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Enforceability of SCMA Awards in Hong Kong

Hill Dickinson Hong Kong
Damien Laracy, *Partner, Head of Hong Kong Office*
Felix Chung, *Associate*

Overview

Hong Kong and Singapore are alike in many aspects, including their positions as leading alternative dispute resolution and maritime law centres in the Asia Pacific region. Both being world class arbitration and maritime law hubs, Hong Kong and Singapore are very collaborative in their arbitration regime. From the Hong Kong perspective, Singapore seated arbitration awards are enforceable as though they are judgments rendered by the Hong Kong Court.

The SCMA is a Singaporean arbitral body specifically established to facilitate resolution of maritime claims. Its counterpart in Hong Kong is the Hong Kong Maritime Law Group ("**HKMAG**"). In the eyes of the Hong Kong Court, an SCMA award has virtually equivalent status as HKMAG awards.

This article examines how an SCMA award would be recognised and enforceable in Hong Kong by providing an overview of the arbitration law and maritime law regimes in Hong Kong.

Overview of Hong Kong Arbitration Law

Arbitration is a means of dispute resolution alternative to litigation where disputes would be heard by a designated independent third party (a private individual, panel or a tribunal) instead of a court. Both parties to the disputes must consent to submit their disputes to arbitration. The usual practice is that the arbitration agreement would be incorporated into the commercial contract through an arbitration clause. If arbitration clauses are not included in the contract, a separate mutual agreement is required. Unlike litigation, arbitration is simple, confidential, flexible and also time-and-cost effective.

Hong Kong is one of the leading international arbitration centres and the Hong Kong courts generally adopt a pro-arbitration stance. In *Shagang South Asia (Hong Kong) Trading co. Ltd. v Daaewoo Logistics (The Nikolaos A)* [2015] EWHC 194 (Comm), Lord Justice Hamblen described Hong Kong as *"a well-known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts."* According to the 2021 International Arbitration Survey conducted by Queen Mary University of London, Hong Kong is the third most preferred seats for arbitration worldwide.[1]

Under Hong Kong law, the main legislation that regulates arbitration is the Arbitration Ordinance (Cap. 609). The Ordinance is mainly based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985) ("**Model Law**"). It superseded the old Arbitration Ordinance (Cap. 341) and unified the legal frameworks of domestic arbitration and international arbitration in Hong Kong.[2]

Regarding the legal position of arbitration in Hong Kong, Justice Chan listed out 10 key principles behind the Hong Kong courts' approach to arbitral proceedings in *KB v S and Others* [HCCT 13/2015]. The 10 principles are set out as follows:

1. The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.

2. Under the Arbitration Ordinance, the court should only interfere in the arbitration of the dispute as expressly provided for in the Ordinance.

3. Subject to the observance of the safeguards that are necessary in the public interest, the parties to a

dispute should be free to agree on how their dispute should be resolved.

4. Enforcement of arbitral awards should be "almost a matter of administrative procedure" and the courts should be "as mechanistic as possible" (*Re PetroChina International (Hong Kong) Corp Ltd [2011] 4 HKLRD 604*).

5. The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way (*Grand Pacific Holdings v China Holdings Ltd [2012] 4 HKLRD 1 (CA)*).

6. In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of "must be serious, even egregious", before the court would find that there was an error sufficiently serious so as to have undermined due process (*Grand Pacific Holdings v China Holdings Ltd [2012] 4 HKLRD 1 (CA)*).

7. In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited [2009] 4 HKLRD 353 (CA)*).

8. Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of *bona fide* (*Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111*).

9. Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111*).

10. The Hong Kong Court of Final Appeal clearly recognised in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act *bona fide* (p 120I and p 137B of the judgment).

These 10 principles fortify the pro-arbitration and pro-enforcement attitude of courts in Hong Kong. According to the 2020 annual case statistics released by the Hong Kong International Arbitration Centre ("**HKIAC**"), 318 new arbitration cases were submitted to the HKIAC in 2020, which is its highest record of the decade.[3] The arbitration friendly stance of the Hong Kong Court also facilitates recognition and enforcement of foreign arbitral awards in Hong Kong. All this demonstrates that arbitration continues to thrive in Hong Kong despite the Covid-19 pandemic.

Overview of Maritime Law in Hong Kong

Following China's resumption of sovereignty over Hong Kong on 1 July 1997, Hong Kong continues to adopt the common law system instead of China's socialist law system under the principle of "One country, Two systems". Therefore, maritime law in Hong Kong is based upon pre-1997 English common law as the substantive law, which aligns Hong Kong with most of the other commonwealth jurisdictions. Maritime law in Hong Kong has gained the global recognition as the most advanced law with the highest standard.[4]

In conjunction with the body of common law, the following two pieces of legislation form a maritime law system familiar to the vast majority of the global entities:

1. By virtue of the Carriage of Goods by Sea Ordinance (Cap 462), the Hague-Visby Rules have the force of law in Hong Kong. The applicability of the Hague-Visby Rules provides certainty to entities globally as to the rights and liabilities of the carriers and other interested parties such as cargo owners and international traders.

2. By virtue of the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap 434), the Convention on Limitation of Liability for Maritime Claims (the 1976 Limitation Convention) and the Protocol of 1996 to amend the 1976 Limitation Convention (the 1996 Protocol) have the force of law.

An Admiralty Court has been set up under the High Court in Hong Kong to specifically deal with maritime disputes and claims listed out in section 12A of the High Court Ordinance (Cap 4) ("**HCO**"). Section 12B of the HCO together with Order 75 of the Rules of High Court (Cap 4A) provide for the complete regime of the mode and procedures whereby the Hong Kong Admiralty Court would exercise admiralty jurisdiction, including the arrest of vessels to secure a maritime claim.

Enforceability of Foreign Awards in Hong Kong

According to section 84 of the Arbitration Ordinance, with the leave of the Court, an arbitral award made either in or outside Hong Kong is enforceable in the same manner as a judgement of the Court.

There are three main categories of foreign awards for the purposes of enforcement:

Convention awards

According to section 2 of the Arbitration Ordinance, a convention award is defined as *"an arbitral award made in a State or the territory of a State, other than China or any part of China, which is a party to the New York Convention."* The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") is an international convention ratified by more than 160 states worldwide. Arbitral awards issued by one of the signatories of the New York Convention are enforceable in other contracting states.

Hong Kong, as a Special Administrative Region of the People's Republic of China, is not itself a separate contracting state party to the New York Convention. However, after the handover of Hong Kong to the PRC on 1 July 1997, the PRC, which is a contracting party to the Convention, extended application of the Convention to Hong Kong. As Hong Kong is included as one of the contracting states to the New York Convention, foreign awards issued by other signatories are enforceable in Hong Kong. The enforcement of the convention awards is governed by Division 2 of Part 10 of the Arbitration Ordinance.

Mainland awards

Section 2 of the Arbitration Ordinance defines Mainland awards as awards issued by any part of China other than Hong Kong, Macao and Taiwan. On 21 June 1999, based on Article 95 of the Basic Law, the Department of Justice in Hong Kong and the Supreme People's Court in China reached the "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region" ("**1999 Arrangement**"), which allows mutual recognition of arbitral awards between Hong Kong and mainland China. The 1999 Arrangement came into effect on 1 February 2000. Since then, arbitral awards made in accordance with the Arbitration Law of the PRC by the arbitral authorities in the Mainland becomes enforceable in Hong Kong via the reciprocal arrangement. Such enforcement is governed by Division 3 of Part 10 of the Arbitration Ordinance.

A Supplemental Arrangement was signed on 27 November 2020 to supplement and modify four main aspects of the 1999 Arrangement:

1. Simultaneous enforcement of awards in both jurisdictions was prohibited under the 1999 Arrangement. However, the Supplemental Arrangement now permits the parties to apply for the enforcement of the arbitral awards before the courts of China and Hong Kong at the same time, as long as the total amount to be recovered does not exceed the amount determined in the award.
2. The Supplemental Arrangement clarifies that the enforcement of arbitral awards under the 1999 Arrangement includes both "recognition" and "enforcement" of the awards.
3. An express provision has been added whereby the courts of the Mainland China and Hong Kong may order preservation or mandatory measures before or after its acceptance of an enforcement application.
4. The Supplemental Arrangement expands the scope of arbitral awards covered by the 1999 Arrangement. All arbitral awards made in the Mainland are now enforceable in Hong Kong under the Arrangement. Previously, only awards made by certain recognized Mainland arbitral authorities were enforceable.

It should also be noted that the time limitation periods for enforcing arbitration awards are different in China and Hong Kong. The limitation period in Hong Kong is 6 years from the date on which the cause of action accrued, while the limitation period in China is 2 years.

Macao awards

A similar reciprocal enforcement arrangement between Hong Kong and China was also made between Hong Kong and Macao in 2013. The "Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macau Special Administrative Region" provides for the mutual recognition and enforcement of arbitral awards between Hong Kong and Macao which are the two Special Administrative Regions of the PRC. The enforcement is governed by Division 4 of Part 10 of the Arbitration Ordinance.

In short, enforcement of foreign awards in Hong Kong is straightforward. Foreign arbitral awards issued by China and Macao are enforceable in Hong Kong under the reciprocal arrangements, while those issued by different international countries are enforceable via the New York Convention.

As mentioned above, the pro-arbitration Hong Kong Court takes a "mechanistic" and quasi-administrative approach to the enforcement of any qualified foreign award. The Arbitration Ordinance lists out three main documents required as evidence for enforcement of arbitral awards (section 85), Convention awards (section 88), Mainland awards, (section 94) and Macao awards (section 98C). These are:

(1) the duly authenticated original award or a duly certified copy of it;
(2) the original arbitration agreement or a duly certified copy of it; and
(3) a certified translation of the award or the agreement if it is written in a language other than English or Chinese.

Institutional vs ad hoc Arbitration – Hong Kong perspectives

There are two different types of arbitration, namely, institutional arbitration and ad hoc arbitration.

Institutional Arbitration

Institutional arbitrations are administered by an arbitral institution. Each institution has its own set of rules to regulate the arbitration process. Parties typically agree to hold the arbitral proceedings under a set of arbitration rules promulgated by a chosen institution. They do not have the complete freedom to decide on the arbitration procedures. Institutional arbitration can ensure that the proceedings will be conducted in an orderly manner

under the supervision of the arbitral institution.

Arbitral institutions in Hong Kong include the HKIAC, HKMAG, China Maritime Arbitration Commission Hong Kong Arbitration Centre and the International Chamber of Commerce. The decisions made by these arbitral institutions are final and binding.

The Hong Kong Court is also well versed with recognizing and enforcing awards issued by other international arbitration bodies, such as the Singapore International Arbitration Centre and the SCMA.

Ad Hoc Arbitration

Ad hoc arbitrations are arranged between the parties and the arbitrators. They are not administered by arbitral institutions; instead, they are administered by arbitrators appointed by the parties. The parties have full discretion to decide the arbitrators selected, the number of arbitrators and the applicable rules that shall govern the arbitration. They may also agree to adopt a set of pre-existent rules, such as the UNCITRAL Rules of Arbitration, the LMAA Rules or the SCMA Rules.

Status of SCMA Awards in Hong Kong

The SCMA Rules provide that the default seat of the arbitration is Singapore. As aforementioned, under the New York Convention, arbitral awards issued by one of the signatories of the New York Convention are enforceable in other contracting states. As Singapore is a signatory to the New York convention, awards issued under the SCMA Rules, or by a Singapore seated Tribunal applying the SCMA Rules, are enforceable in Hong Kong.

The SCMA Rules also allow parties to agree that the seat of the arbitration to be elsewhere than Singapore. Depending on the agreed seat of the arbitration, SCMA awards of any ad hoc arbitration is enforceable the same way as any of the other local (Hong Kong seated) or foreign (Singapore seated for instance) awards as long as they come under the scope of the Arbitration Ordinance.

Concluding Remarks

The global maritime industry is delighted to see that both Hong Kong and Singapore have now their own designated arbitral bodies and sets of rules specifically tailored for maritime disputes. The Hong Kong Court treats SCMA awards virtually no different from HKMAG awards. This no doubt facilities effective alternative dispute resolution globally, and more saliently within the Asia Pacific region.

For further information and assistance in relation to this topic, feel free to reach the authors of this article or your usual contacts at Hill Dickinson.

[1] Queen Mary University of London, "2021 International Arbitration Survey: Adapting arbitration to a changing world" (White and Case LLP 2021), <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf>, accessed 12 July 2021.

[2] LCQ14: Hong Kong as an International Arbitration Hub", <https://www.info.gov.hk/gia/general/201912/18/P2019121800402.htm>, accessed 12 July 2021.

[3] "2020 Statistics" (*HKIAC,* April 22, 2021) <https://www.hkiac.org/about-us/statistics>, accessed 14 July 2021.

[4] "Marine Legal Services" (*HKMPB*) <https://www.hkmpb.gov.hk/en/marine-legal-services.html>, accessed 20 July 2021.

Authors:

Damien Laracy
Partner, Head of Hong Kong Office
damien.laracy@hilldickinson.com

Felix Chung
Associate
felix.cheung@hilldickinson.com

HILL DICKINSON
HONG KONG
希德律師行 香港

Website: https://www.hilldickinson.com/offices/hong-kong

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