



Module 12: Enforcement of Arbitral Awards

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Structure of the Presentation



- Basic Concepts - Challenges against an arbitral award
 - Setting aside/Enforcement
 - Choice of Remedies
- Setting aside
- Enforcement of Awards
- Points peculiar to HK

Overview - Challenging an Arbitral Award



- An arbitration award is final and binding unless otherwise agreed by the parties (s. 73 of the Arbitration Ordinance (Cap. 609)(“**HKAO**”))
- Nevertheless, a party may challenge the award if one of the grounds under s. 81 of the HKAO are met
 - Application for setting aside as exclusive recourse against arbitral award (where the award is made in HK)
 - Alternatively, a party may try to resist enforcement of the award (for awards made in HK or elsewhere)

“Choice of Remedies” Doctrine



Astro Nusantara International BV v PT Ayunda (2018) 21 HKCFAR 118

- Facts: Ps obtained award in Singapore (SIAC) against Ds.
- In SG, Ps initially succeeded in obtaining leave to enforce in SG but later SGCA set aside the enforcement order.
- In HK, Ps obtained leave to enforce (under the old HKAO). Ds did not oppose the enforcement order within 14-day period. Later sought extension of time to resist enforcement - > Proceedings went all the way to the Court of Final Appeal which allowed Ds' appeal and granted an extension of time.

“Choice of Remedies” Doctrine



Cited at [76] with approval: *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at p 837

“There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.”

At [78]

“Section 44(2) [Now, s. 89] is therefore consonant with the choice of remedies principle and enables the party concerned to resist enforcement in Hong Kong without having challenged the award in the supervisory court. It follows that the decisions of the Courts below to treat the fact that the awards have not been set aside in Singapore as a major factor in refusing a time extension come into conflict with the choice of remedies principle.”

Setting Aside an Arbitral Award



- A losing party may apply to set aside an award made in HK: HKAO s. 81
- 3 month (extendable) deadline: s. 81(1)(3), ***Sun Tian Gang v Hong Kong & China Gas*** [2016] 5 HKLRD 221

Setting Aside an Arbitral Award



Exclusive grounds on which a Court *may* set aside an arbitral award (s. 81(1)(2) of the HKAO):

1. Arbitration was entered under incapacity or was invalid
2. The party was **not** given proper notice of the arbitral proceedings or was otherwise unable to present its case
3. The award deals with a dispute not contemplated by or not within the terms of the submission to arbitration
4. The composition of the tribunal or the arbitral tribunal was not in accordance with the agreement of the parties or a non-derogable part of the HKAO
5. The subject matter of the dispute is not capable of settlement by arbitration under HK law
6. The award conflicts with public policy of HK

Setting Aside an Arbitral Award



- Setting-aside under the prescribed grounds only
- Mistake of law or fact is NOT a ground for setting aside: AO s.81(3)
- The conduct complained of must be serious, egregious and affects the structural integrity of the arbitration
- Residual discretion not to set aside even if a ground is established
- Appeal against the Court's decision on setting aside is significantly curtailed: s.81(4), ***American International Group v Huaxia Life Insurance*** (2017) 20 HKCFAR 503

Enforcement of Awards



- If the award is not set aside, prevailing party will attempt to enforce award
- Losing party may resist enforcement
- Enforcement likely given “pro-enforcement” view
- Hong Kong departs slightly from Model Law on recognition and enforcement of awards

Enforcement of awards



Statutory regimes dealing with resisting enforcement

- New York Convention awards: HKAO ss.87-91
- Mainland awards : HKAO ss. 92-95
- Macao awards: HKAO ss.98A-98D
- “Other” awards (including HK and Taiwan awards): HKAO ss. 85-86

Enforcement of Awards - Procedures



- Awards are enforceable with leave of Court: s.84
- A party has 14 days to set aside the leave after *ex parte* leave is granted
- Appeals against Court's decision on enforcement of awards are restricted: s. 84(3)

Enforcement: Convention Awards



- New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958
- Covers all major economies
- PRC became a signatory in 1987 with the following reservations:
 - (i) Application limited to “commercial matters” under PRC law
 - (ii) Reciprocity requirement
- On 4th March 2021, Iraq became the 168th State to accede to the Convention

Enforcement under the Convention



- A uniform, expeditious and low-cost framework for recognition and enforcement of foreign awards
- Applies to arbitration agreement “in writing” (Art II)
- Summary procedures for enforcement (Art IV)
- Limited grounds for resisting enforcement (Art V)
- Permissive rather than obligatory (Art VII)

Convention Awards – Application in HK



- Award made in State or territory other than any part of the PRC, which is a party to the NY Convention
- Hong Kong became a member of the NY Convention through the UK
- After 1997, Hong Kong remains a party to the NY Convention through the PRC
- Awards rendered in HK can take advantage of the enforcement regime

Grounds for Resisting Enforcement



- Grounds on which a Court **may** refuse enforcement of a Convention Award (s. 89(2) of the HKAO) - If the person against whom it is invoked proves:-
 1. Party entered into an arbitration agreement was under incapacity or the arbitration agreement was invalid under the law to which the parties subjected to it, or if there is no indication, the law of the country where the award was made
 2. The party was not given proper notice of the appointment of the arbitrators/the arbitral proceedings or was otherwise unable to present its case
 3. The award deals with a dispute not contemplated by or not within the terms of the submission to arbitration or contains decisions on matters beyond the scope of submission to arbitration
 4. The composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the award was made
 5. The subject matter of the dispute is not capable of settlement by arbitration under HK law
 6. The award conflicts with public policy of HK

Resisting Enforcement – Incapacity



- HKAO s.89(2)(a); NY Convention Article V.1(a):
“party to the arbitration agreement was under some incapacity (under the law applicable to that party)”
- Rarely invoked: ***Hebei Peak Harvest Battery v Polytek Engineering*** CACV 224/1997 (10.3.98), (under s.44(2)(a) of the predecessor of HKAO) (where an attempt was made to argue that the PRC party did not have legal personality at the time of entry into the arbitration agreement)
- Court may have to apply its own conflict of laws rules (*lex fori*) to determine what is the applicable law to the question of capacity
- E.g. question of corporate capacity to enter into the arbitration agreement may be governed by *lex incorporationis* (law of the place of incorporation)

Resisting Enforcement – Invalidity of Arbitration Agreement



- HKAO s.89(2)(b); NY Convention Article V.1(a):

“the arbitration agreement was invalid –

(i) under the law to which the parties subjected it; or

(ii) (if there was no indication of the law to which the arbitration agreement was subjected) under the law of the country where the award was made”

Resisting Enforcement – Failing to give proper notice



- HKAO s.89(2)(c)(i); NY Convention Article V1.(b):
A party not given “*proper notice*” of the appointment of an arbitrator or the arbitral proceedings

Failure to Give Proper Notice



- ***Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd***
[2016] 5 HKLRD 221
- Application for setting-aside
- Applicant was detained in Mainland China during which the Respondent commenced arbitration and obtained an award in the absence of the Applicant
- 8-year-old award set aside as Respondent proceeded with the arbitration with knowledge of the Applicant's status and without informing the tribunal

Failure to Give Proper Notice – Deeming Provisions



HKAO s.10(1) (incorporating Model Law Article 3):

“ (1) Unless otherwise agreed by the parties:

- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;*
- (b) the communication is deemed to have been received on the day it is so delivered.”*

Resisting Enforcement – Otherwise Unable to Present One's Case



- HKAO s.89(2)(c)(ii)/NY Convention Article V.1.(b)
- Focus on due process
- Parties' right to present their case not absolute –
 - Proportionality
 - Reasonableness

*Brunswick Bowling & Billiards Corp v
Shanghai Zhonglu Industrial Co Ltd [2011] 1 HKLRD 707*



- The Court found that the Tribunal formed a secret view as to the validity of the subject-matter contracts without giving the parties reasonable opportunity to address them → Award not set aside on this ground as it had no material effect on the result.
- The Tribunal also decided the conversion claim was governed by PRC law even though the parties argued that the governing law was Illinois law → this aspect of the Award was set aside.

*Brunswick Bowling & Billiards Corp v
Shanghai Zhonglu Industrial Co Ltd [2011] 1 HKLRD 707*



- Parties also agreed that time was to be allocated equally in the hearing
- Tribunal gave more time to one party on the basis that more of its witnesses required interpretation and cross-examination

Held: No breach of due process as parties' agreement must be subject to equality of treatment and a slavish application would be a breach of Art 18 of the Model Law.

X v Y [2021] 2 HKC 68



- Award obtained by insurance Company X against Bank B in an arbitration seated in Taiwan.
- Part of the issues involved Taiwanese law. The Tribunal's decision departed from the parties' positions.
- Affirmed long-standing approach of HK Court that only serious or egregious matters affecting a party's ability to present its case would suffice.

Held: Tribunal was *not* obliged to point out to the parties each and every unsatisfactory aspect of their case or evidence. However, in respect of matters that had never been in issue but featured significantly in the decision, the Tribunal should, as a matter of natural justice, put the point to the parties so that they had a fair and ample opportunity to deal with it.

Due Process Paranoia



“Reluctance of tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully”

Queen Mary University of London Survey 2015

The award deals with a dispute not contemplated by or not within the terms of the submission to arbitration



- HKAO s.89(2)(d)/NY Convention Art V.1(c)
- Challenge base on the Tribunal having acted outside its jurisdiction
- Usually a matter of interpretation of the arbitration agreement
- Partial enforceability if unrelated decision severable:
HKAO s.89(4)

Construction of the Arbitration Agreement



Court adopts expansive and purposive approach: ***Fiona Trust v Privalov*** [2007] UKHL 1

Lord Hoffmann at [13]: *“In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: ‘if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.’”*

Implications of Fiona Trust approach



- **Presumption of “One-Stop Shop”**
- Courts are less concerned over semantics e.g. “*arising out of*”, “*in connection with*” etc.
- Presumption does not apply where there are multiple agreements within the same transaction with different dispute resolution clauses

The “Centre of Gravity” Approach



Houtai Investment Holdings Ltd v Leung Yat Tung [2021] HKCFI 1504 at [21]:

*“Where there are multiple related commercial agreements, each dealing with different aspects of the parties' relationship and dealings, and each containing its own provision for expressed choices of jurisdiction, law and/or mode of dispute resolution, the proper test in ascertaining the parties' intention on how the dispute should be dealt with is to identify the nature of the claim, and the agreement which has the closest connection with such dispute and claim (the agreement ‘at the centre of gravity of the dispute’, as referred to in **Trust Risk Group SpA v Amtrust Europe Ltd** [2017] 1 CLC 456, or at the ‘commercial centre of the transaction’ in question, as referred to in paragraph 4.59 in **Joseph on Jurisdiction And Arbitration Agreements And Their Enforcement**, 6th edition).”*

X v Y [2021] 2 HKC 68



- Also adopted the “Centre of Gravity” approach

At [50]: “It is true that only decisions which are clearly unrelated to, or not reasonably required for the determination of the subject dispute or issues submitted to arbitration can be rightly labelled as ‘decisions on matters beyond the scope of the submission to arbitration’... However, any decision and finding as to the validity or enforceability of the Pledge had clearly been agreed by the parties privy to the series of connected agreements... to be governed by Singapore law.”

Challenge on Composition of Tribunal or Arbitral Procedure



- HKAO s.89(1)(e)/NY Convention Article V1.(d)
- Focuses on:-
 - Composition of arbitral tribunal
 - Procedure of the arbitral proceedings
- Non-Compliance with:
 - Agreement of the parties; or
 - If there was no agreement, the law of the country where the arbitration took place

Arbitrability



- HKAO s.89(3)(a)/NY Convention Article V.2(a)
- Question of arbitrability determined by HK law
- Most contractual/tortious private law disputes are arbitrable
- Possible Exceptions:-
 - Public/criminal law
 - Certain family law/inheritance matters
 - Certain company law matters
 - Intellectual property disputes, but see: HKAO Part 11A

Public Policy



- HKAO s.89(3)(b)/NY Convention Article V.2.(b)
- HK Public Policy
- ***Hebei Import and Export Corp v Polytek*** (1999) 2 HKCFAR 111 at p 136 per Sir Anthony Mason NPJ
- Public policy is to be given a narrow meaning
- Necessary to show that enforcement of the award “*would be contrary to fundamental concepts of morality and justice of the forum*”

Public Policy



Possible scenarios:

- Fraud
- Corruption
- Penalty
- Other criminal/unconscionable conduct (may depend on whether the conduct was part of the arbitral process:
Hong Kong Golden Source Ltd v New Elegant Investment Ltd HCCT 14/2014)

Enforcement: Convention Awards



Additional grounds for refusal:

- HKAO s.89(2)(f)/NY Convention Art V1.(e)
- Where the award has **not yet** become binding on the parties
- Where the award has been set aside or suspended by the competent authority of the country in which, or under the law of which it was made: s.89(2)(f)(ii)
- Court has power to order security upon an application to set aside or suspend an award that has been made: s.89(5)

Approach of the Court towards challenge against awards



- “Pro-enforcement” approach
- Burden is on the party challenging the award
- Failed challenges → indemnity costs: **A v R** [2009] 3 HKLRD 389

Principle of good faith/estoppel



- Parties who wishes to rely on a ground of challenge should raise the issue promptly before the Tribunal and shall not keep the point up his sleeve for later use
- Failure to abide by the principle of good faith may estop a party from subsequently challenging the award

See: *Hebei Import & Export v Polytek Engineering* (1999) 2 HKCFAR 111
(1999) 2 HKCFAR at pp 137-138

- Rigid approach of the good faith principle whenever there is a failure to pursue active remedies may conflict with the “choice of remedies” principle

Mainland Awards



- Reunification of Hong Kong with China in 1997
- Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR (2000)
- Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR (2020)
- Implemented in both Mainland China and Hong Kong
- Enforcement mechanisms and exclusive grounds for refusing enforcement similar to those of NY Convention

Mainland Awards



Differences:

- Not more than one application to PRC court
- Simultaneous applications in both HK and PRC now possible
- Public policy - Article 7 of the Arrangement provides that enforcement may be refused by the Mainland Court if contrary to the “public interest” of Mainland
- Need to consider possible interplay of public policy considerations in Mainland and HK

Macao Awards



- Arrangement Concerning Mutual Enforcement of Arbitral Awards between Hong Kong and Macao (2013)
- Implemented in both Hong Kong and Macao
- Enforcement mechanisms and exclusive grounds for refusing enforcement similar to those of NY Convention

“Other Awards”



- HKAO s. 85: Awards which are not Convention Awards, Mainland Awards or Macao Awards
- Applies to Awards rendered in Hong Kong and Taiwan and non-New York convention jurisdictions
- Grounds for refusal of enforcement largely the same as Convention Awards except the Court may also refuse enforcement if it is “*just to do so*” for any other reason: s.86(2)(c) → Greater scope of Challenge

Enforcement outside HKAO



- The HKAO preserves the enforcement method of arbitral awards by way of common law: ***Xiamenxinjindi v Eton Properties*** (2020) 23 HKCFAR 348
- Based on an implied promise to perform
- Usually not preferred:-
 - The burden is on the party seeking to enforce the award
 - Time-consuming
 - Defendant may challenge merits of the award

Alternative to “Enforcement” – Winding-up based on Award



- An award (for payment of a sum) is a valid and binding debt obligation
- ***Re Lucky Resources (HK) Ltd*** [2016] 4 HKLRD 301
- No need to apply for enforcement before applying for winding-up
- Subject to the debtor company raising a defence of “*bona fide defence on substantial grounds*”
- Jurisdiction requirements for exercising winding-up jurisdiction over a foreign incorporated company: ***Kam Leung Sui Kwan v Kam Kwan Lai*** (2015) 18 HKCFAR 501

Hong Kong's Unique Political Situation



- “One Country, Two Systems” principle
- Hong Kong must follow Mainland China to adopt absolute theory of sovereign immunity
- Absolute “Crown” immunity of Mainland China in Hong Kong

Sovereign Immunity



- HK follows Mainland China in adopting “absolute immunity” position following NPCSC interpretation in ***Democratic Republic of the Congo v FG Hemisphere*** (2011) 14 HKCFAR, 95, 395 → No exception for commercial transactions
- Facts:
 - Arbitration awards made against Congo
 - Awards were purchased by GF, a “vulture fund”
 - FG found out that a Chinese SOE was due to make a payment to Congo under an infrastructure project
 - FG sought to enforce the awards by way of garnishee order

Sovereign Immunity – Takeaway Points



- Applies to foreign states
- Immunity must be waived in the face of the Court
- (i) Waiver clause; (ii) Entry into arbitration agreement; or (iii) Participation in arbitration proceedings → NOT amount to waiver of immunity
- Exercise care when dealing with a foreign state or state-owned entity

“Crown” Immunity - Overview



- Prior to the handover, the British Crown as sovereign could not be subject to the jurisdiction of the HK Courts - both immunity from suit and execution
- Extension of “Crown Immunity” pre-1997
- HK Courts have no jurisdiction over the PRC State or the Central People’s Government (**CPG**)
- First recognised in *Intraline Resources SDN BHD v The Owners of the Ship “Hua Tian Long”* [2010] 3 HKLRD 611
- Also absolute in nature

“Crown” Immunity - *The “Hua Tian Long”* case



Facts:

- The Hua Tian Long was one of the largest vessels of its kind in Asia owned by the Guangdong Savage Bureau, part of the CPG’s Ministry of Communications
- P sought to arrest the vessel when it entered HK waters

“Crown” Immunity



Issue was whether the Bureau may rely on Crown Immunity

Stone J held that:

- Crown immunity continued to apply in HK in respect of the CPG
- Based on evidence, the Court accepted that the Bureau was part of the CPG and not a separate legal entity
- Crown Immunity was by nature absolute because the HKSAR has no power to bind the CPG

“Crown” Immunity - State-owned Enterprises



TVB Fuel Services Sdn Bhd v China National Coal Group Corp HCCT 23/2015 (unreported, 8 June 2017)

Issue was whether a Chinese SOE solely owned by the State-owned Assets Supervision and Administration Commission is subject to crown immunity

“Crown” Immunity - State-owned Enterprises



- The HK and Macao Affairs Office of the State Council issued a letter to the DOJ expressing the view that the SOE was an independent legal entity.
- Court also accepted that under PRC law, SOEs enjoy operational autonomy
- Accordingly, the Court denied the SOE’s claim to crown immunity

“Crown” Immunity – Some Observations



- No appellate authority on the existence of “Crown” Immunity
- The extent of “Crown” Immunity is not entirely clear with respect to State-Owned Entities
- *Possible* arguments in relation to arbitration:-
 - **HK Basic Law Art 22: All offices** set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices **shall abide** by the laws of the Region.
 - **HKAO s.6:** This Ordinance applies to the Government and **the Offices** set up by the Central People’s Government in the Hong Kong Special Administrative Region.

See: Prof. Anselmo Reyes, *How to be an Arbitrator: A Personal View*, Chapter 4



Q&A



Thank you!