

Enforcement of Chinese Arbitral Awards Complete Once More — But with a Difference

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A combination of major reform of the Arbitration Ordinance on 27 June 1997 and China's resumption of sovereignty over Hong Kong on 1 July 1997 resulted in an unfortunate hiatus in the summary enforcement in Hong Kong of arbitral awards from Mainland China and Taiwan. Enforcement in the SAR of awards from these jurisdictions could henceforth only be effected by way of an action on the award, a situation which did not promote Hong Kong as a centre for arbitrating China disputes or for enforcing Chinese awards. It was not until two further sets of amendments to the Ordinance took effect on 1 February and 23 June 2000 that this situation was redressed. Whilst these amendments have restored the status quo ante, they also make provision for interlocutory orders and directions of any arbitral tribunal sitting outside of Hong Kong to be enforced by the Hong Kong courts, with no requirement for reciprocity. The author cautions that the scope of this power, and the circumstances in which the courts of the SAR should exercise their discretion in favour of enforcement, are matters requiring definition.

Introduction

1997 was a momentous year for the enforcement of awards between Mainland China and Hong Kong and between Taiwan and Hong Kong, albeit for the wrong reasons. The resumption of sovereignty over Hong Kong by the People's Republic brought an end to ten years of almost trouble-free enforcement (on Hong Kong's side of the border, at any rate) of Chinese awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.¹ Political difficulties, however, meant that no alternative summary enforcement arrangements were put in place in time for 1 July 1997. With regard to Taiwan, reform of Hong Kong's arbitration law in June 1997 inadvertently terminated the right of Taiwanese parties to seek summary enforcement of Taiwanese awards in Hong Kong at the discretion of the court.

The period July 1997-February 2000 was, therefore, one of legal vacuum with regard to intra-Chinese arbitration. This vacuum has since been filled by amendments to Hong Kong's arbitration law which took effect in February and

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¹ Hereinafter 'the New York Convention', which is enacted as the Third Schedule to the Arbitration Ordinance (Cap 341). In this article, references to this Schedule should also be read as references to the Convention.

June 2000. What follows is a brief account of the reasons for the vacuum and the provisions which have substantially restored the *status quo ante*.

Mainland China

Prior to 27 June 1997, Mainland Chinese awards were summarily enforceable in Hong Kong, pursuant to the now-repealed s 2H of the Arbitration Ordinance (Cap 341).² Until 1 July 1997, such awards were also Convention awards, that is, foreign awards that may be enforced in Hong Kong pursuant to the New York Convention. All this changed with the transition of sovereignty and the amendment of the principal Ordinance by the Arbitration (Amendment) Ordinance 1996.³ Section 2H of the Ordinance was repealed and replaced by s 2GG. Unlike s 2H, s 2GG is a provision of Part IA of the Ordinance. Section 2GG as originally enacted provided that a party to an arbitration may seek leave from the Court of First Instance to enforce (*inter alia*) the award and to enter judgment in terms of the award. That provision clearly applied to domestic awards, to international awards made in Hong Kong under the UNCITRAL Model Law on International Commercial Arbitration⁴ and, by virtue of s 42(1) of the Ordinance, to Convention awards. This therefore begged the question: did s 2GG as originally enacted apply to awards other than these?

Warnings going back to 1992 about a legal vacuum in cross-border enforcement were vindicated by the decision of the Court of First Instance in *Ng Fung Hong Ltd v ABC*,⁵ where Findlay J in the Court of First Instance refused summary enforcement of an award of an arbitral tribunal appointed by the China International Economic and Trade Arbitration Commission (CIETAC) under s 2GG of the Ordinance, on the basis that that provision applied only to the enforcement of awards made in domestic arbitrations and in international arbitrations conducted in Hong Kong.⁶ Because of 'one country, two systems' under Hong Kong's Basic Law, a Mainland award was not a foreign award but at the same time was not a domestic award either. Mainland awards could therefore only be enforced in Hong Kong by virtue of a common law action on the award. By contrast with the summary procedure provided for by s 2GG and Order 73 rule 10 of the Rules of the High Court, an action on the award is a regular action begun by writ for breach of an implied term in the arbitration agreement requiring the award to be honoured.⁷ Such an action is subject to

² Hereafter referred to as 'the Ordinance' or 'the principal Ordinance'.

³ Ordinance No 75 of 1996, which took effect on 27 June 1997.

⁴ The Model Law has been enacted as Hong Kong's international arbitration law and is set out as the Fifth Schedule to the Ordinance.

⁵ [1998] 1 HKC 213.

⁶ Its application to Convention awards was clearly not relevant in this case as the New York Convention had by the relevant time ceased to apply as between Hong Kong and the Mainland.

⁷ For detailed discussion of the difficulties, see R Morgan, *Mutual Enforcement of Awards between Hong Kong and the People's Republic of China — One Country, Still no System* [1999] Int ALR 29-34.

a far greater number of defences to enforcement than the system provided for by the New York Convention,⁸ which is founded on a 'pro-enforcement bias'⁹ and a limited number of defences.

On 20 June 1999, following protracted discussions, the authorities in Hong Kong and the PRC concluded an *Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards*¹⁰, a juridical assistance agreement made under art 95 of the Basic Law.

The Arrangement was implemented in Hong Kong by further amendments to the principal Ordinance which came into force on 1 February 2000 via the Arbitration (Amendment) Ordinance 2000.¹¹ In the PRC, by contrast, it was adopted directly into law by virtue of a Supreme People's Court Notice of 24 January 2000 entitled *Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards*.¹²

The effects of the Hong Kong provisions are as follows.

- (i) A new Part IIIA (ss 40A-40G) is added to the principal Ordinance to effect the enforcement of 'Mainland awards'.
- (ii) A 'Mainland award' is defined in s 2(1) as amended as —
*an arbitral award made on the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China...*¹³
- (iii) A party whose application to enforce a Mainland award was refused at any time between 1 July 1997 and 1 February 2000 may nevertheless reapply for leave to enforce the award.¹⁴

⁸ For a list of defences to an action on the award, see N Kaplan & R Morgan, 'National Report — Hong Kong', in the *ICCA International Handbook of Commercial Arbitration* (Kluwer, The Hague, 2000), pp 84-85.

⁹ *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)*, 508 F 2d 969 (2d Cir 1974) at 973, per Smith J (US Court of Appeals, 2nd Circuit); this has also been referred to as a 'powerful presumption' that the arbitral tribunal acted within its powers: *Corporacion Transnacional de Inversiones SA de CV v Stet International SpA* (1999) 45 OR (3d) 183, per Lax J (Superior Court of Ontario).

¹⁰ Hereinafter 'the Arrangement', which was discussed in P S Caldwell, *Reciprocal Enforcement of Arbitral Awards between Hong Kong and the Mainland of China* [1999] Int ALR N-33-N-35. The English text of the Arrangement has never been officially gazetted. It may, however, be found in the following sources: W S Clarke & M Wilkinson, *Hong Kong Civil Court Practice* (Butterworths Asia, Hong Kong), Vol 1A at X [647]; D Cheng, M Moser & S Wang, *International Arbitration in the People's Republic of China: Commentary, Cases and Materials* (Hong Kong: Butterworths Asia, 2nd ed, 2000) pp 1262-65.

¹¹ Ordinance No 2 of 2000.

¹² Fa Shi [2000] No 3, which took effect on 1 February 2000.

¹³ The Arbitration Law of 31 August 1994, Chapter II. The term 'arbitral authority' used in this provision is also defined by s 2(1) of the principal Ordinance as amended. The list of domestic and foreign-related arbitration commissions whose awards may be enforced in Hong Kong pursuant to the new provisions was gazetted by the Secretary for Justice as GN 768 of 3 February 2000 (*Gazette* No 6/2000) in accordance with s 40F of the Ordinance.

¹⁴ Section 40G. Although the drafting is not entirely clear, art 10 of the Arrangement limits the right to reapply to 6 months from 1 February 2000 in the case of legal persons and 12 months from the same date in the case of natural persons. This provision of the Arrangement is of doubtful legality in Hong Kong because the time limit was not enacted in Ordinance No 2 of 2000.

- (iv) New York Convention-type arrangements apply, that is, provisions as to recognition and enforcement,¹⁵ enforcement mechanisms,¹⁶ evidentiary requirements,¹⁷ a pro-enforcement bias¹⁸ and exclusive grounds for refusing enforcement.¹⁹
- (v) A Mainland award may not generally be enforced in Hong Kong if application has been made to enforce it on the Mainland.²⁰ Where, however, an award has been only partially satisfied on the Mainland, an application to enforce payment of the balance may be made in Hong Kong.²¹

Taiwanese and other foreign awards

Prior to 27 June 1997, Taiwanese awards were summarily enforceable in Hong Kong, pursuant to the now-repealed s 2H of the Ordinance, at the discretion of the former High Court. The construction of s 2GG of the Ordinance as originally enacted, enunciated in *Ng Fung Hong Ltd v ABC*,²² applied equally to Taiwanese awards, however, thus leaving them also enforceable only by an action on the award.

Following discussions between the Government of the SAR and the arbitration community in Hong Kong, new arrangements for enforcing Taiwanese awards were implemented by the Arbitration (Amendment) (No 2) Ordinance 2000.²³ The effects of the new provisions are as follows.

- (i) The principal Ordinance is amended by the addition of a new s 2GG (2).
- (ii) Awards made in Taiwan are henceforth enforceable once again at the discretion of the court — though Taiwan itself is not named in the legislation.
- (iii) Foreign awards other than Convention awards are also enforceable under s 2GG — for example, awards made in Pakistan.²⁴

¹⁵ Section 40B of the Ordinance.

¹⁶ *Ibid*, s 40B(1) (applying s 2GG) and s 15 of Ordinance No 2 of 2000, which consequentially amends RHC Ord 73 r 10.

¹⁷ Section 40D of the Ordinance.

¹⁸ See note 9 above.

¹⁹ *Ibid*, s 40E.

²⁰ *Ibid*, s 40C(1).

²¹ *Ibid*, s 40C(2).

²² See note 5 above.

²³ Ordinance No 38 of 2000, which took effect on 23 June 2000.

²⁴ Pakistan has signed but not ratified the New York Convention. It therefore remains a party to the (Geneva) Convention on the Execution of Foreign Arbitral Awards 1927, which lapsed in Hong Kong on 1 July 1997 - although this was not legally confirmed until 1 February 2000, when ss 4 and 11 of Ordinance No 2 of 2000 took effect.

- (iv) Defences available to domestic awards or under an action on the award apply, however, to awards made in Taiwan and in other non-New York Convention States and territories, because the Convention has no application to them.

One effect of these amendments is, however, startling. Section 2GG(2) also has the effect of applying s 2GG to the enforcement of interlocutory orders and directions of an arbitral tribunal, *even one sitting overseas*. Furthermore, this provision applies as much to a Convention or Mainland award as to a Taiwanese or other foreign award. Hong Kong has therefore unilaterally undertaken to facilitate the enforcement in the Special Administrative Region of interlocutory orders and directions made by any Chinese, Taiwanese or foreign arbitral tribunal in the absence of any reciprocal agreement to this effect. This legislation flies in the face of strong case authority under the New York Convention (albeit not of Hong Kong origin) which holds that non-final orders cannot be enforced overseas.²⁵ Furthermore, because of the absence of any basis of reciprocity, it is most unlikely to be copied in other jurisdictions.

Section 2GG is, however, an enabling provision and enforcement will be at the discretion of the Court of First Instance. Judicial guidance is required as to what categories of order and direction will be enforceable under s 2GG(2), the grounds that should be demonstrated and the proper exercise of the court's discretion. It cannot, for example, have been the intention of the legislature that an order for American-style discovery and depositions or any other form of order not recognised by Hong Kong law should be enforced in Hong Kong. It is submitted, therefore, that only interim measures of protection should be the subject of an enforcement order, provided that the measure which is sought to be enforced in a particular case is one which is recognised by Hong Kong law,²⁶ such as *Mareva* injunction.²⁷

²⁵ *Resort Condominiums International v Bokwell* (1993) 118 ALR 655 (Supreme Court of Queensland). This approach is in line with that relating to the enforcement of overseas judgments.

²⁶ *Bocotra Construction Pte Ltd v Attorney-General of Singapore* [1995] 2 SLR 523 (Court of Appeal, Singapore).

²⁷ Or, in post-Woolf parlance, a freezing order.