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The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects

Introduction

A legal vacuum lasting for over two years finally came to an end when the Agreement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR ('the Agreement') was signed by the Supreme People's Court of mainland China (the 'mainland') and the Department of Justice of the Hong Kong SAR on 21 June 1999.[1] The long awaited arrangement has been introduced by the Arbitration (Amendment) Bill 1999 into the Legislative Council by the Department of Justice on 1 July 1999 and, as of this writing, the second reading debate is being conducted.[2] This article discusses the importance and implications of the Agreement, including some continuing legal concerns. The first part highlights the current conditions regarding mutual enforcement of arbitral awards between the two sides since the handover; the second part examines the content of the Agreement; the third part considers the implications of the Agreement for the Hong Kong SAR as a center of both international finance and arbitration;[3] the fourth part analyses some on-going concerns with the Agreement; and the fifth part offers a brief conclusion.

The current conditions since the handover

Mutual enforcement of arbitral awards between the Hong Kong SAR and the mainland was conducted satisfactorily before the reunification on the basis of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('the New York Convention') by virtue of the accession of both China and the United Kingdom to it. Between January 1989 (when the first award made by the China International Economic and Trade Arbitration Commission ('CIETAC') in China was executed in Hong Kong)

1 The Agreement was signed by Mr Shen Deyong, the Vice-President of the Supreme People's Court, and Elsie Leung Oi-sie, Secretary for Justice, in Shenzhen on 21 June 1999. See the report in *Wen Wei Bao*, 22 June 1999, p A3.

2 See the speech made by Elsie Leung, Secretary for Justice, in resuming the second reading debate of the Bill on 5 January 2000. Available at http://www.info.gov.hk.

3 For a historical review of Hong Kong's development into a major venue for international arbitration over the past two decades, see Neil Kaplan, 'The History and Development of Arbitration in Hong Kong' in Joseph J Norton (ed), *Yearbook of International Finance and Economic Law 1996* (London: Kluwer Law International, 1998), pp 202-23.

and 1 July 1997 approximately 150 awards rendered by the CIETAC and the China Maritime Arbitration Commission ('CMAC') were brought before the former High Court for recognition and enforcement.[4] During this period, the mainland awards constituted on average between one half and two thirds of the total applications to enforce awards and to set aside leave respectively.[5] According to Shen Deyong, the Vice-President of the Supreme People's Court, thirteen awards made in Hong Kong were executed in the mainland during the same period.[6]

The return of sovereignty over Hong Kong to China, however, has rendered the mutual enforcement regime based on the New York Convention no longer applicable. On the eve of the handover, the Chinese Government sent a note to the United Nations concerning the international treaties applicable to the Hong Kong SAR after 1 July 1997 and the reservation therein. In Item 11, it declared that the New York Convention would only be applied within the SAR to recognize and enforce arbitral awards made in the territory of another contracting state.[7] As a result, the New York Convention ceased to be the governing law between the two sides.

Unfortunately, the arbitration legislation of the two sides was not prepared for this historical change. Under the Hong Kong Arbitration Ordinance (Cap 341) as amended, the enforcement scheme is grounded on the classification of awards into domestic awards, Convention awards and other foreign awards.[8] In the mainland, the legal structure has been left virtually the same. The current laws and judicial guidance of the Supreme People's Court address enforcement procedures applicable to domestic awards made,[9] Convention awards[10] and other foreign awards respectively.[11] As such, arbitral awards made in the

4 Chen Dejun, 'CIETAC Annual Report' made on 10 April 1998 in CIETAC and CMAC: *China International Commercial Arbitration Yearbook* (Beijing: CIETAC and CMAC, 1998), p 9.

5 Robert J M Morgan, 'The Transition of Sovereignty to the People's Republic of China and the Arbitration Regime in Hong Kong: The Issues and Their Management' in *Mealey's International Arbitration Report* (Wayne: Mealey Publications, May 1997), p 13.

6 Interview with Mr Shen Deyong, *Wen Wei Bao*, 22 June 1999, p A3.

7 The Declarations and Reservations of the Chinese Government Concerning the Application of Multiple International Treaties to the Hong Kong SAR on 20 June 1997 (1997) 39 *Guowuyuan Gongbao* (The State Council Gazette of the PRC), p 1703.

8 See the definitions in s 2(1), Part I of the Ordinance.

9 See Chapter 6 of the Arbitration Law of the PRC, in *The Laws of the People's Republic of China* (1994) compiled by the Legislative Affairs Commission of the Standing Committee of the National People's Congress, (Beijing: Science Press, 1996), pp103-4; Chapter 21 of the Civil Procedure Law of the PRC, printed in *The Laws of the People's Republic of China* (1990-2) (Beijing: Science Press, 1993), pp 228-9; and several circulars of the Supreme People's Court concerning arbitral award enforcement.

10 See Article 269 of the Civil Procedure Law of the PRC, ibid, and the Notice of the Supreme People's Court Concerning Implementation of the New York Convention dated 10 April 1987, published in Research Office of the Supreme People's Court, *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Sifa Jieshi Quanji* (Collections of Judicial Interpretation of the Supreme People's Court-1949-1993), (Beijing: People's Court Publishing House, 1994), pp 1959-61.

11 Foreign awards not subject to the New York Convention may be enforced in the mainland either pursuant to other international agreements, or on a reciprocal basis under Article 269 of the Civil Procedure Law of the PRC.

mainland and the Hong Kong SAR find no suitable category for enforcement in the law of the other side after they lost their Convention nature.

This condition was soon reflected in judicial decisions on both sides. In *Ng Fung Hong v ABC*,[12] the HKSAR Court of First Instance dismissed the plaintiff's application to enforce a CIETAC award in its favor for lack of legal grounds. With regret, Findlay J held that neither the New York Convention, nor the rules concerning international arbitration under the Arbitration Ordinance could apply to enforcement of arbitral awards from the mainland. As a result, the plaintiff could only enforce the award by filing a separate action with the award as evidence of an unpaid debt. Soon after, in *Hebei Import-Export Corp v Polytek Engineering Co Ltd (No 2)*,[13] Chan CJ held, in obiter dictum, that mainland awards should no longer be treated as Convention awards after the handover, nor as domestic awards under the Arbitration Ordinance because of Hong Kong's separate and different status.[14]

As the judiciary in the Hong Kong SAR predicted,[15] People's Courts in the mainland have taken the same position towards the mutual enforcement of arbitral awards. Since a Taiyuan Intermediate People's Court in Shanxi Province indefinitely suspended enforcement of a Hong Kong arbitral award on the ground of lack of a clear legal basis on 31 January 1998,[16] People's Courts in Beijing, Anhui, Shangdong and Guangdong all followed suit in more than ten proceedings to enforce Hong Kong awards.[17]

Despite the repeated promises of the governments of the two sides to have an arrangement in place soon,[18] this unfortunate state of affairs prevailed for over two years. The break-down of mutual enforcement cooperation not only angered local practitioners,[19] but also damaged arbitration as a service industry in Hong Kong. It has been reported that the slow progress of the Hong Kong SAR and the mainland governments in this regard was costing millions of

12 [1998] 1 HKC 213.
13 [1998] 1 HKC 192.
14 Ibid, pp 196-7.
15 Findlay J stated in his decision that 'it is a pity that such an award cannot be enforced directly [today]. What is equally important is that there may be difficulties in seeking to enforce a Hong Kong award in mainland China.' (Note 12 above), pp 215-6.
16 Reported in Robert Morgan, ' Mutual Enforcement of Arbitral Awards between Hong Kong and the People's Republic of China-One Country, Still No System' [1999] 2 *Mealey's International Arbitration Report*, p 33.
17 Interview with Mr Shen Deyong (note 6 above).
18 For example, Ms Shao Wenhong of the Supreme People's Court, who participated in the negotiation with the Hong Kong SAR, promised in early March 1998 to reach agreement on issues concerning judicial assistance as soon as possible. See *Dongfan Ribao* (Oriental News), 3 March 1998, p A19. Also see the speech made by the Secretary for Justice at the Hong Kong SAR 1998 International Dispute Resolution Conference, 11 November 1998, printed in *Mealey's International Report* (Mayne: Mealey Publications, 1999), pp E1-3.
19 See Lok Kin Wah, 'Alienating Itself from the International Legal Framework; How Can Hong Kong Be a Financial Centre?' *Xianggang Jinji Ribao* (Hong Kong Economic Times), 12 August 1998, A22; and Wang Shengchang, 'The Mutual Enforcement of Arbitral Awards in Hong Kong SAR and the Mainland China: A Deadlock Must Be Broken as Soon as Possible', a paper presented at the International Dispute Resolution Conference, Hong Kong, November 1998.

dollars in business as people were forced to switch their arbitration venue to Singapore.[20] The Chief Justice of the Hong Kong SAR has also acknowledged the condition as a matter of deep concern. He further pointed out that it was important for the health of business and arbitration in both Hong Kong and the rest of China that there should be an efficient regime of mutual enforcement of awards.[21]

Against this backdrop, the conclusion of the Agreement Concerning Mutual Enforcement of Arbitral Awards deserves applause. The development brings not only long awaited relief to many award holders, but also a new regime important to award holders in the future. According to the Department of Justice, the final adoption of the Agreement through the amendment of the Hong Kong Arbitration Ordinance is expected in early 2000.[22]

The major content of the agreement

Jurisdiction

The Agreement applies to arbitral awards made in mainland China and the Hong Kong SAR. Where a party fails to honour his obligation under the award, the other party may apply to the relevant court for enforcement[23] in the place where the other party resides or the property concerned is located. In the mainland, the relevant court is the Intermediate People's Court, and in the Hong Kong SAR it is the High Court.[24]

With regard to territorial jurisdiction, a party may file his application for enforcement either in the place of the other party's residence or the place where the property is located, assuming these are two different jurisdictions within the mainland. Where the two places are in Hong Kong and mainland China respectively, the party may only file his application in the court in one place at a time. He may not file his second application unless he is unable to fully recover the award from the first proceeding. In any event, the sum enforced by the courts of the two jurisdictions shall not exceed the amount awarded.[25]

As compared with the practice before the handover, the Agreement does not change the previous rules.[26] However, it allows more flexibility to the parties concerned. For example, if the party subject to enforcement and the

20 Karen Cooper & Jane Moir, 'Millions "Lost" as Settlements Go to Singapore', *South China Morning Post*, 30 November 1998.

21 Keynote address made by Andrew Li, the Chief Justice of the Court of Final Appeal of Hong Kong at the International Commercial Arbitration: Asian Update Conference, Hong Kong, 13 November 1997. See [1998] 64 JCI Arb J 205.

22 See the speech made by Mr Steven K Y Wong, Deputy Solicitor General of the Department of Justice at the Conference on Comparative Studies of the Mainland and Hong Kong Legal Systems, 19 November 1999, p 8.

23 Article 1 of the Agreement.

24 Article 2 of the Agreement.

25 Ibid.

26 See Article 269 of the Civil Procedure Law of the PRC (note 9 above), p 240.

property concerned are in the mainland and Hong Kong respectively, the rules of the Agreement do not require the enforcing party to first exhaust enforcement means within his own jurisdicton. Rather, a choice is granted. As a result, the party who fails to perform the obligation under the arbitral award may have to take the risk of being subjected to legal proceedings in a jurisdiction that it does not want to enter and incur much higher legal costs.

Application documents

Articles 3 and 4 list the application documents for enforcement proceedings, which include the enforcement application, the arbitral award and the arbitration agreement. As compared with Article IV of the New York Convention, which mentions only the arbitral award and the arbitration agreement, a party seeking to enforce an arbitral award under the Agreement may have to produce more supporting documents. According to Article 4(3) and (4) of the Agreement, in addition to the parties' basic information, the applicant shall also produce a copy of its business registration, particulars and grounds of the enforcement application, and the conditions of the property concerned. If the applicant is a foreign legal person or organization, the documents need to be notarized and attested.

The particulars, which cannot be found in the current enactment in the mainland,[27] may create some difficulties for parties from Hong Kong. For instance, a partnership is not strictly required to do formal business registration in Hong Kong[28] and as a result, it may not be able to produce its business registration in an enforcement proceeding to the People's Court in the mainland. Also, it is not clear how an enforcement application may be affected in the mainland if the applicant is unable to know the location or the condition of the property concerned due to lack of possession or cooperation of the other party.[29]

Limitation period

According to Article 5, limitation shall be governed by the law of the place where the enforcement is sought. As such, a difference between the relevant rules of the two sides should be noted. In the mainland, the time limit to apply for execution of judgments or arbitral awards is one year if a natural person is

[27] The Arbitration Law, the Civil Procedure Law, and the circular of the Supreme People's Court on implementation of the New York Convention all fail to specify items that should be included in an enforcement application.

[28] The Hong Kong Partnership Ordinance (Cap 38) does not mandate registration as the necessary condition of formation. Professor Vanessa Stott has pointed out that there is no system of registering partnership, or even of registering partnership names in Hong Kong. Vanessa Stott: *An Introduction to Hong Kong Business Law* (Hong Kong: Longman, 1997), p 252. Under Hong Kong Business Registration Ordinance (cap 310), any person carrying on any business is required to register his business (s 5(1)). However, some businesses may be exempted.

[29] It should be noted that in 40D of the Draft Bill to amend the Hong Kong Arbitration Ordinance, the particulars of the application as specified in the Agreement are not stipulated.

a party concerned, and six months if both parties are legal persons.[30] The statute of limitation begins to run from the last day of the performance period specified in the arbitral award.

In Hong Kong, the limitation period for an action on the ground of breach of the implied promise included in the arbitration agreement to perform a valid award can be as long as six years.[31] As such, a party seeking to enforce a Hong Kong arbitral award in his favor in the mainland has much less time than his counterpart seeking to enforce a mainland award in Hong Kong.

Procedure

Under Article 6 of the Agreement, after receipt of an enforcement application, the court shall handle the application and enforce the award in accordance with the procedure of its own jurisdiction. In this regard, although both sides agree that awards of arbitral tribunals shall be enforced as binding orders or judgments of the court, [32] the procedures for enforcement will vary.

After the damaging case of Revpower where the Shanghai Intermediate Court refused to recognize and enforce a foreign arbitral award,[33] the Supreme People's Court adopted some new rules against unlawfully setting aside, or refusing to enforce, foreign arbitral awards. As a result, where an enforcement application is filed with an Intermediate People's Court and the Court intends to refuse to enforce the award, it must first report its tentative ruling to the High People's Court of the province for approval. Should the High Court agree on the lower court's refusal, a further report must be made to the Supreme People's Court. A refusal may not be rendered until the Supreme Court approves.[34] The same supervision rule shall also be applicable to invalidate any arbitration agreement with a foreign party, including a party from Hong Kong, Macau or Taiwan.[35] As such, in mainland China, any setting aside or refusal to enforce

30 Article 219 of the Civil Procedure Law of the PRC (note above 9).

31 The Hong Kong Limitation Ordinance (Cap 347), s 4 (1)(c). For a discussion, see Robert Morgan, *The Arbitration Ordinance of Hong Kong- A Commentary* (Hong Kong: Butterworths Asia, 1997), pp 395-6.

32 Article 2GG of the Hong Kong Arbitration Ordinance (cap 341).

33 In order to deny the legal effect of the arbitral award made by a tribunal in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) against a Shanghai factory in 1993, the Court accepted a separate lawsuit filed by the factory on the same subject matter after the date of the final hearing of the arbitration was set. The Court did not correct its mistake until after the Supreme People's Court exerted its pressure and the Shanghai factory was declared bankrupt in 1996. The case even triggered a political motion against China's admission to the World Trade Organization in the US Congress. For the details of the case, see Zhao Xiuwen, 'On the Principles of Arbitration Jurisdiction from Perspective of the Revpower Case' (1998) 3 *Faxuejia* (Jurists' Review), pp 78-87; and Alberto More, 'The Revpower Dispute: China's Breach of the New York Convention?' in Chris Hunter (ed), *Dispute Resolution in the PRC — A Practical Guide to Litigation and Arbitration in China* (Hong Kong: Asia Law & Practice Ltd, 1995), pp 151- 8.

34 Point 2 of the Notice of the Supreme People's Court Concerning Handling of Certain Issues of Foreign Related Arbitration and Foreign Arbitration by the Supreme People's Courts, 28 August 1995. Printed in *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Sifa Jieshi Quanji* (Collection of Judicial Interpretations of the Supreme People's Court, Vol 2, 1993-1996) (Beijing: People's Court Publishing House, 1997), p 548.

35 Ibid, Point 1 of the Notice.

a foreign arbitral award is subject to heightened scrutiny by the Supreme People's Court.[36]

A concern with the applicability of the Supreme People's Court's supervision of enforcement of Hong Kong arbitral awards in the mainland has been raised by Wang Shenchang, the Deputy Director of CIETAC. Mr Wang sees an ambiguity, in that the Supreme Court's notice mentioned parties from Hong Kong only in the context of invalidating arbitration agreements, while the Agreement is silent on such a supervision procedure.[37] However, according to the practice of the mainland courts after the handover, the laws and regulations adopted before 1 July 1997 treating Hong Kong as a foreign region and jurisdiction are still being applied.[38] Newly issued regulations continue to treat matters concerning the Hong Kong SAR as foreign related ones.[39] Moreover, in the context of the Supreme People's Court's Notice, the supervision shall be applicable to awards made by both foreign arbitration tribunals and domestic commissions authorized to handle foreign related disputes. As such, the underlying policy of the supervision is clearly to honor foreign related awards as much as possible, whether made in or outside China, with tightened scrutiny. Therefore, there seems to be no reason to exclude awards made in Hong Kong from this important scheme.

The most important distinguishing feature between Hong Kong and mainland enforcement procedures is the allowance in the Hong Kong procedures of an appeal, subject to leave granted by the Court of Appeal after an application for enforcement is denied.[40] In the mainland, a People's Court's decision to set aside an arbitral award cannot be appealed.[41]

In terms of execution, the Supreme People's Court made it clear in 1998 that a People's Court shall make its decision within two months of receipt of an application to enforce a Convention award. The execution shall be completed

36 In 1998, a decision of the High People's Court of Jiangsu Province to hold an arbitral agreement invalid against a Hong Kong and a Canadian company was repealed by the Supreme People's Court in the exercise of its scrutiny power. See the case report on *Zuigao Renmin Fayuan Gongbao* (Bulletin of the Supreme People's Court), Issue 3, 1998, pp 109-10.

37 Wang Shengchang, 'Neidi he Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue de Wenti Jiezheng jiqi Tupo' ('Problems and Breakthrough in Mutual Enforcement of Arbitral Awards between the Mianland and the Hong Kong SAR'), paper in Chinese presented at the Conference on Judicial Assistance under One Country, Two Systems, University of Hong Kong, 6 September 1999, p 9.

38 For example, the State Taxation Bureau made it clear before the handover that the preferential treatment in taxation given to foreign investors would continue to be applicable to investment from Hong Kong, and the policy would not be changed in any way after 1 July 1997. See (1997) 7 China Economic News, p 3.

39 For example, Article 22 of the Interim Procedures for Pilot Trials of Sino-foreign Joint Equity Travel Agencies explicitly provides that investment from the Hong Kong SAR, Macau and Taiwan shall be handled according to this Procedure. The regulation was promulgated jointly by the Ministry of Foreign Trade and Economic Cooperation and the State Tourism Bureau on 2 December 1998, after being approved by the State Council. See (1999) 13 China Economic News, p 12.

40 See s 23 of the Hong Kong Arbitration Ordinance.

41 Article 140 of the Civil Procedure Law of the PRC (note 9 above), pp 213-4.

within six months of the ruling, unless extraordinary conditions are present.[42]

In Hong Kong, the enforcement of an arbitral award depends on leave granted by the court subject to judicial discretion. Procedure for seeking leave for enforcement is governed by the Rules of the High Court.[43]

Refusal grounds

Article 7 of the Agreement articulates seven grounds on which a court can set aside an arbitral award.

(1) a party to the arbitration agreement was of some incapacity under the law applicable to him, or the arbitration agreement was invalid under the governing law that was agreed upon by the parties in their agreement, or the arbitration agreement was invalid under the law of the place of the arbitration due to the absence of any indication of the governing law;

(2) the party subject to enforcement did not receive any appropriate notice of the arbitrator appointment, or was unable to present his case for other reasons;

(3) the subject matter in the dispute dealt with by the arbitral award was not contemplated by the parties' submission, or was not covered by the arbitration agreement, or the award includes rulings over the subject matter outside the scope of arbitration agreed by the parties. Nevertheless, an award over the submitted subject matters may be enforced partially if the matters disposed by the award are severable from the *ultra vires* part;

(4) the composition of the arbitration tribunal or its procedure violates the arbitration agreement; or fails to comply with the law of the place of the arbitration if the parties did not indicate any agreement in these matters;

(5) the arbitral award in question has not become binding on the parties, or it has been set aside or its enforcement has been suspended by the court in the place of the arbitration or in accordance with the law of the place of the arbitration;

(6) the relevant court believes that the subject matter dealt with by the award is not arbitrable in accordance with the law where the enforcement is sought;

(7) the award violates social public interest of the mainland or public policy of the Hong Kong SAR.

[42] Point 4 of the Provisions of the Supreme People's Court Concerning Charges and Examination Period in Recognition and Enforcement of Foreign Arbitral Awards, 14 November 1998.

[43] See rule10. For a discussion, see Morgan (note 31 above), pp 394-5.

Article 7 of the Agreement virtually translates Article V of the New York Convention word for word, except for a few minor deviations. In this regard, one important reservation made by China in 1986 while ratifying the New York Convention should be noted: the subject matter that is arbitrated must be of a commercial nature.[44] Later, the Supreme People's Court in its instruction further stated that as far as recognition and enforcement of foreign arbitral awards are concerned, the New York Convention could only be applied to disputes arising from contractual or non-contractual commercial matters, including legal rights and obligations derived from contract, torts or other economic relations. [45]

However, the Hong Kong Arbitration Ordinance includes no such restriction.[46] The Chinese Declaration of 1997 concerning the continuing application of the New York Convention in Hong Kong, which did not mention the mainland reservation on arbitrability of subject matter, indicates that the current rule under the Hong Kong Ordinance in this regard will not be changed. As a result, although certain Hong Kong arbitral awards can still be made in Hong Kong, they cannot be enforced in mainland China.[47]

Retroactive arrangement

Since the handover, the enforcement of many arbitral awards made in Hong Kong and the mainland have been stalled for up to two years, due to the breaking-off of mutual enforcement. In order to provide a remedy for the parties, some retroactive arrangements have been made to enable them to enforce the awards.

(1) The rules of the Agreement shall govern all enforcement applications filed after 1 July 1997.[48] Consequently, any application filed after the effective date to enforce arbitral awards made earlier will still be subject to the legal regime under the Agreement;

(2) If a party cannot file his enforcement application between 1 July 1997 and the effective date of the Agreement, he may obtain a renewed period of limitation to file his application to the relevant court in either Hong Kong or the mainland. For a natural person, the statute of

[44] See Article 1 (3) of the Decision of the Standing Committee of the National People's Congress on Ratification of the New York Convention on 2 December 1986.

[45] Point 2 of the Supreme People's Court Notice (note 10 above). For example, according to Professor Tang Houzhi, the Deputy Director of CIETAC, disputes concerning validity and infringement of intellectual property rights may not be arbitrable under the Chinese law. Tang Houzhi,'The People's Republic of China', Annex I, in *Handbook on Commercial Arbitration* (Deventer: Kluwer Law International, 1994), p 3.

[46] For example, s 34(2) of the Ordinance provides that art 1(1) of the UNCITRAL Model Law shall not have the effect of limiting the application of the law to international commercial arbitration.

[47] For a discussion of arbitrability under Hong Kong and Chinese law, see Benjamin P Fishburne III and Chuncheng Lian, 'Commercial Arbitration in Hong Kong and China: A Comparative Analysis' (1997) 1 University of Pennsylvania Journal of International Economic Law 297, 313 - 5.

[48] Article 9 of the Agreement.

limitation will be one year from the effective date of the Agreement. In the case of a legal person or other organization, the period is shortened to six months;[49]

(3) If a party made his enforcement application between 1 July 1997 and the effective date of the Agreement, but was refused, he shall be entitled to make a fresh application.[50]

Enactment

Although the Agreement does not specify the means to enact the Agreement, the Hong Kong SAR Government is implementing the Agreement by introducing the Arbitration (Amendment) Bill to the Legislative Council on 7 July 1999. Currently, the second reading debate is being resumed.[51] According to the Draft Bill to amend the Arbitration Ordinance drafted by the Department of Justice, a new type of award, mainland awards,[52] will be created and incorporated into the Ordinance, together with the provisions of the Agreement.

In the mainland side, the signing of the Agreement by the Supreme People's Court apparently indicates the Central Government's unwillingness to make any change to the existing law through any formal legislative procedure. As such, the contents of the Agreement will become binding over People's Courts through judicial instructions of the Supreme People's Court, which may be issued any time it deems fit without any further external proceeding. Consequently, the effective date of the Agreement depends on the pace of the legislative procedure in Hong Kong.

Finally, the Supreme People's Court and the Department of Justice have agreed to consult each other in future in order to address new problems or to make necessary amendments.[53]

Major implications of the Agreement

First of all, the conclusion of the Agreement is the latest achievement in building up a judicial assistance regime under the principle of 'one country, two systems'.[54] Following the Agreement on the Arrangement Concerning Service of Judicial Documents in Civil and Commercial Matters between the Mainland and the Hong Kong SAR on 14 January 1999, the signing of the Agreement

49 Ibid, Article 10.
50 Ibid.
51 Leung (note 2 above).
52 A mainland award is defined as an arbitral award made on the mainland by a recognized mainland arbitral authority in accordance with the Arbitration Law of the PRC (s 3 of the Draft Bill).
53 Article 11 of the Agreement.
54 For a recent discussion of this development, see H L Fu, 'The Form and Substance of Legal Interaction between Hong Kong and Mainland China—Towards Hong Kong's New Legal Sovereignty' in Raymond Wacks (ed): *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999), pp 95-132.

clearly signals not only the widening of areas of cooperation between the two sides, but also a break-through in the difficulties of the past two years. As a result, there is some cause for optimism regarding negotiations on judicial assistance in other civil and commercial matters, including evidence collection and recognition and enforcement of court judgments.

Moreover, as more agreements on judicial assistance will be reached by the two sides, the model for such a regime has been eventually shaped up. Under the Basic Law of the Hong Kong SAR, the Hong Kong SAR may, through consultation and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country, which may render assistance to each other.[55] However, the Law does not specify how this is to be achieved. As a result, several suggestions have been advanced,[56] including a model of regional co-operation formed by the Hong Kong SAR and other provinces of China[57] and one established through China's unilateral declaration[58] or legislation to grant such assistance.[59] The practice, nevertheless, has demonstrated that judicial assistance will be directly conducted between the top judicial branches of the two sides. As such, the arrangement correctly reflects the characteristics of judicial assistance between mainland China and the Hong Kong SAR: despite its minuscule land size and population, the Hong Kong SAR will hold its equal status as an independent legal region.[60]

With regard to enforcement of arbitral awards, the Agreement has achieved the goal of preservation of the pre-unification practice under the New York Convention.[61] Since creation of the new category of mainland awards in the Hong Kong Arbitration Ordinance does not affect the current rules governing enforcement of other awards, the arrangement is in line with the Chinese Government's promise to leave the existing legal system in Hong Kong 'basically unchanged'.[62] And as a result of the inclusion into the Agreement of the relevant rules of the New York Convention applicable to mutual enforcement prior to the reunification, continuation will be ensured when the new regime begins to function. Before the handover, some local practitioners were concerned that arbitral awards made in Hong Kong and the mainland would not be enforced since neither Convention awards nor domestic awards would be

55 Article 95 of the Basic Law of the Hong Kong SAR.
56 See Xian Chu Zhang, 'Enforcement of Arbitral Awards Between China and Hong Kong: Before and After Reunification' in Wacks (note 54 above), pp 201-5.
57 Morgan (note 5 above), pp 20-1.
58 Wang Guiguo, 'One Country, Two Arbitration Systems: Recognition and Enforcement of Arbitral Awards in Hong Kong and China' (1997) 1 Journal of International Arbitration 5, at 40.
59 Morgan (note 5 above).
60 Jin Huang and Andrew Xuefeng Qian, 'One Country, Two Systems, Three Law Families, and Four Legal Regions: The Emerging Inter-regional Conflicts of Law in China,'(1995) 5 Duke Journal of Comparative & International Law, 289, at 302-3.
61 See speech by the Secretary for Justice (note 18 above).
62 Article 3 (3) of the Sino-British Joint Declaration on the Question of Hong Kong, 19 December 1984.

acceptable.[63] The creation of the new category offers a solution with minimum change in the law and practice.

In addition, in maintaining the spirit of the New York Convention, the differences between the two legal systems are respected. For example, during the negotiation, some scholars called for abolition of appeal procedures in proceedings to enforce mainland awards in Hong Kong,[64] which would have required substantial revision of the Hong Kong Arbitration Ordinance. The Agreement does not take this approach. Also, 'social public interest' and 'public policy' are used to label the two similar but not identical doctrines of the mainland and Hong Kong respectively. Moreover, local procedures and statutes of limitation continue to be applied in enforcement proceedings. By the same token, the requirement of Chinese translation and restriction on arbitrability in the mainland are recognized by the Agreement. By taking the reunification into account, the Agreement leaves scope to develop the framework through the continuing consultation in future.

Further, the regime will prove its merit in better judicial efficiency by taking into account the reality of the reunification. For example, in some bilateral judicial assistance agreements concluded by China with other countries, the judiciaries of the two countries cannot deal with each other directly and a foreign party may not submit his application to the court of the other country. Rather, the Ministries of Justice of the two sides are named as the central authorities responsible for transferring enforcement requests to the Supreme People's Court of the country, which will further transfer the request to the competent local court.[65]

Finally, the conclusion of the Agreement on the mutual enforcement of arbitral awards may enhance Hong Kong's position as an international arbitration centre. With the continuation of the Convention principles, a well-developed legal system, high professional standards, and an enforcement regime with great potential, Hong Kong can take centre stage in the arbitration world, particularly as regards the China-related practice.

63 Ankana Vivasiri, 'Xianggang Huigui dui Zhongguo Neidi yu Xianggang Diqu Sifa Xiezhu de Yingxiang' ('The Impact of the Return of Hong Kong on Judicial Assistance between Mainland China and Hong Kong') in Liu Zesheng (ed), *Maixiang Xin Jiyuan* (Towards A New Era- Experts on 97 Hong Kong's Return) (Hong Kong: Xiangjiang Publishing House, 1997), pp 490-504.

64 Yu Xianyu and Zhu Shiqiang, 'Guanyu Neidi yu Xianggang Zhongcai Caijue Chengren yu Zhixing Wenti' ('Issues Concerning Recognition and Enforcement of Arbitral Awards between Hong Kong and the Mainland'), (1998) 6 *Zhengzhi yu Falu* (Political Science and Law), p 76.

65 For an example, see the Judicial Assistance Agreement between China and Turkey, 28 September 1992, particularly, arts 2 and 26, and the Judicial Agreement between China and Thailand, 16 March 1994, particularly Article 4. Printed in *Zhongwai Sifa Xiezhu yu Yindu Tiaoyueji* (Collections of Judicial Assistance and Extradition Treaties between China and Foreign Countries compiled by Criminal Division of the Supreme People's Procuratorate) (Beijing: Public Security University Press, 1997), pp 183-96 and pp 149-57 respectively.

Some on-going legal concerns

Despite this progress, the Agreement has also raised some further legal concerns, on which the success of the Agreement will depend.

Enforcement only, not recognition[66]

This omission may trigger an immediate inquiry. Indeed, one could argue that recognition is an essential prerequisite of enforcement and thus, enforcement already includes the concept of recognition. However, this argument may not be very convincing. After noting that in all major international treaties the two concepts stood side-by-side, Mauro Rubino-Sammartano, an experienced arbitrator in Europe wrote, 'recognition can be distinguished from enforcement since the latter is intended to oblige the losing party to carry out the award, while the purpose of the former is different and in a way, more limited.'[67] James H Carter, a distinguished American lawyer, has acknowledged the distinction by stating that recognition refers to giving effect to the award to bar litigation on the same issues settled in arbitration; enforcement means applying judicial remedies to assure that the award is carried out.[68] Albert Jan van den Berg, a leading authority on international arbitration, also pointed out that in addition to acknowledging that an arbitral award's value is similar to that of a judgment issued by the court, recognition may also serve to neutralize a losing party's attempt to obtain a new decision by the courts of the state requested to enforce the award, a decision that would conflict with the award. As such, recognition of the award is even more independent from enforcement.[69] Further, an application for recognition may be made, if the procedural law so permits, in other pending proceedings instituted by the losing party.[70]

The points above have been well taken in the mainland. For example, Professor Tan Bing, the Dean of Hainan Law School agrees that recognition and enforcement are two different concepts. Recognition has much broader application than enforcement.[71] Some scholars further explain that recognition

66 In this regard, it should be noted that in the Arbitration Ordinance, enforcement only is mentioned, whereas in the UK Arbitration Act 1996, both recognition and enforcement are included. Compare Part III and IV of the Hong Kong Ordinance entitled 'Enforcement of Foreign Awards' and 'Enforcement of Convention Awards' respectively with Part III and IV of the UK Act entitled 'Recognition and Enforcement of Certain Foreign Awards' and 'Recognition and Enforcement Convention Award' respectively.

67 Mauro Rubino-Sammartano, *International Arbitration Law* (Deventer: Kluwer Law and Taxation Publishers, 1990), p 484.

68 James H Carter, Litigating in Foreign Territory: Arbitration Alternatives and Enforcement Issues, presentation made before the American Bar Association Center for Continuing Legal Education on 8-10 February 1998; quoted from Charles Kenworthey Harer, 'Arbitration Fails To Reduce foreign Investors' Risk in China' (1999) 2 Pacific Rim Law & Policy Journal, p 401.

69 Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Deventer: Kluwer Law and Taxation Publishers, 1981), p 244.

70 Rubino-Sammartano (note 67 above), p 484.

71 Tan Bing, *Zhongguo Zhongcai Zhidu Yanju* (A Study of Arbitration in China), (Beijing: Legal Publishing House, 1995), pp 318-9.

of a foreign arbitral award in a domestic court means that the dispute has been finally settled by the arbitral award. If the same subject matter is raised again later for adjudication, the winning party may refuse to appear before the court on the ground of *res judicada*, with the recognition as the proof.[72]

For all these reasons, it seems that the Agreement should not deviate from well established international conventions and domestic legislation. If it does so, the courts might later find themselves in a situation where there is no legal basis for handling an application for recognition alone.

The difference between 'social public interest' and 'public policy' and their application

Although the two terms used in the Agreement sound very similar, in practice two differences may be noted. The first is the difference in scope between the two concepts. Although it has been agreed that violation of public policy may only be decided on an *ad hoc* basis according to the concrete facts,[73] the concept should include definite and governing principles that the community as a whole has already adopted, either formally by law or tacitly by its general course of corporate life.[74] For example, due process as a long established judicial principle has been discussed and applied in many judicial decisions. [75]

However, social public interest in China can be much broader and more flexible.[76] It includes not only adopted rules, expressed state commitments and social morality, but also less transparent state interests and unstable short-term policies. Invocation of the doctrine may not only deny the application of any possibly conflicting foreign laws, but also international practice.[77] It has been characterized as not only a legal institution, but also a political means to implement the current domestic policy.[78] As such, some scholars have pointed

72 Jiao Shiming & Liu Jingyi, *Zhongcai Fa Lilun yu Shiyong* (Theories and Application of Arbitration Law) (Beijing: People's Court Publishing House, 1997), pp 295-6.

73 AJ van den Berg, *The New York Arbitration Convention of 1981: Towards a Uniform Judicial Interpretation* (Deventer: Kluwer, 1981), p 376.

74 C Shum, *General Principles of Hong Kong Law* (Hong Kong: Longman, 1992), p 100.

75 For example, in *Packlito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, an application to enforce a CIETAC award was refused when the court found the defendants were denied a fair and equal opportunity of being heard. Also, in *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 HKC 293, the Court of Appeal unanimously allowed the appeal for denial of enforcement of a CIETAC award on the ground that the outcome of the award could have been affected since the Hong Kong party was not given an opportunity to respond to the opinion of a domestic administrative bureau.

76 Fishburne III & Lian (note 47 above), p 327.

77 For example, in 1989 the Maritime People's Court of Guangzhou used public interest doctrine to invalidate an internationally accepted practice of letter of credit in order to freeze the fund in question in China. The decision has been criticized by domestic scholars. Li Shuangyuan and Xu Guojian (ed): *Guoji Minshang Xin Chixu de Lilun Jiangou* (Theoretical Structure of the New International Civil and Commercial Order — Reorientation and Function Transformation of Private International Law), (Wuhan: Wuhan University Press, 1998), pp 269-70. For a recent comment, see Huan Jin: *Private International Law in China* (Beijing: Legal Publishing House, 1998), pp 132-3.

78 Yao Zhuang and Ren Jisheng: *Guoji Sifa Jichu* (Fundamentals of International Private Law) (Beijing: Social Science Publishing House, 1981), pp 30-7.

out that 'social public interest' is general and unclear. It is a defective concept that cannot function in the same way as 'public policy' does in judicial practice.[79] Thus, the concept is on occasion broadly interpreted by the People's Courts to justify non-enforcement of awards, including the economic and social consequences that may result in if the enforcement is granted.[80] In contrast, public policy has been considered by the Hong Kong courts as a very limited ground in refusing the enforcement of Convention awards that are in line with international practice. The standard of application of the public policy defence in Hong Kong is that it should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notion of morality and justice.[81] In a recent decision the Court of Final Appeal unanimously affirmed the standard by allowing the appeal from the Court of Appeal's decision setting aside a CIETAC arbitral award on the ground of public policy.[82]

Moreover, the application of the public policy doctrine in judicial assistance between mainland China and the Hong Kong SAR has been controversial. Professor Huang and Xuefeng Qian were of the view that given the great differences between the two legal regions, both sides should be left free to refuse to apply certain provisions of the other region's body of law on public policy ground.[83] However, Dr Xu Hong of Ministry of Foreign Affairs believed that in mutual enforcement of arbitral awards between the two sides, the use of the public policy doctrine should be strictly limited and shall not harm China's sovereignty, safety and fundamental interest.[84] The latest query came from Su Yuanhua, a senior local legislative officer. He stated that despite the great disparities in political, economic and legal systems between the two jurisdictions, the use of public policy doctrine in enforcing civil judgments and arbitral awards, which may lead to denial of execution of judgments or awards of the other side, would not only offend the principle of 'one country, two systems', but also obstruct the common development of the two systems. He further

79 Li & Xu (note 77 above), pp 268-9.

80 Alastair Crawford, 'Plotting Your Dispute Resolution Strategy: From Negotiating the Dispute Resolution Clause to Enforcement against Assets' in Hunter (note 33 above), p 42.

81 The test was originally stated in an American case, *Parsons & Whittemore v* RAKTA, 508 F 2d 969 (2d Cir 1974). Later, it was accepted in the Hong Kong case of *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 and quoted by Chan CJ in the recent case of *Hebei Import-Export Corp v Polytek Engineering Co Ltd (No 2)* [1998] 1HKC 192. For a detailed discussion of the practice in Hong Kong in this regard, see Morgan (note 31 above), pp 412-7.

82 *Hebei Import & Export Corp v Polytek Engineering Co Ltd*, [1999] HKLD 665, especially p 670, per Litton PJ and p 691, per Sir Mason NPJ. The Court of Final Appeal noted that the learned judge of the Court of Appeal received considerably less assistance in regard to the facts in its hearing. Ibid, p 677.

83 Huang and Qian (note 60 above), p 319.

84 Xu Hong, 'Lun Yiguo Liangzhi Xiade Sifa Xiezhu' (on Judicial Assistance between Hong Kong and the Mainland in Civil and Commercial Matters under One Country, Two Systems) in *Cifa Xiezhu Yanju* (A study on Judicial Assistance)(Beijing: Legal Publishing House, 1996), p 345.

called for unconditional recognition of civil judgments and arbitral awards by the courts of the two jurisdictions.[85]

Against this background, one may have legitimate concerns regarding the exercise of the doctrine of the public policy by the courts in the Hong Kong SAR. There is no doubt that the capitalist system in Hong Kong is fundamentally contradictory to the socialist ideology and institutions in mainland China. Thus, the public policy doctrine should be maintained as a necessary legal protection against political intrusion or corrupt practice from other jurisdictions. In this regard, although the Agreement at this stage does not impose any restriction on its application, the continuing consultation mechanism under Article 10 may allow both sides to discuss their disagreements regarding the application of public policy in decision-making.

Arbitration institutions in mainland recognized by the agreement

As at January 1999, it was expected that the arrangement of mutual enforcement would take a progressive approach, to start with enforcement of awards of CIETAC and CMAC from the mainland, and later to admit other domestic institutions when the conditions become ripe.[86] However, the negotiations between Beijing and the SAR Governments subsequently took a dramatic turn. As a result, 148 domestic arbitration institutions are now recognized by the Agreement, and will be named as 'recognized mainland arbitral authorities' in the amendment to be made to the Arbitration Ordinance.

Since the implementation of the Arbitration Law of the PRC in 1995, an institutional reform has been vigorously conducted in mainland China. As far as foreign parties are concerned, two significant changes should be noted. The first is the transformation of arbitration institutions from subordinates of different government departments[87] to geographic establishments on an independent basis.[88] As a result, in addition to CIETAC and CMAC, 138 such local arbitration commissions had been formed by October 1998.[89]

85 Su Yuanhua, 'On Full Faith and Credit Principle in Recognition and Enforcement of Interregional Civil Judgments and Arbitral Awards', China Law, June 1999, pp 75-6.

86 Ms Margaret Ng's message from LegCo on 5 January 1999 (on file with the author); also Morgan (note 16 above), p 35.

87 Before the reform, arbitration commissions were formed under different government branches. For instance, by 1994 the State Administration of Industry and Commerce had established 3,400 arbitration commissions with 8,800 full-time arbitrators in economic contract arbitration; the State Science and Technology and Ministry of Urban Construction also had their arbitration commissions dealing with disputes arising from technology and real estate contracts respectively.

88 Article 8 of the Arbitration Law recognizes the independence of arbitration free from intervention of any administrative organs, social organizations and individuals. Article 10 stipulates that arbitration commissions may be established in the capital city of each province and other cities where such needs are proved.

89 See the report on *Fazhi Ribao* (Legal Daily), 26 September 1998, p 2.

The other change is the dilution of the monopoly of CIETAC and CMAC over foreign related arbitration.[90] According to a notice of the State Council of 1996, if parties to a foreign related dispute voluntarily submit a dispute to the newly established domestic arbitration commission for arbitration, the institution may accept.[91] At the same time, CIETAC has also expanded its jurisdiction by amending its Arbitration Rules in 1998, under which the CIETAC may arbitrate, in addition to foreign related ones, disputes relating to parties in Hong Kong SAR, Macau or Taiwan and disputes between foreign investment enterprises in China and Chinese legal or natural persons.[92] Thus, the trend seems well in line with market development in China.[93]

However, the recent domestic development may not sufficiently justify the rushed inclusion of virtually all the local arbitration commissions. The practical feasibility of doing so in relation to the Hong Kong SAR will inevitably be affected by an institutional structure that is not based on equality, compatibility, or experience.

First, most of these domestic arbitration commissions have not established the necessary infrastructure for handling foreign and Hong Kong related arbitration. As Wang Shengchang, a very experienced arbitrator in China, pointed out, few of them have adopted arbitration procedures that meet international standards. For example, most of arbitration rules of these domestic commissions allow parties much less time, making it difficult for the parties to present their cases. Also, without proper means to protect the confidentiality of parties' information, procedures of many commissions still allow service by public notice.[94]

90 In China, arbitration has for a long time been divided into domestic and foreign related arbitration and governed by different rules. For example, Chapter 7 of the Arbitration Law is still entitled Special Provisions Concerning Foreign Related Arbitration. Traditionally, the powers to arbitrate foreign related disputes were exclusively vested in CIETAC and CMAC by the State Council. See the Notice of the State Council Concerning Conversion of the Foreign Trade Arbitration Commission into the Foreign Economic and Trade Arbitration Commission on 26 February 1980, published in CIETAC, *Arbitration Rules of the CIETAC* (Beijing: CIETAC, 1998), p 24. Therefore, all arbitral awards enforced in Hong Kong thus far have been made by these two commissions. At one time, the separation rule was strictly enforced to the extent that even a dispute between a domestic party and a foreign joint venture in China could not be heard by CIETAC because the joint venture was deemed a Chinese legal person under the Chinese law. For a case report, see Cheng Dejun, Michael J Moser and Wang Shengchang, *International Arbitration in the People's Republic of China: Commentary, Cases and Materials* (Hong Kong: Butterworths, 1995), pp 79-80.

91 Point 3 of the Notice of the General Office of the State Council Concerning Clarification of Certain Issues in Implementation of the Arbitration Law of the PRC on 8 June 1996, published in (1996) 18 *Zhonghua Renmin Gongheguo Guowuyuan Gongbao* (The State Council Gazette), p 702.

92 Article 2 of the Arbitration Rules of the CIETAC as amended in 1998. CIETAC (note 90 above), pp 28-9. In this regard, it is also interesting to note that in addition to expansion of its jurisdiction, CIETAC is expanding its geographic coverage by deciding to establish branches in Dalian, Fuzhou, Changsha, Chengdu and Chongqi recently. *Guoji Jingmao Xiaoxi* (International Economic and Trade News), 23 July 1999.

93 The issue of CIETAC's monopoly over foreign related arbitration was raised and discussed by Katherine L Lynch in her article ' The New Chinese Arbitration Law' (1996) 26 HKLJ 120.

94 Wang Shengchang: 'Zhongguo Zhongcaifa de Xinfazhan' (New Developments in Arbitration in China) in Chen An (ed), *Guoji Jingjifa Luncong* (Journal of International Economic Law), Vol. I, 1998, p 403.

In *Paklito Investment Ltd v Klockner East Asia Ltd*,[95] the High Court of Hong Kong refused to enforce a CIETAC award on the ground that the Hong Kong defendants were denied a fair and equal opportunity to be heard. In that case, the arbitration tribunal's decision was based on a report of experts appointed by the tribunal. However, no opportunity was allowed to the defendants to rebut the report although they had informed the tribunal of such intention. Kaplan J held that, 'I have no doubt whatsoever that a serious procedural irregularity occurred and that on reflection the arbitral tribunal would recognize it as such.'[96] The CIETAC Arbitration Rules were later amended to afford parties the right not only to express their opinions concerning an expert report, but also the right to require the experts to appear in the hearing to explain their conclusions.[97] Nevertheless, today article 40 of Tianjin Arbitration Commission's Rules still reads: 'if necessary, the arbitration tribunal may request an appraisal to be conducted by an institution either agreed by the parties, or appointed by the tribunal. The expert may appear before the hearing upon the request by a party or the tribunal. However, a party may not be allowed to ask questions unless permitted by the tribunal'.[98] Apparently, under the rule, a party's entitlement to ask questions is at the discretion of the tribunal, as is the opportunity of rebutting statements in the expert report. Also, article 38 of the current CIETAC Rules stipulates that in investigating the facts and collecting evidence, the tribunal should, when necessary, notify both parties and allow them to be present at the site, whereas article 31 of Beijing Arbitration Commission's Rules merely states that the tribunal may collect evidence by itself when necessary.[99] In this regard, it should be noted that Rules adopted by the arbitration commissions in Beijing and Tianjin, as two municipalities directly under the Central Government, are probably the best rules, (apart from the CIETAC Rules), meaning that the rules of other commissions have even more worrying aspects.

Second, if rules may be dramatically changed overnight, there are other difficulties that will take a long time to overcome. For instance, among 148 domestic arbitration commissions, only 32 (or less than a quarter) have ever had experience handling arbitration cases that involve parties from Hong Kong

95 [1993] 2 HKLR 39.

96 Ibid, p 47.

97 Compare arts 26 and 28 of the CIETAC Rules of 1988 in Wang Cunxue, *Zhongguo Jinji Zhongcai he Susong Shiwu Shouce* (Practice Manual of Economic Arbitration and Litigation) (Beijing, Development Publishing House, 1993), pp 26-8 with art 40 of the CIETAC Rules as amended in 1994, published in Guo Xiaowen (ed), *Zhongguo Guoji Jingji Maoyi Zhongcai Anli Fenxi* (Analysis of International Economic and Trade Arbitration Cases in China) (Hong Kong: Joint Publishing (HK) Co Ltd, 1995), p 272.

98 Provisional Arbitration Rules of Tianjin Arbitration Commission of 1995, published in Jian Xianming and Li Qiangui, *Zhongguo Zhongcai Faxue* (Arbitration Law of China) (Nanjing: Southeast University Press, 1996), p 328.

99 Arbitration Rules of Beijing Arbitration Commission of 1996, published in Liu Zhongya and Han Xiangqian, *Zhngguo Zhongcaifa Jiangzuo* (Lectures on Arbitration Law of China) (Beijing: Reform Publishing House, 1996), p 356.

or Macau.[100] Moreover, given their recent establishment and less convenient locations, they may suffer a lack of necessary communications network, translation capacity, research facilities and corpus of neutral arbitrators.[101] This may make it difficult to bring the quality of arbitration and professional standards in line with commonly accepted international practice.[102] Here it is interesting to note that the Ministry of Justice, in responding to a local arbitration commission's request, refused to allow it to appoint any foreign arbitrators. Although it realized that the State Council had allowed local commissions to hear foreign related cases, the Ministry held that the appointment of foreign arbitrators was only granted (by article 67 of the Arbitration Law) to the commissions that were especially authorized to handle foreign related disputes. Thus, it advised the local commission that 'it is not appropriate to appoint any foreign arbitrator'.[103]

The third, perhaps largest, concern is the impartiality of these local commissions. Although the Arbitration Law intends to set independence of arbitration as the cornerstone of the business, the course of liberating local arbitration commissions from government control has proved quite bumpy. Even today, the imposition of local government influence or control on arbitration or judicial proceedings is still very common.[104] As President Xiao Yang of the Supreme People's Court admitted recently, 'judicial function has been localized under heavy local protectionism, which has seriously damaged the unity of the socialist legal system of the nation and its authority.'[105] Even so, one must bear in mind that local protectionism is just one problem in China. As Alan Leong SC recently observed, the concern expressed by most Hong Kong investors in the mainland about the approval of 148 domestic arbitration commissions is the likelihood of mistakes in handling cases due to their uneven quality.[106]

[100] The information is provided in the list of the mainland arbitration commissions recognized by the Agreement on mutual enforcement. Source: The Legal Affairs Office of the State Council.

[101] Currently, CIETAC's arbitrator list includes 418 arbitrators. Among them 137 are from 26 foreign countries and the Hong Kong SAR (news report of *Xinhua News Agency* on 11 May 1998, available at http://www.chinainfobank.com). Moreover, it has decided to appoint some arbitrators from Taiwan (*Xinhua News Agency*, 9 December 1998).

[102] Certain local arbitration commissions and their practices are well developed. Wuhan Arbitration Commission, for example, has attracted some Hong Kong parties with its highly respected expertise in private and economic international law, its arbitrators having given up their opportunities to arbitrate in Beijing and Hong Kong. See the report on Changjiang Ribao (Yangtze Daily), 31 August 1999. However, most commissions still have a long way to go to catch up with the standards of the Wuhan Commission. For a recent discussion of these concerns, see Harer (note 68 above), pp 406-7.

[103] The reply to Weihai Arbitration Commission by the Ministry on 20 August 1996, in *Zhongguo Falu Nianjian* (Yearbook of Chinese Law 1997) (Beijing: Yearbook of Chinese Law Press, 1997), p 666.

[104] For a discussion of the background of local protectionism, see Wong Kwok Yuen and Derek Roebuck, 'Legal Needs, Moral Standards, and Cultural Disparities: Enforcement of Foreign Arbitral Awards in the PRC' in Wei Zhenying & Wang Guiguo (ed), *Shichang Jingjiyu Falu* (Market Economy and Law) (Beijing: Beijing University Press, 1995), pp 272-91.

[105] See the report on *Min Bao*, 6 August, 1999, p A16.

[106] Comments made by Alan K K Leong SC in the Commercial Law Session II of the Conference on Comparative Studies of the Mainland and Hong Kong Legal Systems, 20 November 1999, p 3.

In this context, it may be argued that the long list of commissions is intended only to provide Hong Kong parties with more choices and that the parties should exercise their own due diligence in selecting an arbitration commission. However, on many occasions in the mainland a party may be deprived of freedom of choice by administrative diktat. For example, local governments often force parties to accept arbitration within their jurisdiction by using pre-drafted contracts with a local arbitration clause. The refusal to accept such a condition by a party may put his business project at a risk of not being approved by the local government.[107]

Under the Agreement and also in line with the spirit of the New York Convention, a Hong Kong court may only conduct procedural, not substantive, reviews of the award concerned in the enforcement proceeding. As a result, a Hong Kong party may not have any proper remedy if he is wronged by inexperience, substandard rules, corrupt practice of the local arbitration commission or the local government's undue influence in the mainland. In these circumstances, the rushed inclusion of so many domestic arbitration commissions without sufficient safeguards may be good news for the balance of local interests in the mainland, but not for business parties and the courts in Hong Kong. The Hong Kong legal system would be seriously tested if such problematic awards were to flood into the SAR.

Failure to address suspension of enforcement proceeding

Under Article VI of the New York Convention, where a party to enforcement proceedings has applied to the court in the place of arbitration for setting aside or suspension of the award, the enforcing court may adjourn the decision on the enforcement if it considers proper and, upon the other party's application, order the party to provide suitable security.

The Agreement fails to address this important procedure. As a matter of fact, such an application for suspension has indeed been filed in the past in enforcement proceedings.[108] Moreover, in a case before the handover one party applied for enforcement of the arbitral award in Hong Kong, whereas the other filed for suspension in Shenzhen. The Hong Kong court, relying on Article VI (e) concerning the finality of the award, suspended the enforcement proceeding until the Shenzhen court disposed the setting-aside application.[109]

The suspension procedure may not be a serious problem in Hong Kong since the Arbitration Ordinance has included rules applicable to different types of awards. Under s 2GG of the Ordinance, an award may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect. As

[107] Wang (note 94 above). This problem has also been noted by foreign investors. Although no foreign party would voluntarily submit to domestic arbitration, in the end, many may have no choice. Report: China's Rocky Road to Dispute Resolution: Rough Justice, Business China, 2 February 1998.

[108] Wei Xiaoxuan, 'Shewai Zhongcai de Sifa Shencha Chengxu' ('Judicial Examination Procedure of Arbitral Awards Involving Foreign Elements'), (1999) 7 *Renmin Sifa* (People's Judiciary), p 44.

[109] Ibid.

a result, where the validity of an award is doubtful, the court will not grant leave, leaving the applicant to pursue his remedy through an action on the award.[110] However, in mainland China, no rules have been articulated regarding suspension of a proceeding enforcing an arbitral award made in a foreign jurisdiction. In the current Civil Procedure Law of the PRC, article 212 (which authorizes the court to suspend execution upon the party's application and on security being given) applies only to domestic award enforcement. Neither Chapter 29 of the Law (entitled Judicial Assistance) nor the Notice of the Supreme People's Court concerning Implementation of the New York Convention on April 10, 1987[111] include any rules dealing with suspension of enforcement of foreign awards. The closest provision is found in Point 315 of the Supreme People's Court's Opinions Concerning Implementation of the Civil Procedure Law on 14 July 1992, which states that a proceeding to enforce an arbitral award made by an arbitration commission that is authorized to handle foreign related arbitration in China may be suspended if security is duly provided.[112] But this provision, as it is stated, may only be applicable to foreign related awards made by a domestic commission, not those made in Hong Kong. Thus, the lapse of the applicability of the New York Convention and failure to address the issue by the Agreement may leave the courts and parties with no guidance, but rather confusion.

Unclear expressions and translation

It should be noted first that the only text of the Agreement that was signed by the two sides was in Chinese. Since the Agreement does not indicate in any way the development path in relation to the New York Convention, or provide any principle for future interpretation, the Chinese text will be the only authority in application and the source for further clarification. However, many words and terms in the Agreement are translated from the Convention. Therefore, in the Hong Kong SAR (a common law jurisdiction dominated by English) something may be lost or wrongly expressed in this English–Chinese–English conversion. For example, in addition to the omission of recognition, article 7 (2) further omitted a reference to failure to give proper notice of arbitration proceedings to the party subject to enforcement as a ground of refusal from Article VI(b) of the New York Convention.[113] Fortunately, this matter will be rectified, as a result of the recent legislative debate of the Arbitration (Amendment) Ordinance 1999.[114]

[110] For a detailed discussion, see Morgan (note 31 above), pp 60-1.
[111] See note 10 above, pp 1959-60.
[112] Ibid, p 1711.
[113] Compare with Section 5, 40E(2)(c) of the Draft Bill to amend the Hong Kong Arbitration Ordinance.
[114] After the issues was raised in the debate in the Legislative Council, Elsie Leung, the Secretary for Justice proposed to amend the Arbitration (Amendment) Bill to make it clear that enforcement may be refused where there was a failure to give proper notice of the arbitration proceedings to the other party. Leung (note 2 above), p 1.

Moreover, certain Chinese expressions in the Agreement are not clear. Under Article VI(b) of the Convention, failure to give proper notice of the appointment of *the arbitrator* to the party subject to enforcement may entitle the court to refuse enforcement. In this regard, Van den Berg seems to suggest that the correct reading of the term should cover each arbitrator since he believes that the impartiality of the tribunal is capable of falling within the provision.[115] However, one cannot tell whether the expression in Chinese refers to a singular or a plural number. As such, it may raise three possibilities: notice to appoint the party's own arbitrator, notice to appoint the entire arbitral tribunal, or notice of appointment of the arbitrator by the other party. In the third case, the other party may have to apply for that arbitrator's withdrawal under the law where the arbitration is conducted.

Another example is the term 'residence' used in the Agreement as a test for establishment of jurisdiction. In the mainland, an individual may have his household registration and residence[116] in two different places; in both the mainland and Hong Kong, a company as a legal person may have its principal place of business and many more local places of business. In this circumstance without any legislative guidance, the meaning of residence is not clear at all and may cause jurisdictional conflict.

Also as noted by Wang Shengchang of CIETAC, Article 3 of the Agreement does not mention authentication of the award to be enforced and the certification of the arbitration agreement between the parties as required by Article IV of the New York Convention. He considers this omission as an indication that the conditions set out in the Agreement for mutual enforcement in this aspect may be even more relaxed than those provided in the New York Convention.[117] However, based on the practice from 1991 to date, any documents to be used by Hong Kong parties concerning their civil and economic legal matters, including any evidentiary documentation to be submitted in legal proceedings in mainland China, must be notarized by Hong Kong lawyers appointed by the Ministry of Justice and then sealed and transferred by China Legal Services Ltd (Hong Kong), an establishment of the Ministry in Hong Kong, to the mainland courts or institutions concerned.[118] As such, some confusion concerning the

[115] Van den Berg (note 69 above), p 302.

[116] Thus far the laws and regulations in China have not define the term 'residence' and the conditions of its establishment.

[117] Wang (note 37 above), p 7.

[118] See The Notice of the Ministry of Justice Concerning Appointment of 23 Hong Kong Lawyers to Handle Notarization Matters on 12 November 1991, published in *Zhongguo Falu Nianjian 1992* (Yearbook of Chinese Law 1992) (Beijing: Yearbook of Chinese Law Press, 1992), p 589. The Notice ordered the implementation of the notarization, sealing and transfer procedure on 1 December 1991. On 1 March 1996, the procedure was restated in the Notice of the Ministry of Justice Concerning Strict Implementation of Notarization and Transfer Procedure. According to the Notice, it was agreed by the Ministry and the Supreme People's Court that documents submitted in the mainland would be invalid unless the procedure was strictly followed. Ibid, Vol. 1996, pp 652-3.

procedure for proof does exist; this need to be clarified before the Agreement is put into practice.

Finally, some inaccuracies in the English translations of the Agreement should be corrected. For example, the first paragraph of Article 7 of the Agreement provides that after having received notice, the party subject to enforcement may provide evidence for setting aside the arbitral award. Here, the notice clearly refers to the notice of the enforcement application. But the English translation refers to notice of the arbitral award. This is wrong because at that time the enforcement proceedings have not been set in motion.

Also, in certain provisions of the Agreement the location of the property is used to determine the court's jurisdiction. The term used in the English translation — 'the property of the party against whom the application is filed' — is apparently inaccurate. The property subject to enforcement may not belong to (or be in the possession of) the party against whom enforcement is sought. Therefore, the term 'the property concerned' would seem clearer.

Conclusion

The conclusion of the Agreement on mutual enforcement of arbitral awards between mainland China and the Hong Kong SAR is a significant development in judicial assistance between the two jurisdictions and implementation of the 'one country, two systems' principle. The enactment of the Agreement will end the hiatus which has persisted in this very important area for over two years. To a large extent, the Agreement achieves its goals of keeping alive the spirit of the New York Convention and continuing past practice, as well as promoting judicial efficiency. However, the effectiveness of the new regime has to be tested in future practice. The detailed working procedures and strategies may not be mapped out until the uncertainties and concerns are addressed by the two jurisdictions.

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