ENFORCEMENT OF ARBITRAL AWARDS BETWEEN THE MAINLAND AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION

In our recent briefing, we discussed the key features of the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region dated 27 November 2020 (the **Supplemental Arrangement**).¹ The Hong Kong government has lately introduced the Arbitration (Amendment) Bill 2021 (**Amendment Bill**) with a view to implementing two major provisions of the Supplemental Arrangement that require local legislative amendments to take effect.²

The Supplemental Arrangement

As discussed in our earlier briefing, the Supplemental Arrangement brought changes to the original arrangement in respect of mutual enforcement of arbitral awards between the Mainland and Hong Kong³ (**Arrangement**) in four major ways:

- 1) The procedures for enforcing arbitral awards set out in the Arrangement now include the procedures for not only enforcement, but also recognition of such awards;
- 2) It is now expressly provided that a winning party to an arbitral process may apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award;
- 3) The scope of arbitral awards to which the Arrangement applies will be expanded to include all arbitral awards rendered pursuant to the Arbitration Law of China, whether or not they are made by "recognised" arbitral authorities in the Mainland; and
- 4) The restriction on concurrent enforcement actions in the Mainland and Hong Kong will be removed.

The first two changes have come into force on 27 November 2020, while the remaining two will take effect after the enactment of the Amendment Bill.

The Amendment Bill

The Amendment Bill contains the following operative provisions to amend the Arbitration Ordinance (Cap. 609) (the **Ordinance**) to give effect to the Supplemental Arrangement:

- (a) Clauses 3 and 5 operate to amend the definition of "Mainland award" under section 2(1) of the Ordinance and repeal the definition of "recognized Mainland arbitral authority" under section 2(1) as well as section 97 concerning the publication of the list of recognised Mainland arbitral authorities. As a result, the definition of "Mainland award" will be amended to include all arbitral awards made in accordance with the Arbitration Law of the PRC, whether or not they are made by a Mainland arbitral authority or foreign arbitral institution;

¹ Slaughter and May, An Easier Bite of the Arbitral Cherry: Supplemental Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and HKSAR (21 Dec 2020), available [here](#)

² Legislative Council of the Hong Kong Special Administrative Region, Arbitration (Amendment) Bill 2021, available [here](#)

³ The Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region dated 21 June 1999, as amended and supplemented by the Supplemental Arrangement

- (b) Clause 4 repeals section 93 of the Ordinance which currently prohibits a party from seeking to enforce an arbitral award in both the courts of the Mainland and Hong Kong simultaneously. The effect is that parties to a Mainland award may apply to the Hong Kong courts for enforcement of the award even if a concurrent enforcement application has been made in the Mainland;

For the sake of completeness, the Amendment Bill also seeks to update the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609 sub. leg. A) to include four new parties to the New York Convention, which are Ethiopia, Palau, Sierra Leone and Tonga.

What do they mean to parties who may adopt arbitration in Hong Kong or the Mainland as a dispute resolution mechanism in their contracts?

These proposed amendments to the Ordinance (if passed) mean that:

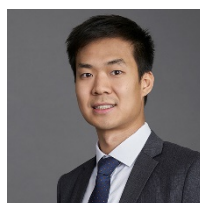
- (a) The expansion of the definition of “Mainland awards” under the Ordinance will make mainland arbitral awards rendered by foreign arbitral institutions in accordance with the Arbitration Law of the PRC also eligible to benefit from the Arrangement. It means that going forward, parties who consider choosing the Mainland as the seat of arbitration with the possibility of enforcing arbitral awards in Hong Kong will have a wider choice of administering arbitral institutions. They will no longer need to choose from the prescribed list of recognised Mainland arbitral authorities;
- (b) The removal of the restriction on parallel enforcement of an award in the Mainland and Hong Kong will significantly improve efficiency and chance of recovery by the winning party in a cross-border arbitration involving the two jurisdictions. Winning parties could avoid the situation as demonstrated in CL v SCG (discussed in our earlier briefing), 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.

It is expected that the Amendment Bill will be passed and enacted in the first half of this year. It is hoped that these improvements to the Arrangement will offer additional advantages to parties who choose Hong Kong or the Mainland as the seat of arbitration, especially where it is anticipated that the awards will need to be enforced in either or both of the two jurisdictions.

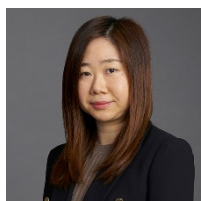
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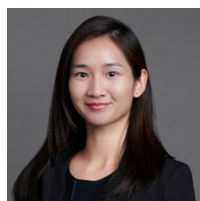
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