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Looking Back on the Supplemental Arrangement on Mainland-Hong Kong Mutual Enforcement of Arbitral Awards

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Introduction

On November 27, 2020, Mainland China and Hong Kong entered into 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 not only amended the existing Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR (effective since February 2000) (the "**Arrangement**"), but also, like the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, fully acknowledged that the post-award stage consists of both the recognition and enforcement of arbitral awards.

This Client Alert discusses the salient pro-arbitration, pro-enforcement updates that the Supplemental Arrangement makes to the Arrangement and highlights specific areas that deserve commercial parties' attention. In short, the Supplemental Arrangement consists of three updates to the Arrangement: (1) Reciprocal Enforcement, (2) Simultaneous Enforcement, and (3) Post-Award Injunctive Measures.¹

I. Reciprocal Enforcement. All arbitral awards rendered pursuant to (a) the Hong Kong Arbitration Ordinance ("HKAO") will be enforceable in the Mainland, and (b) the PRC Arbitration Law will be enforceable in Hong Kong.

Arrangement	Supplemental Arrangement
Arbitral awards rendered by certain Mainland arbitral "authorities" pursuant to the PRC Arbitration Law could be enforceable in Hong Kong. ²	Arbitral awards rendered pursuant to the PRC Arbitration Law will be enforceable in Hong Kong. ³

Prior to the Supplemental Arrangement, all arbitral awards seated in Hong Kong and validly rendered under the HKAO were already enforceable in the Mainland. The Supplemental Arrangement reinforced this: Arbitral awards validly rendered in both institutional and *ad hoc* arbitrations that are seated in Hong Kong will still be enforceable in the Mainland pursuant to the terms of the Arrangement.

Significantly, the Supplemental Arrangement lifted the restriction that only arbitral awards rendered in the Mainland by certain Mainland arbitral institutions can be enforceable in Hong Kong. As a result, institutional arbitral awards rendered under the PRC Arbitration Law will now generally be enforced in Hong Kong. One important limitation, however, remains that the existing PRC Arbitration Law still

requires an arbitration agreement to refer to a specific arbitral institution to be valid.⁴ Consequently, despite the Supplemental Arrangement, arbitrations in the Mainland still need to be administered by a specific arbitral institution, in order for any resulting arbitral award to be enforceable in Hong Kong.⁵

The effect of this change is that all arbitral awards rendered in Mainland-seated arbitrations will be enforceable in Hong Kong, even if—but so long as—those arbitrations were administered by a non-Mainland arbitral institution. To illustrate this, on March 25, 2013, the PRC Supreme People’s Court (the highest court in the Mainland) upheld the validity of an arbitration agreement that referred disputes to ICC arbitration seated in Shanghai.⁶ Likewise, on August 3, 2020, the Chinese First Intermediate Court of Shanghai found an arbitration agreement that referred disputes to SIAC arbitration seated in Shanghai to be valid.⁷ These cases show that the Mainland courts have recognized as valid arbitration agreements referring disputes to an arbitration administered by a foreign arbitral institution and seated in the Mainland. The Mainland courts have also been seen to be enforcing arbitral awards rendered under such arbitration agreements in the Mainland. Because of the Supplemental Arrangement, Hong Kong courts will recognize them too: the arbitral awards validly rendered under such arbitration agreements became enforceable in Hong Kong.

II. *Simultaneous Enforcement.* A prevailing party in a Hong Kong-seated or Mainland-seated arbitration can simultaneously apply to enforce an arbitral award in the Mainland and in Hong Kong.

Arrangement	Supplemental Arrangement
If an award creditor wished to enforce an arbitral award in both the Mainland and Hong Kong, it had to apply to the courts in one jurisdiction first. Only if enforcement of the award by the court of that first jurisdiction was insufficient to satisfy the liability could an award creditor apply to the court of the other jurisdiction to enforce the remaining liability. ⁸	If an award creditor wishes to enforce an arbitral award in both the Mainland and in Hong Kong, it can simultaneously do so. ⁹

The preceding regime embodied in the Arrangement entailed many risks that could delay enforcement of arbitral awards in the Mainland and Hong Kong and thus impede award creditors seeking to promptly satisfy favorable arbitral awards. Because an award creditor could not enforce arbitral awards in the Mainland and Hong Kong simultaneously, award creditors often had to make a difficult choice—whether to pursue enforcement proceedings in the Mainland or Hong Kong first. As an illustration, in *A Co v B Co and Others* [2021] HKCU 2542 (CFI), on May 25, 2021, the Hong Kong Court of First Instance set aside an order granting leave to enforce an arbitral award rendered by the Shenzhen Court of International Arbitration on the ground that, at the time the order was made, enforcement proceedings were pending in the Mainland. The Hong Kong Court also ordered “A Co” to pay the cost of the application for the order on indemnity basis. A Co was not, however, allowed to enforce the arbitral award in the Mainland and Hong Kong simultaneously. This shows that, under the preceding regime, when calculating the time and cost for enforcing an award, an award creditor had to factor in potentially numerous years of sequential litigations in two jurisdictions.

In addition, a further issue frequently arose under the preceding regime: In situations in which a losing party had substantially more assets in Hong Kong than in the Mainland but its assets in Hong Kong fell far short of satisfying the arbitral award, the prevailing party might still be tempted to first pursue enforcement proceedings in the Mainland before pursuing them in Hong Kong. This is because parties would often be influenced by the six-year limitation period to enforce an arbitral award in Hong Kong, compared to only two years to enforce the award in the Mainland.¹⁰

Although in theory the preceding regime still allowed prevailing parties to eventually pursue the full award in both the Mainland and Hong Kong, they often could not do so without unnecessary delay and cost. The additional time and cost hampered the purpose and efficiency of enforcing arbitral awards and allowed a resisting party to engage in mere-delay tactics. The Supplemental Arrangement, however, serves Hong Kong's long-standing and the Mainland's increasing pro-arbitration approach.¹¹ One of the key purposes of choosing arbitration—to permit an expeditious resolution of commercial disputes and an effective recovery of adequate remedies—is now better preserved for all parties.

A Brand New Enforcement Strategy?

In the significant decision of *廈門新景地集團有限公司 v Eton Properties Limited and Others* [2020] HKC 451 (CFA), the Hong Kong Court of Final Appeal (the highest court in Hong Kong) ruled on October 9, 2020 that an award creditor may choose between the Hong Kong statutory regime (of enforcing the arbitral award) and the Hong Kong common law regime (of suing the award debtor for breaching the arbitral award). Although the statutory regime does not allow the award creditor to pursue relief beyond that ordered by the arbitral tribunal,¹² the common law regime does allow such an approach.¹³

Connecting this significant ruling with the Supplemental Arrangement, a new enforcement strategy may emerge:¹⁴ An award creditor may elect to pursue enforcement proceedings in the Mainland and initiate a common law action on the arbitral award in Hong Kong simultaneously. For instance, if a Hong Kong-seated arbitral tribunal orders an award debtor to compensate the award creditor in 30 days, and 30 days have elapsed, the award creditor may enforce the arbitral award in the Mainland and simultaneously commence a common law action in Hong Kong. Utilizing this approach, the award creditor may, depending on the facts and circumstances and subject to the principle against double recovery, pursue the full amount of the arbitral award in the Mainland and additional remedies in Hong Kong against the award debtor for failing to timely and fully satisfy the arbitral award. This can maximize the interests of award creditors against award debtors with assets in both the Mainland and Hong Kong.

III. Post-Award Injunctive Measures. The Hong Kong and the Mainland courts may order preservation or mandatory measures ("Injunctive Measures") before or after accepting an application for enforcement of arbitral awards rendered in, respectively, Mainland-seated or Hong Kong-seated arbitrations.

Arrangement	Supplemental Arrangement
The Arrangement does not refer to whether the enforcing court has the power to grant any Injunctive Measures.	The enforcing court may, before or after accepting an application to enforce an arbitral award, impose Injunctive Measures under the law of the place of enforcement. ¹⁵

Thanks 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 Hong Kong Special Administrative Region in 2019 (the "**Interim Measures Arrangement**"),¹⁶ an enforcing court in those jurisdictions can now grant interim Measures before the arbitral tribunal issues an arbitral award. The Supplemental Arrangement and the Interim Measures Arrangement work hand-in-hand to fend off any attempt by losing parties to dissipate assets: Because the enforcing court can now even grant Injunctive Measures before or after accepting an enforcement application, the law operates to strictly hold losing parties to account.

Connecting the Supplemental Arrangement with the Interim Measures Arrangement, we make two further observations:

- Before the arbitral tribunal issues the arbitral award, an arbitrating party can apply for interim measures only under the Interim Measures Arrangement.¹⁷ At the post-award stage, a prevailing party would rely on the Supplemental Arrangement to apply for Injunctive Measures. It is likely that the prevailing party can successfully do so only after first applying for the enforcement of the arbitral award (but the court can grant Injunctive Measures before or after accepting the enforcement application).¹⁸
- The Interim Measures Arrangement recognizes only Hong Kong-seated institutional arbitrations and the Mainland arbitrations administered by a Mainland arbitral institution,¹⁹ whereas the Supplemental Arrangement recognizes Hong Kong-seated institutional and *ad hoc* arbitrations and Mainland-seated arbitrations administered by either a Mainland or a foreign arbitral institution.²⁰ Thus, arbitrating parties in Hong Kong-seated *ad hoc* arbitrations still cannot apply for pre-award interim measures in the Mainland under the Interim Measures Arrangement. Likewise, arbitrating parties in Mainland-seated arbitrations administered by a foreign arbitral institution still cannot apply for pre-award interim measures in Hong Kong under the same arrangement. We await further developments in the laws, in particular the Interim Measures Arrangement.

Conclusion

The Supplemental Arrangement strengthens and enhances the former enforcement regime. Since its passage, the Mainland and Hong Kong courts have recognized the role of the Supplemental Arrangement and used the Supplemental Arrangement to rectify several of the previous enforcement regime's flaws. These latest developments with respect to the Mainland-Hong Kong arbitral enforcement practice are consistent with the intention of maintaining Hong Kong as a financial center and an international dispute resolution hub. We expect further developments and continued demand for effective cross-border arbitration in Hong Kong and the Mainland.



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¹ Pursuant to Article 5 of the Supplemental Arrangement, these three updates went into effect on different dates. The first and second updates went into effect on May 19, 2021, while the third update went into effect on November 27, 2020.

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- ² The Preamble and Article 1 of the Arrangement use the phrase “arbitral authorities” instead of the more commonly used phrase “arbitral institutions.” The Arrangement provides that a prescribed list of Mainland arbitral authorities was supplied by the Legislative Affairs Office of the PRC State Council.
- ³ Article 2, Supplemental Arrangement, amending the preamble and Article 1 of the Arrangement.
- ⁴ Article 16(2), PRC Arbitration Law.
- ⁵ On July 30, 2021, the PRC Ministry of Justice proposed revisions to the PRC Arbitration Law. Even so, the proposed law still provides that all arbitrations commenced under the PRC Arbitration Law are institutional arbitrations (Article 35(3) of the proposed law), with one exception: The proposed law recognizes *ad hoc* foreign-related commercial arbitrations only (Article 91(1) of the proposed law). If this exception materializes, arbitral awards rendered in *ad hoc* foreign-related commercial arbitrations in the Mainland may become enforceable in Hong Kong.
- ⁶ *Longlide Packaging Co. Ltd. v. BP Agnati S.R.L.* (SPC Docket Number: 2013-Min Ta Zi No. 13).
- ⁷ *Daesung Industrial Gases Co., Ltd. & Another v. Praxair (China) Investment Co., Ltd.* (2020 Hu 01 Min Te No. 83).
- ⁸ Article 2(3), Arrangement.
- ⁹ Article 3, Supplemental Arrangement, amending Article 2(3) of the Arrangement.
- ¹⁰ Article 5, Arrangement; section 4(1)(c) of the Limitation Ordinance of the Laws of Hong Kong; Article 239 of the PRC Civil Procedure Law 2017.
- ¹¹ As the Hong Kong Court of First Instance held very recently on March 22, 2022, because of the Supplemental Arrangement, an award creditor’s right to enforce a Mainland arbitral award in Hong Kong is not vitiated by the mere fact that the award creditor has applied, or has obtained the order, to enforce it in the Mainland: *G v X and Others* [2022] HKCU 1390 (CFI).
- ¹² 廈門新景地集團有限公司, at [83]-[89].
- ¹³ 廈門新景地集團有限公司, at [90]-[97], and [102]-[103].
- ¹⁴ Albeit untested in Court.
- ¹⁵ Article 4, Supplemental Arrangement, adding to Article 6(2) of the Arrangement.
- ¹⁶ Details and some of our observations of the Interim Measures Arrangement can be found in our earlier Client Alert: [Applications for Interim Measures in Mainland China: Advantages of Arbitrating in Hong Kong](#).
- ¹⁷ Articles 3 and 6, Interim Measures Arrangement.
- ¹⁸ The Supplemental Arrangement does not make clear whether Injunctive Measures are available after the arbitral tribunal issues the arbitral award but before a party even applies to enforce it. Nevertheless, Article 4 of the Supplemental Arrangement, which authorizes the enforcing court to grant Injunctive Measures before or after accepting an enforcement application, was being added to Article 6 of the Arrangement as Article 6(2). Article 6(1), which requires the enforcing court to enforce arbitral awards according to the procedures of the place of enforcement, begins with the condition “Upon receipt of an application for enforcement from an applicant.” Correspondingly, it appears that, by reading Articles 6(1) and 6(2) together, a prevailing party at the post-award stage has to apply to enforce an arbitral award, before it can apply for post-award Injunctive Measures.
- ¹⁹ Articles 2, 3, and 6, Interim Measures Arrangement.
- ²⁰ Article 2, Supplemental Arrangement, amending the preamble and Article 1 of the Arrangement.