Recognition and Enforcement of Hong Kong Arbitral Awards in Mainland China: The State of Play

Wei SUN and Ziyue WANG

sunwei@zhonglun.com; wangziyue@zhonglun.com

Abstract

This article centres on recognition and enforcement of Hong Kong arbitral awards in Mainland China. Part I looks back on the history of the legal framework for reciprocal recognition and enforcement of arbitral awards between the two jurisdictions. It then illustrates the main content of the current legal regime and introduces recent updates to the mechanism. Part II focuses on analysis of judicial practices of Mainland courts in recognition and enforcement of Hong Kong arbitral awards. Overall speaking, the current enforcement mechanism is an effective one, and is predictably to be further enhanced by the new amendments.

I. Legal Framework

A. Pre-1997: the New York Convention

The Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") came into force in China as of 22 April 1987. Since then, it has been the framework for reciprocal recognition and enforcement of arbitral awards between Hong Kong and China. Upon resumption of sovereignty over Hong Kong on 1 July 1997, China extended the territorial application of the New York Convention to Hong Kong. As a result, the New York Convention no longer applied as between the two jurisdictions, which created a period of legal void for reciprocal enforcement of arbitral awards between Mainland China and Hong Kong.

B. Post-2000: The Arrangement for Mutual Enforcement

On 21 June 1999, Mainland China and Hong Kong entered into the Arrangement Concerning Mutual Enforcement of Arbitral Awards (the "**Arrangement for Mutual Enforcement**" or the "**Arrangement**"). It later took effect on 1 February 2000. The Arrangement on Mutual Enforcement is detailed in the Arbitration Ordinance of Hong Kong, while it is implemented in

Mainland China in the form of judicial interpretation. Main content of the Arrangement is illustrated below.

1. Time limit for application

According to Article 5 of the Arrangement, the time limit for applying to courts of Mainland China for enforcement of arbitral awards made in Hong Kong shall be in accordance with the provisions of the laws on time limits of Mainland China.

In this regard, Article 239 of the Civil Procedure Law of the PRC provides that, "[t]he period for applying for enforcement shall be two years. The suspension or interruption of the time limitation for applying for enforcement shall be governed by legal provisions regarding the suspension or interruption of the time limitations for instituting an action." In the case of *Ding Yi v. Shen Dong*[1], Shenzhen Intermediate People's court held that application to Hong Kong court for enforcement constitutes an event for interrupting the time limit.

Article 483 of the Interpretation of SPC on the Application of the Civil Procedure Law of the PRC further clarifies that if the applicant files an application for mandatory enforcement beyond the time limit, the people's court shall still accept the application. However, if the party subject to enforcement raises an objection as to the expiration of time limit, the people's court shall render a ruling of non-enforcement if it concludes that the objection is valid. In the case of *Xiongfeng Group (Shenzhen) Co., Ltd. v. Xiongfeng Group Co., Ltd.*[2], the award creditor applied to Shenzhen Intermediate People's Court for enforcement of a Hong Kong ad hoc arbitral award 4 years after the issuance of the award, the court held that since the party subject to enforcement did not raise an objection on the time limit, the court accepted the application.

2. Competent courts

According to Article 2 of the Arrangement, the competent court to accept application for enforcement of Hong Kong arbitral award in Mainland China is the intermediate people's court of the place where the respondent resides or where the respondent's property is located.

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[1] (2019) Yue Zhi Fu No.73 [(2019) 粤执复 73 号].

[2] (2018) Yue 03 Min Chu No.2267 [(2018) 粤 03 民初 2267 号].

However, it should be noted that China implements a centralized-jurisdiction system for foreign-related cases, which include cases of recognition and enforcement of Hong Kong arbitral awards. Thus, in addition to the requirement under Article 2 of the Arrangement, the courts that would be competent to hear this type of cases should come from those that have centralized jurisdiction over foreign-related cases.

In this regard, Article 1 of the Provisions on Certain Questions Concerning the Jurisdiction of Foreign-related Civil and Commercial Litigation Cases (effective as of 1 March 2002) provides, "[t]*he jurisdiction of the first instance foreign-related civil and commercial law cases shall be vested with the following courts: (1) courts established within the Economic and Technological Development Zones that are approved by the State Council; (2) intermediate courts located in the capital cities of provinces, autonomous regions and directly administered municipalities; (3) intermediate courts established within Special Economic Zones and cities under separate planning; (4) other intermediate courts designated by the Supreme People's Courts; and (5) higher people's courts. The regional extent of jurisdiction for the above intermediate people's courts shall be determined by the higher people's court in the relevant locality*."

3. Grounds for refusing enforcement

Article 7 of the Arrangement sets out two categories of grounds upon which enforcement could be refused by courts of Mainland China or Hong Kong, which largely mirror those in the New York Convention. The first category of grounds can be relied by the court only if the party against whom application is made adduces evidence to prove the existence of any of the grounds. These include:

a. a party to the arbitration agreement was, under the law applicable to him, under some incapacity,

b. the arbitration agreement was not valid under the law to which the parties subjected it, or, failing any indication thereon, under the law of the place in which the arbitral award was made;

c. the party against whom the application is filed was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case;

d. the award deals with a difference not contemplated or not falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of the submission to arbitration;

e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with agreement of the parties, or, failing such agreement, with the law of the place where the arbitration took place;

f. The award has not yet become binding on the parties, or has been set aside or suspended by the court or in accordance with the law of the place where the arbitration took place.

The second category contains two grounds which the court may apply *ex officio* or upon proof of the party against whom application is made, including:

a. under the law of the place of enforcement, the dispute is incapable of being settled by arbitration;

b. the enforcement of the arbitral award in the Mainland would be contrary to the public interests of the Mainland.

It should be noted that Article 7 of the Arrangement uses the term "the court **may** refuse to enforce the award" (emphasis added) for both categories of grounds, which indicates that the courts of Mainland and Hong Kong have discretion to allow enforcement even if any of the grounds for refusal of enforcement is made out.[3]

4. Recourse against rulings of the court

According to Article 1 of the Provisions of the SPC on Several Issues relating to the Hearing of Cases Involving Judicial Review of Arbitration (the "**Provisions on Judicial Review of Arbitration**"), cases of application for recognition and enforcement of arbitral award made in Hong Kong fall into the scope of cases involving judicial review of arbitration.

Regarding recourse against rulings of the court in this type of cases, Article 20 of the Provisions on Judicial Review of Arbitration provides, "[t]he ruling made by the people's court for a case

[3] See e.g. *Chan Lui-yu v Ho Chi-lan*, HCMP 3203/2013,

involving judicial review of arbitration shall come into effect once it is served, except for such circumstances as *in-admission, dismissal of application or objections to jurisdiction*. If the party concerned applies for a reconsideration, lodges an appeal, or applies for a re-trial, the people's court shall not accept the application, unless otherwise provided by law and judicial interpretations." (emphasis added) Accordingly, parties do not have right of appeal against the court's ruling on whether to recognize and enforce the arbitral award made in Hong Kong.

5. Prior reporting

Established in 1995, the Prior Reporting System is an internal court process and one of the most praiseworthy approaches taken by the SPC to create an arbitration-friendly environment and to ensure consistency in the judicial review of arbitration-related cases. The system was initially designed to apply only in the context of foreign or foreign-related arbitral awards and arbitration agreements. After an amendment promulgated in 2018, it now covers all arbitration-related cases, whether foreign, foreign-related or domestic.

Under this system, if an intermediate people's court intends to refuse enforcement of an award made in Hong Kong, it should report and request approval from the high people's court in its jurisdiction. If the latter concurs, then the case will be ultimately reported to the SPC for final approval.

C. 2020: The Supplemental Arrangement

Seeking to refine the current enforcement regime and remove certain restrictions in the Arrangement, on 27 November 2020, the Department of Justice of Hong Kong Government and the Supreme People's Court (SPC) of China signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the "**Supplemental Arrangement**"). The Supplemental Arrangement clarifies and modifies the existing arrangement in four aspects:

1. Express reference to the "recognition" procedure

According to Article 3 of the New York Convention, each Contracting State shall "recognize" arbitral awards as binding and "enforce" them in accordance with its domestic rules of

procedure and the Convention. Therefore, recognition and enforcement are separate concepts under the New York Convention. The Civil Procedure Law of the PRC and relevant judicial interpretations of the SPC also use the term "recognition and enforcement" in respect of foreign arbitral awards and arbitral awards made in Macau and Taiwan.[4]

By contrast, the Arrangement only use the term "enforcement" with no mention of the procedure of recognition of arbitral awards made in Hong Kong or Mainland China. However, in the Provisions of Causes of Actions in Civil Cases issued by the SPC (initially promulgated in 2008 and amended in 2011), the relevant cause of action is "application for *recognition and enforcement* of an arbitral award made in the HKSAR" (emphasis added). Such lack of clarity in the law leads to inconsistent judicial practices as to whether Hong Kong arbitral awards are subject to recognition procedure before they are enforced in Mainland China.

A notable example is the divergent approaches taken by Shenzhen Intermediate People's Court and Wuhan Intermediate People's Court on the enforcement of an HKIAC arbitral award rendered on 20 October 2014. The award creditor first applied to Shenzhen Intermediate People's Court for mandatory enforcement of the award, which was dismissed by the court on grounds that the applicant must apply for recognition of the award prior to applying for enforcement[5]. Afterwards, the award creditor applied to Wuhan Intermediate People's Court for recognition of the award. However, the court clarified to the applicant that in accordance with the Arrangement, recognition is not a prerequisite to enforcement[6]. As such, the applicant withdrew the application for recognition and directly applied to Wuhan Intermediate People's Court for enforcement of the HKIAC arbitral award.

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[4] Article 283 of the Civil Procedure Law of the PRC provides, "Where an arbitration award of a foreign arbitral institution requires recognition and enforcement by a people's court of the People's Republic of China, […]"

See Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards (in effect as of 1 January 2008) and Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region (in effect as of 1 July 2015).

[5] See *Intel Capital (Cayman) Corp., Intel Capital Corp., Deutsche Telekom AG, v. Airway Telecom International Holding Co., Ltd., et al*., (2017) Yue 03 Zhi Yi No.97 [(2017)粤 03 执异 97 号].

[6] See *Intel Capital (Cayman) Corp., Intel Capital Corp., Deutsche Telekom AG v. Huang Shuying*, (2019) E 01 Zhi No.2 [(2019) 鄂 01 执 2 号].

The above inconsistent interpretation by people's court is arguably unsupported since Article 1 of the Supplemental Arrangement clarifies that, "[t]*he procedures for enforcing arbitral awards of the Mainland or the HKSAR as specified in the Arrangement shall be interpreted as including the procedures for the recognition and enforcement of the arbitral awards of the Mainland or the HKSAR.*"

2. Removing the concept of "recognised Mainland arbitral authorities"

The Preface of the Arrangement provides that, "[…] the courts of the HKSAR have agreed to enforce arbitration awards *made by mainland Chinese arbitration organisations (the list of which shall be provided by the Office of Legal Affairs of the State Council through the Office of Hong Kong and Macao Affairs of the State Council)* in accordance with the Arbitration Law of the People's Republic of China […]" (emphasis added) Accordingly, with respect to awards of Mainland China, the Arrangement only applies to those rendered by Mainland arbitration institutions within the prescribed list.

Article 2 of the Supplemental Agreement removes the concept of "*recognised Mainland arbitral authorities*" (the italic part in the Preface), meaning that all arbitral awards made in Mainland China will be covered by the Arrangement. This reflects Mainland China's move to align with international practice with respect to the standard for determinination of the origin of arbitral awards, namely, by focusing on the seat of arbitration rather than the nationality of the arbitration institution rendering the award.

Removal of this restriction also paved the way for further development of *ad hoc* arbitration and the operation of foreign arbitration institutions in Mainland China.

Currently the Arbitration Law of the PRC only allows for institutional arbitration and *ad hoc* arbitration only legally edged its way into China with the issuance of Supreme People's Court Opinion on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones (the "**FTZ Opinion**") on 30 December 2016. To illustrate, Article 16 of PRC Arbitration Law requires that a valid arbitration clause must specify the designated arbitration commission to administer the arbitration.The FTZ Opinion relaxed this requirement for free trade zones by providing, at Paragraph 3, Article 9, that an arbitration agreement "*between two companies*

registered within the pilot free trade zones, which provides for arbitration in a specified location in mainland China pursuant to specified arbitration rules and by specified arbitrators" may be held valid.

Article 10(3) of the Arbitration Law of the PRC requires arbitration commissions to be registered with the relevant department of justice. However, Chinese laws and regulations do not expressly deal with the registration of foreign arbitration institutions. This then gives arise to uncertainty on whether foreign arbitration institutions can administer cases in Mainland China. On 6 August 2019, the State Council of the PRC (the "**State Council**") published the Framework Plan for the New Lingang Area of the China (Shanghai) Pilot Free Trade Zone, permitting reputable foreign arbitration and dispute resolution institutions to register with the Shanghai Municipal Bureau of Justice and the judicial administrative authority of the State Council, and set up operations in the New Lingang Area of the Shanghai Pilot Free Trade Zone. The Chinese arbitration market was further opened to foreign institutions by a reply issued by the State Council on 7 September 2020, which allows "*well-known foreign arbitration and dispute resolution institutions to set up, after registering with the administrative department of justice of the Beijing Municipality and filing with the Ministry of Commerce, operational entities in designated areas of Beijing, to provide arbitration services for civil and commercial disputes in international business and investment sectors*".

3. Allowing simultaneous enforcement applications in Hong Kong and Mainland China

Currently Article 2(3) of the Arrangement prohibits award creditor from lodging separate applications for enforcement with courts of Hong Kong and Mainland China at the same time, except that when enforcement of the award in one place is insufficient to satisfy the liabilities, application may then be made with the court of the other place for enforcement of the outstanding liabilities. This has forced award creditors to make a choice at the outset on whether to pursue enforcement in Mainland China or Hong Kong.

If enforcement at the place firstly chosen turns out to be unsuccessful, the risks facing the award creditor are two-fold: (a) subsequent application to the court of the other place might be time-barred. This happened in the case of *CL v. SCG* [2019] HKCFI 398 where application for leave

to enforce a Hong Kong arbitral award was held to be time-barred by the Hong Kong Court of First Instance after an initial unsuccessful attempt by the award creditor to enforce the award in the Mainland. (ii) by the time application is made to the court of the other place, the award debtor has already transferred or disposed of its assets in order to evade enforcement.

Article 3 of the Supplemental Arrangement has effectively mitigated the above risks by allowing parallel applications for enforcement with courts of Hong Kong and Mainland China. However, this is subject to the condition that the total amount to be recovered from enforcing the arbitral award in the courts of the two places shall not exceed the amount set out in the arbitral award. This Article also requires the courts of the two places to provide information on its status of the enforcement of the arbitral award at the request of the court of the other place.

4. Availability of interim relief

Under Chinese law, the power to grant interim relief in support of arbitration rests exclusively with the people's courts. However, under the Civil Procedure Law of the PRC, court-ordered interim relief in aid of arbitration is restricted to domestic arbitration. In practice, cases are rare where the people's court would award interim relief at the application of a party to arbitration proceedings seated outside of Mainland China.

This treatment used to extend to arbitrations seated in Hong Kong. On 1 October 2019, with the coming into force of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administration Region (the "**Arrangement on Interim Measures**"). Article 1 of the Arrangement on Interim Measures defines "interim measures" in Mainland China as including "*property preservation, evidence preservation, and conduct preservation*."

However, Article 3 of the Arrangement on Interim measures places a significant restriction that such application is available to parties to arbitration proceedings seated in Hong Kong prior to the issuance of arbitral awards. This left a legal void as to the possibility for a party to seek interim relief after the awarded has been rendered.

The Supplemental Arrangement filled that void by providing in Article 4 that, "[t]*he relevant court may, before or after accepting the application for enforcement of an arbitral award,*

impose preservation or mandatory measures pursuant to an application by the party concerned and in accordance with the law of the place of enforcement." Thus, court-order interim measures in Mainland China are available to parties to Hong Kong arbitration throughout the entire lifespan of an arbitration, namely, prior to the commencement of arbitration, during the arbitral proceedings and at the enforcement stage of the award.

II. Case Analysis

A. An Overview

Since the promulgation of the Arrangement in 2000, the courts of Mainland China have recognized and enforced approximately 40 arbitral awards from Hong Kong. To date there are only 3 reported cases where recognition and enforcement were refused, 2 of which concern public interests and the other one was where the award dealt with a difference not falling within the terms of the submission to arbitration. In general, the grounds most frequently revoked for resisting recognition and enforcement are that enforcement of the arbitral award would be contrary to the public interests, the respondent was not given proper notice, and that the arbitration agreement is not valid.

B. Standard of Review

1. Public interests

There is no statutory definition of "public interests" in Chinese laws, regulations or judicial interpretations of the SPC. In a Letter of Reply to a lower court[7], the SPC articulated that "*violation of public policy under the New York Convention should be construed as contradiction with the fundamental principles of law, infringement on the sovereignty, damage to public safety, violation of good social customs and other situations that suffice to imperil the public interests of China*." Accordingly, as far as judicial review of arbitration in China, the meaning of public policy and public interests are the same.

In cases concernin the applicationof the New York Convention, there is only one case where the court held that recognition and enforcement of the award would contravene the public

[7] [2006] Min Si Ta Zi No.36 ([2006]民四他字第 36 号).

interests of China. In that case, the court held that the award contradicts with a prior judgement made by the people's court which undermines the judicial sovereignty of China.[8]

Similarly, in the 2 cases abovementioned where recognition and enforcement of Hong Kong arbitral awards were refused by the people's courts due to public interests concerns[9], the underlying arbitration agreements were found to be invalid by the people's courts before the application was lodged, so the courts concluded that enforcement of the awards would contradict with effective decisions of the people's courts, which constitutes violation of the public interests of Mainland.

A Senior Judge of the SPC confirmed that "*Chinese court interpret public policy in a very narrow way* […]. *It is triggered only if the award is manifestly contrary to the principle of the law, fundamental interests of the society, safety of the country, sovereignty, or good social customs*".[10]

In a landmark case of recognition and enforcement of foreign arbitral award[11], the SPC opined that violation of mandatory provisions of Chinese law does not equate with violation of public policy of China. The opinion of the SPC was reiterated in subsequent court rulings on public policy defence in similar situations.

In the case of *Farenco Shipping Pte. Ltd. v. Eastern Ocean Transportation Co., Ltd.*[12] , the respondent alleged that enforcement of the Hong Kong arbitral award would go against the requirement of the Arbitration Law of the PRC that arbitration agreement should be expressed in writing. Guangzhou Maritime Court reaffirmed that violation of Chinese law shall generally

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[8] *Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd.* [2008] Min Si Ta Zi No. 11 ([2008] 民四他字第 11 号), English summary of the case in the New York Convention Guide: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=836

[9] *Automotive Gate FZCO Corp. et al. v. Hebei Zhongxing Automobile Co., Ltd.*, (2015) E Yichang Zhong Min Ren Zi No.00002 [(2015)鄂宜昌中民认字第 00002 号], *Wicor Holding AG v. Thaizhou Haopu Investment Co.,Ltd*., (2015) Tai Zhong Shang Zhong Shen Zi No.00004 [(2015) 泰中商仲审字第 00004 号]

[10] See Report on the Public Policy Exception in the New York Convention, China, p.2, https://www.ibanet.org/Document/Default.aspx?DocumentUid=5E68BFA3-533B-40CB-A4A3-181636B88802. .

[11] *ED & F Man (Hong Kong) Co., Ltd. v. China National Sugar & Wines Group Corp.*, [2003] Min Si Ta Zi No. 3 ([2003] 民四他字第 3 号), English summary of the case in the New York Convention Guide: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=638

[12] (2019) Yue 72 Ren Gang No.1 [(2019) 粤 72 认港 1 号].

not be deemed as contravention of public interests of Mainland, unless it reaches the threshold of fundamental principles of law. In another occasion the public interests defence failed where potential damage to state-owned assets was alleged[13].

2. Proper notice

In a Letter of Reply to Beijing High People's Court regarding a case of recognition and enforcement of foreign arbitral award[14], the SPC opined that notice in the arbitration procedure should be deemed properly given by the applicable arbitration rules. The SPC opined that it would not be determined by the treaty on bilateral judicial assistance or Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

In judicial practices relating to the Arrangement, the people's courts have followed the above standard established by the SPC. In the case of *Bensley Design Group International Consulting Co., Ltd. v. Chengdu Chenchuan Industrial Co., Ltd.*[15], Chengdu Intermediate People's Court pointed out at the outset that the basis for deciding whether notice had been properly given was the arbitration rules. As the arbitration documents were served in accordance with the provisions of the underlying contract and were confirmed as received by the respondent, they have been deemed as served in conformity with the arbitration rules. The court also rejected the respondent's allegation that the arbitration documents should have been served pursuant to the Administrative Measures on China Entrusting Notary Public (Hong Kong). In another case of recognition and enforcement of Hong Kong arbitral award, notice served via electronic mail was also found by the court to be properly given due to conformity with the HKIAC Administered Arbitration Rules[16].

By contrast, in a 2015 case[17], the Hong Kong Court of First Instance refused enforcement of a Mainland arbitral award on the basis of improper notice, despite that the notice was deemed as

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[13] *David Dein & Bramley v. Guo'an Football Club*, (2020) Jing 04 Ren Gang No.5 [（2020）京 04 认港 5 号].
[14] [2016] Min Si Ta Zi No.36 ([2006]民四他字第 36 号).
[15] (2019) Chuan 01 Ren Gang No.1 [(2019) 川 01 认港 1 号].
[16] *Israel China Europe International Investment Group Co., Ltd. v.Wuxi New District Wangzhuang Technology Development Co., Ltd. & Wuxi Franke Gmkp Energy Control Co., Ltd.*,(2015) Xi Shang Wai Zhong Shen Zi No. 2[(2015)锡商外仲审字第 2 号].
[17] *Chan Lui-yu v. Ho Chi-lan*, HCMP 3203/2013.

served in accordance with the arbitration rules of Guangzhou Arbitration Commission. In that case, Guangzhou Arbitration Commission sent the notice of hearing to the Respondent's address but was subsequently returned to the arbitration commission marked with the words "*No acknowledgement of Receipt and Return*". Because the arbitration commission had previously served the notice of arbitration to the same address, which was confirmed receipt by the respondent, the second notice of hearing was deemed properly served pursuant to the then arbitration rules of Guangzhou Arbitration Commission. The arbitration hearing was conducted in the absence of the respondent. The Hong Kong court held that, the notice of hearing was not a valid hearing notice for the purposes of section 95(2) of the Arbitration Ordinance because it was undisputed that the notice had not been received by the Respondent and had been returned to the Guangzhou Arbitration Commission.

3. Validity of arbitration agreement

Another defence frequently put up by parties resisting enforcement is that the underlying arbitration agreement is invalid. According to Article 7 of Arrangement, the applicable law for determining the validity of the arbitration agreement should be the law that applies to the arbitration agreement itself, or failing express indication thereon, the law of the place where the arbitral award was made.

In deciding the law applicable to the arbitration agreement, the people's courts have prevailingly adopted the "separability" rule, namely, the arbitration clause is independent from the underlying contract. For example, in the case of *David Dein & Bramley v. Guo'an Football Club*[18], Beijing Fourth Intermediate People's Court held that, the parties in the present case agreed only on English law as the governing law of the agreement, without stating explicitly the law to be applied to the arbitration agreement. As both the location of the arbitration institution and the seat of arbitration were in Hong Kong SAR, the Arbitration Ordinance of Hong Kong should apply in examining the validity of the arbitration agreement.

Objection to the validity of arbitration agreement in the enforcement stage often triggers discussion on waiver of right to object, a principle widely acknowledged in domestic arbitration

[18] (2020) Jing 04 Ren Gang No.5 [(2020) 京 04 认港 5 号].

laws and the arbitration rules of international arbitration institutions[19].

Article 4 of the UNCITRAL Model Law on International Commercial Arbitration defines this principle as: "[a] *party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.*"

The Arbitration Law of the PRC and relevant judicial interpretation have also provided for waiver of right to object in respect of objection to the validity of arbitration agreement. Specifically, Article of the Arbitration Law of PRC provides that, "[..] *A party's challenge of the validity of the arbitration agreement shall be raised prior to the arbitration tribunal's first hearing."* Article 27 of the Judicial Interpretation on the Arbitration Law of the PRC further elaborates that, "*Where a party concerned did not object to the validity of the arbitration agreement during arbitration procedures, and requests revocation or resist enforcement of the arbitral award on the ground of invalidity of the arbitration agreement, such request or defence shall not be supported by the people's court*."

The Chinese law and regulations do not make it clear whether the above provisions also apply to cases of recognition and enforcement of Hong Kong arbitral awards. However, in the case of *Brambile Co., Ltd v. Zhangjiagang Huafeng Heavy Equipment Manufacturing Co., Ltd*[20], the court rejected the respondent's defence of invalidity of the arbitration agreement for reason that the respondent did not raise objection in this regard during the arbitration proceedings.

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[19] See Arbitration Act 1996, Section 73: "*Loss of right to object：(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection* […]";
See also, LCIA Arbitration Rules (Effective 1 October 2020), Article 32.1: "A party who knows that any provision of the Arbitration Agreement has not been complied with and yet proceeds with the arbitration without promptly stating its objection as to such non- compliance to the Registrar (before the formation of the Arbitral Tribunal) or the Arbitral Tribunal (after its formation), shall be treated as having irrevocably waived its right to object for all purposes."
SCC Arbitration Rules 2017, Article 36: "Waiver: A party who, during the arbitration, fails to object without delay to any failure to comply with the arbitration agreement, these Rules or other rules applicable to the proceedings, shall be deemed to have waived the right to object to such failure."

[20] (2014) Su Zhong Shang Wai Chu Zi No. 00031 [(2014)苏中商外初字第 00031 号].

Although the court did not refer to the above provisions of the Arbitration Law of the PRC and the judicial interpretation in its reasoning, the decision is a de facto application of waiver of right to object.

Concluding Remarks

The enforceability of an arbitral award is a key consideration for commercial parties when choosing to resolve their disputes through arbitration. The Arrangement has provided a simple and effective mechanism for the reciprocal recognition and enforcement of arbitral awards between Mainland China and Hong Kong in the last 20 years, thereby playing a pivotal role in making arbitration a preferable means of dispute resolution for business transactions involving the two jurisdictions. Implementation of the Arrangement in Mainland China also speaks to the pro-arbitration stance taken by Chinese courts in judicial review of arbitration. The Supplemental Arrangement will assist in curing some of the deficiencies of the current arrangement that have been come to light over the years and provide parties with more legal certainty and protection, and will predictably further enhance Hong Kong's status as a hub for international dispute resolution. [21]

Short biography:

Wei Sun, Partner, Zhong Lun Law Firm, sunwei@zhonglun.com

Ziyue WANG, Associate, Zhong Lun Law Firm, wangzique@zhonglun.com

[21] The authors of this article are: (i) Wei SUN, Partner, Zhong Lun Law Firm, sunwei@zhonglun.com; (ii) Ziyue WANG, Associate, Zhong Lun Law Firm, wangziyue@zhonglun.com.

This article focuses on the status of recognition and enforcement of Hong Kong arbitral awards in the Mainland through analysis of the legal regime and judicial practices.