

# Hong Kong Court Sets Aside Enforcement of Emergency Arbitration Award

27 January 2022

**Introduction.** Hong Kong has a modern legal framework that is supportive of arbitration. The Hong Kong Arbitration Ordinance is kept up-to-date to cater to recent developments. One such development is the advent of emergency arbitration. Hong Kong is one of only a handful of jurisdictions to have amended its legislative framework to provide an express statutory basis for the enforcement of emergency arbitration awards.

A recent decision of the Hong Kong Court of First Instance illustrates the ease of enforcement of emergency arbitration awards in Hong Kong. It also highlights the importance of jurisdictional requirements, as ultimately the Court found that there was no valid arbitration agreement between the parties and declined enforcement of the award. The decision does not impact the enforceability of emergency arbitration awards more generally, and it serves as a reminder of the importance of the choice to pursue emergency arbitration or a court application for urgent interim relief.

**Interim Measures.** In some circumstances, urgent relief may be required at the outset of a dispute. A claimant may face the risk of the respondent dissipating assets, destroying property or evidence, disseminating confidential information, or taking some other irreversible step. The availability of interim measures aimed at preventing such harm can be vital to support the rights of claimants. Interim measures ensure that rights are not harmed or lost before claims have been determined.

Generally, parties to arbitration agreements now have two options to obtain interim measures during the period required for the formation of an arbitral tribunal. First, if emergency arbitration is available under the applicable arbitration rules, they may apply for the appointment of an emergency arbitrator. Second, they may apply to courts which have jurisdiction to issue interim measures in support of the respective arbitration.

**Enforceability of Emergency Arbitration Awards.** Emergency arbitration is a relatively recent phenomenon, but it has become a popular mechanism for obtaining urgent relief. There has been significant debate on whether emergency arbitration

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awards are directly enforceable in courts.<sup>1</sup> Several jurisdictions, most notably Hong Kong and Singapore, have addressed this uncertainty by amending their arbitration laws to expressly provide for the enforceability of emergency arbitration awards.<sup>2</sup> It follows that in Hong Kong and Singapore, the debate is over, as there is an express statutory basis permitting the enforcement of emergency arbitration awards. The arbitration laws of other leading arbitral seats do not yet contain similar provisions.<sup>3</sup>

The certainty surrounding the enforceability of emergency arbitration awards in Hong Kong and Singapore is an advantage for parties requiring urgent interim relief at the outset of a dispute and weighing up whether to proceed down the emergency arbitration or court route. There are a variety of reasons that emergency arbitration may be preferable. These include the confidentiality of arbitration proceedings; concerns about the quality, impartiality, or speed of justice available in certain courts; or the ability to bring a single application for relief (whereas multiple applications may be required in separate courts depending on the nature of the relief sought). However, if *ex parte* relief (without notice to the opposing party), or relief against third parties is required, a court application may be the preferable route. Generally, such relief is not available under most emergency arbitration rules.

Once a party has obtained an emergency arbitration award, the respondent may choose to comply with it. If a respondent does not comply, then enforcement in courts will be required.

**Ex Parte Enforcement.** A further benefit of the express statutory recognition afforded to emergency arbitration awards under Hong Kong law is that *ex parte* enforcement is available. This means that a party may take its emergency arbitration award to the Hong Kong courts and obtain an order for enforcement before the other party has been heard.

This is precisely what occurred in the recent case of *GD v HY*.<sup>4</sup> The claimant had obtained an emergency arbitration award, which restrained the respondent from dissipating his property and required the respondent to disclose a list of his assets. This is a typical example of interim relief which might be granted where a claimant can demonstrate there is a risk that a respondent will render itself award proof by removing or redistributing assets such that they are out of the claimant's reach by the time an

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<sup>1</sup> Emergency arbitration rules refer to both emergency arbitration awards, and emergency arbitration orders. For ease of reference, we refer in this update to emergency arbitration awards.

<sup>2</sup> Hong Kong Arbitration Ordinance (Cap 609), section 22B(1); Singapore International Arbitration Act 2002 (Cap 143A), sections 2(1), 12(6).

<sup>3</sup> Other jurisdictions which have amended their arbitration laws to provide expressly for the enforceability of emergency arbitration awards include Bolivia, Fiji, Macau, Malaysia, the Netherlands, and New Zealand.

<sup>4</sup> [2021] HKCFI 3900.

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award is issued. The Hong Kong Court of First Instance granted leave to the claimant on its ex parte application to enforce the emergency arbitrator's award.

**The Importance of Jurisdiction.** Following the Court's decision, the respondent applied to set aside the enforcement order. This was on the basis that the arbitration agreement relied upon by the claimant was not valid.

The underlying dispute concerned a loan agreement. This contained a dispute resolution clause in favour of the non-exclusive jurisdiction of the Hong Kong courts. The repayment date for the loan was extended several times. One of the extension letters contained an agreement for arbitration in Hong Kong.<sup>5</sup> However, the extension letter was not signed by all parties to the loan agreement.

The emergency arbitrator concluded that he had jurisdiction to issue the relief sought including because both the claimant and the respondent had signed the extension letter. The Hong Kong Court of First Instance disagreed. The Court set aside the enforcement order and ordered the claimant to pay all costs incidental to the set-aside application.

The reason the Court disagreed is that it determined that there was no valid arbitration agreement. The loan agreement expressly provided that it could not be varied without the written agreement of all parties. The arbitration agreement contained in the extension letter was a variation of the dispute resolution clause in the loan agreement. The extension letter was not signed by all parties, and so the Court held that it was not a valid variation of the dispute resolution provision of the loan agreement. Without a valid arbitration agreement, the emergency arbitrator could not have jurisdiction over the parties.

**Conclusion.** This decision highlights the importance of considering at the outset of a dispute whether emergency arbitration or a court application is the most viable route for urgent relief. Most importantly, it must be clear that there is a valid arbitration agreement that applies to the disputing parties and that the applicable arbitration rules permit emergency arbitration. In this case, the claimant's decision to pursue emergency arbitration instead of a court application ultimately left it out of pocket and without the urgent interim relief it deemed necessary to protect its rights. The decision also illustrates that, where emergency arbitration is successfully utilised, emergency arbitration awards can be readily enforced in jurisdictions recognising their enforceability, including in both Hong Kong and Singapore.

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<sup>5</sup> The applicable arbitration rules have not been reported.

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