

GAR KNOW HOW CHALLENGING AND ENFORCING ARBITRATION AWARDS

Hong Kong

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Applicable requirements as to the form of arbitral awards

1 Must an award take any particular form?

Section 67 of the Hong Kong Arbitration Ordinance (Cap. 609) (HKAO), which gives effect to article 31 of the UNCITRAL Model Law, sets out the formal and substantive requirements for an award. It provides that an award must:

- be in writing;
- be signed by the arbitrator or arbitrators. A signature by a tribunal majority is sufficient in proceedings with more than one arbitrator, provided that the reason for any omitted signature is stated (eg, death, incapacity, permanent absence overseas with no means of contact, refusal to sign in the case of dissent);
- state the reasons on which it is based, unless the parties have agreed otherwise; and
- be dated and state the place of arbitration.

A signed copy of the award must be delivered to each party.

There is no default time limit for making an award (HKAO, section 72(1)). The Court of First Instance of the High Court of Hong Kong (the Court) has the power to extend any time limit to render an award, even if it has expired (HKAO, section 72(2)). An order to extend the time limit for making an award is not subject to appeal (HKAO, section 72(3)).

Applicable procedural law for recourse against an award (other than applications for setting aside)

2 Are there provisions governing modification, clarification or correction of an award? Are there provisions governing retraction or revision of an award? Under what circumstances may an award be retracted or revised (for fraud or other reasons)? What are the time limits?

Section 69(1) of the HKAO, which gives effect to article 33 of the UNCITRAL Model Law, provides that within 30 days of receipt of the award (unless the parties have agreed on another time limit), a party, with notice to the other party, may request that the tribunal:

- correct any computational, clerical or typographical errors or similar errors in the award; and
- if so agreed by the parties, give an interpretation of a specific point or part of the award.

Within 30 days of receipt of the request, the tribunal must determine whether the request is justified and, if so, make the correction or give the interpretation. The interpretation will form part of the award (HKAO, section 69(1)(1)). The tribunal can also correct any computational, clerical or typographical errors or similar errors on its own initiative within 30 days of the date of the award (HKAO, section 69(1)(2)).

Unless the parties have agreed otherwise, a party may also, with notice to the other party and within 30 days of receipt of the award, request an additional award as to claims presented in the arbitral proceedings but omitted from the award. The tribunal has 60 days to make the additional award if it considers the request to be justified (HKAO, section 69(1)(3)). The tribunal may extend the time limit to make a correction, interpretation or additional award (HKAO, section 69(1)(4)).

A correction or interpretation of an award, or an additional award, must be made in accordance with the requirements of the HKAO (Section 69(1)(5)) as to form, content and delivery of awards generally. Section 69(2) of the HKAO further provides that the tribunal has the power to make other changes to an award that are necessary or consequential to the correction or interpretation of the award.

The tribunal may also review an award of costs within 30 days of rendering the award if, when making the award, the tribunal was not aware of certain information relating to costs that it should have taken into account. The tribunal can then confirm, vary or correct the award of costs (HKAO, section 69, paragraphs (3) and (4)).

Applications to set aside an award, based on fraud or otherwise, may be made pursuant to section 81 of the HKAO. The grounds for setting aside an award include incapacity of a party, invalidity of the arbitration agreement, inability to present a party's case, arbitrability and conflict with Hong Kong public policy. The Court will not consider the merits of the dispute or the correctness of the award.

An application to set aside an award must be made within three months from the date on which the party making the application received the award (HKAO, section 81, paragraph (1)(3)). If an application has been made for correction and interpretation of an award, an application to set it aside must be made within three months from the date on which the tribunal disposed of the request. (HKAO, section 81, paragraph (1)(3)).

3 May an award be appealed to or set aside by the courts? What are the differences between appeals and applications to set aside awards?

An award may ordinarily not be appealed. However, the parties may opt into section 5 of Schedule 2 of the HKAO pursuant to section 99(e) of the HKAO if they wish to have the right to appeal an award on a question of law. In those circumstances, the Court will have discretion in determining appeals and will have the power either to confirm, vary, remit or set aside the award. Parties may also opt into section 4 of Schedule 2 of the HKAO pursuant to section 99(d) of the HKAO so that they can challenge an award on the ground of serious irregularity affecting the tribunal, the arbitral proceedings or the award.

In set-aside proceedings, the Court will not consider the substantive merits of the dispute or the correctness of the award, whether concerning errors of fact or law. The grounds for setting aside an arbitral award in Hong Kong are set out in section 81 of the HKAO, which incorporates article 34 of the UNCITRAL Model Law. The grounds for challenge include incapacity of a party, invalidity of the arbitration agreement, inability to present a party's case, arbitrability, and conflict with Hong Kong public policy.

An award can also be set aside if there has been a successful challenge to an arbitrator who has participated in proceedings resulting in an award (HKAO, section 26(5)).

Applicable procedural law for setting aside of arbitral awards

4 Is there a time limit for applying for the setting aside of an arbitral award?

An application to set aside the award under section 81 of the HKAO must be made within three months of the date of receipt of the award or, if a request for a correction or interpretation of an award or an additional award has been made under section 69 of the HKAO, from the date on which the request has been disposed of by the tribunal (HKAO, section 81(1)(3)). However, the Court has discretion to grant an extension of time for the application (*Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd* [2017] 1 HKC 69 at [90]; *A v. D* [2020] HKCFI 2887 at [11]).

5 What kind of arbitral decision can be set aside in your jurisdiction? Can courts set aside partial or interim awards?

Section 71 of the HKAO provides that 'an arbitral tribunal may make more than one award at different times on different aspects of the matters to be determined', meaning that partial or interim awards can be set aside.

6 Which court has jurisdiction over an application for the setting aside of an arbitral award? Is there a specific court or chamber in place with specific sets of rules applicable to international arbitral awards?

The competent court in Hong Kong for the setting aside of arbitral awards is the Court of First Instance of the High Court of Hong Kong. See section 2 of the HKAO (definition of Court) and section 81 of the HKAO (application for setting aside as exclusive recourse against arbitral award).

The Court of First Instance has a specialist arbitration list containing judges with extensive experience of arbitration-related cases and applications under the HKAO (RHC Commentary 72/2/13). Order 73 of the Rules of the High Court contains specific procedural rules for matters concerning arbitration-related proceedings and arbitral awards.

7 What documentation is required when applying for the setting aside of an arbitral award?

The application, request or appeal to the Court shall be made by originating summons under Order 73, Rule 1 of the Rules of the High Court (Cap. 4A) (RHC) (HKAO, Section 107). The application and any order thereon may be served out of the jurisdiction by leave of the Court (RHC, Order 73, Rule 7(1)).

8 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with the application for the setting aside of an arbitral award? If yes, in what form must the translation be?

The HKAO does not contain any provisions requiring the translation of an arbitral award in respect of which a set-aside application is made (whereas it does contain express provisions regarding the translation of awards in recognition and enforcement proceedings: see sections 85, 88, 94 and 98C of the HKAO). In accordance with section 27 of the Evidence Ordinance, if the final arbitral award is not in either or both of the official languages (namely, English and Chinese), the award should be translated into either official language, and certified by an official or sworn translator or by a diplomatic or consular agent.

9 What are the other practical requirements relating to the setting aside of an arbitral award? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

The originating summons must set out the grounds of the set-aside application. Where the application is based on affidavit evidence, a copy of the supporting affidavit must also be served (RHC, Order 73, Rule 5(4)). Solicitors should refrain from providing affidavits on behalf of their clients when facts that are pertinent to the application have to be deposed to (KB v. S [2016] 2 HKC 325, [26]). The originating summons must also be served on the arbitrators, who may participate in the proceedings, file evidence on matters that may assist the Court (but do not seek to explain the interpretation of the award), or take no action (RHC, Order 73, Rule 5(5)). There are no limitations on the length of submissions or documentation filed in support, which may be in either or both of the official languages (namely, English and Chinese).

10 What are the different steps of the proceedings?

Following the filing of the originating summons to set aside an award, the award debtor must file an acknowledgment of service. If the award debtor fails to do so, the award creditor is still required to proceed to have the matter heard. If the award debtor files an acknowledgment of service, the award creditor must support the originating summons with an affidavit or affirmation of evidence. If the

award debtor wishes to submit evidence, it must also file its own affidavit or affirmation. Subsequently, the application will be disposed of by way of an oral hearing.

The Court may also suspend the setting-aside proceedings to enable the arbitral tribunal to take steps to eliminate the grounds for setting aside (HKAO, section 81(1)). In *A v. B* [2015] 5 HKC 509, the Court suspended the setting-aside proceedings to enable the sole arbitrator to include findings in the award in respect of a limitation defence advanced by the respondent.

11 May an arbitral award be recognised or enforced pending the setting-aside proceedings in your jurisdiction? Do setting aside proceedings have suspensive effect? If not, which court has jurisdiction over an application to stay the enforcement of the award pending the setting aside proceedings, and what are the different steps of the proceedings?

The commencement of setting-aside proceedings does not give rise to an automatic suspension of enforcement proceedings. Pursuant to sections 86(4) and 89(5) of the HKAO, if a party applies to set aside an award while an application for recognition or enforcement is pending, the Court has the discretion to adjourn the recognition or enforcement proceedings. The Court may also order the party seeking an adjournment to provide security. In considering whether an adjournment or security is appropriate, the Court will consider, inter alia, the merits of the set-aside application, and whether enforcement will be rendered more difficult if it is delayed (*Dana Shipping and Trading SA v. Sina Channel Asia Ltd* [2017] 1 HKC 281; *Weili Su v. Shengkang Fei* [2019] 2 HKLRD 1214).

12 What are the grounds on which an arbitral award may be set aside?

The grounds for setting aside an arbitral award in Hong Kong are set out in section 81 of the HKAO, which incorporates article 34 of the UNCITRAL Model Law. The grounds for challenge include incapacity of a party, invalidity of the arbitration agreement, inability to present a party's case, arbitrability, and conflict with Hong Kong public policy. Hong Kong public policy has been construed to mean 'contrary to the fundamental conceptions of morality and justice of Hong Kong', to be applied narrowly (eg, if an award was procured by fraud, corruption or other unconscionable behaviour (*Hebei Import v. Polytek Engineering* [1999] 2 HKC 205 at 233); see also *X Chartering v. Y* [2014] HKEC 477 at [26]). In *Z v. Y* [2018] HKCFI 2342, the Hong Kong High Court refused to enforce an award on public policy grounds because the tribunal had not provided adequate reasons for dismissing the respondent's case on illegality, and thus had not properly considered the illegality issues. In *X v. Jemmy Chien* [2020] HKCFI 286, the Hong Kong Court of First Instance granted leave to enforce an award notwithstanding that one party alleged the underlying agreement was a sham and tainted by illegality. The Court held that public policy interests would not justify allowing a party to rely on its own wrongdoing to avoid its contractual obligations in circumstances where the arbitral tribunal had considered and addressed the illegality claim.

In *Z v. R* [2021] HKCFI 2312, the Hong Kong Court of First Instance reinforced that (i) an applicant seeking to challenge an arbitral award under section 81 of the HKAO must furnish proof of the grounds of exclusive recourse set out in article 34(2) of the UNCITRAL Model Law, (ii) the burden of proving the existence of the grounds for setting aside is on the applicant, and (iii) even if the grounds are made out, the Court has a discretion to enforce the award nevertheless.

13 What is the effect of the decision on the setting-aside application in your jurisdiction? What challenges are available?

The setting-aside of an award has the effect of the award never having been made. If the Court sets aside an award on the basis that the arbitral tribunal lacked jurisdiction, it may declare the award to be a nullity and of no effect. The leave of the Court of First Instance is required for any appeal to the

Court of Final Appeal against a decision to set aside an arbitral award (HKAO, section 81(4); *China International Fund Ltd v. Dennis Lau & Ng Chun Man Architects & Engineers (HK) Ltd* [2016] 1 HKC 35).

14 Will courts take into consideration decisions rendered in relation to the same arbitral award in other jurisdictions or give effect to them (eg, in recognition or enforcement proceedings)?

The Court may take into consideration, but is not bound by, decisions rendered in other jurisdictions. The Court retains the discretion to enforce a foreign arbitral award even if it has been set aside by the courts of the seat of arbitration (*Dana Shipping and Trading SA v. Sina Channel Asia Ltd* [2017] 1 HKC 281).

Applicable procedural law for recognition and enforcement of arbitral awards

15 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The HKAO is the applicable legislation in Hong Kong. It divides awards into four main categories for the purposes of enforcement:

- Convention awards (defined in section 2 of the HKAO as awards made in states or territories that are party to the New York Convention (the Convention), other than China), the enforcement of which is governed by Division 2 of Part 10 of the HKAO;
- Mainland awards (defined in section 2 of the HKAO as awards made in ‘any part of China other than Hong Kong, Macao and Taiwan’), the enforcement of which is governed by Division 3 of Part 10 of the HKAO;
- Macao awards (defined in section 2 of the HKAO as awards made in the Macao Special Administrative Region), the enforcement of which is governed by Division 4 of Part 10 of the HKAO; and
- awards made in Hong Kong and Taiwan and other arbitral awards that are not Convention awards, Mainland awards or Macao awards, the enforcement of which is governed by Division 1 of Part 10 of the HKAO.

As a Special Administrative Region of the People’s Republic of China (PRC), Hong Kong is not itself a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – International Centre for Settlement of Investment Disputes, Washington 1965 (the ICSID Convention). However, when China took over sovereignty of Hong Kong from the United Kingdom in 1997, it notified the United Nations and the World Bank that the ICSID Convention would apply to Hong Kong.

The Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the 1999 Arrangement) allows for the enforcement of arbitral awards as between mainland China and Hong Kong. The Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (2020) clarifies and modifies the 1999 Arrangement, such that all arbitral awards rendered pursuant to the HKAO can be enforced in mainland China and, likewise, all arbitral awards rendered pursuant to the PRC Arbitration Law can be enforced in Hong Kong. Simultaneous enforcement applications may be made in the courts of mainland China and Hong Kong. On 19 May 2021, Part 2 of the Arbitration (Amendment) Ordinance 2021 came into force to fully implement the Supplemental Arrangement by effecting the necessary changes to the HKAO. This included the repeal of section 93 of the HKAO, which prohibited simultaneous enforcement applications. This change will

assist in the enforcement of arbitral awards against award debtors with assets in both mainland China and Hong Kong.

The Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region allows mutual recognition of arbitral awards between Hong Kong and Macao.

16 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under article I(3) of the Convention?

Similar to the position with respect to the ICSID Convention, Hong Kong itself is not a separate contracting state to the Convention. Nevertheless, China, where the Convention entered into force on 22 January 1987, extended the application of the Convention to Hong Kong in 1997.

China has made both reciprocity and commercial relationship reservations under article I(3) of the Convention, which also bind Hong Kong. These mean that Hong Kong will apply the Convention (1) to recognise awards made in the territory of another contracting state (the reciprocity reservation) and (2) 'only to differences out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration' (the commercial reservation).

Recognition proceedings

17 Is there a time limit for applying for the recognition and enforcement of an arbitral award?

Ordinarily, a six-year time limit to enforce an award runs from the point at which the award debtor fails to comply with its obligations under the award (section 4(1)(c) of the Limitation Ordinance (Cap. 347); CL v. SCG [2019] HKCFI 398). However, the applicable limitation period depends on whether the underlying contract giving rise to the dispute is a standard contract (for which a six-year time limit applies) or a contract executed under seal (for which a 12-year time limit applies)(Wang Peiji v. Wei Zhiyong [2019] HKCFI 2593).

18 Which court has jurisdiction over an application for recognition and enforcement of an arbitral award? Is there a specific court or chamber in place with specific sets of rules applicable to international arbitral awards?

The competent court in Hong Kong for the recognition and enforcement of arbitral awards is the Court of First Instance of the High Court of Hong Kong. See section 2 of the HKAO (definition of Court), sections 61 and 84 of the HKAO (granting leave to enforce an arbitral order, direction or award), and sections 87(1)(a), 92(1)(a) and 98A(1)(a) of the HKAO (enforcing a Convention, Mainland or Macao award).

The Court of First Instance has a specialist arbitration list containing judges with extensive experience of arbitration-related cases and applications under the HKAO (RHC Commentary 72/2/13). Order 73 of the Rules of the High Court contains specific procedural rules for matters concerning arbitration-related proceedings and arbitral awards.

19 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement and for the application to be admissible? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Section 84 of the HKAO specifies that an award in arbitral proceedings by an arbitral tribunal, whether made in or outside Hong Kong, is enforceable in the same manner as a judgment of the Court that has the same effect, but only with leave of the Court, and otherwise subject to the provisions of the HKAO. Typically, if a party tries to enforce an arbitral award in Hong Kong, it is because there is some jurisdictional nexus with Hong Kong (eg, assets located in Hong Kong), although this is not a statutory requirement.

20 Are the recognition proceedings in your jurisdiction adversarial or ex parte? What are the different steps of the proceedings?

An application seeking leave to enforce an arbitral award under section 84 of the HKAO is governed by Order 73, Rule 10 of the RHC, as amended by section 13 of Schedule 4 of the HKAO. The application is made ex parte, supported by an affidavit. The Court may direct a summons to be issued if it considers it appropriate to give the other party an opportunity to be heard in an inter partes hearing. The recognition and enforcement proceedings themselves are adversarial in nature.

21 What documentation is required to obtain recognition?

Under section 85 of the HKAO, a party seeking recognition of an arbitral award must produce (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) if the award or agreement is not in either or both of the official languages (namely, English and Chinese), a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent.

Sections 88, 94 and 98C of the HKAO require similar documents for the recognition of a Convention award, a Mainland award and a Macao arbitral award, respectively.

22 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition? If yes, in what form must the translation be?

Yes. According to sections 85, 88, 94 and 98C of the HKAO, if the final arbitral award is not in either or both of the official languages (namely, English and Chinese), it is necessary for the award to be translated into either official language, and certified by an official or sworn translator or by a diplomatic or consular agent.

23 What are the other practical requirements relating to recognition and enforcement? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

Under Hong Kong law, the first step towards the recognition and enforcement of an arbitral award is obtaining the Court's grant of leave to enforce the award.

The procedure for seeking leave to enforce an award under section 84 is governed by Order 73, Rule 10 of the RHC. The application is usually made ex parte and the applicant must make full and frank disclosure of all relevant information in support of the application, including the existence of any proceedings to set aside the award. Failure to do so could be fatal to the application if:

- the relevant information is of material importance;
- the failure was culpable; or

- the sanction would not be out of all proportion to the ‘offence’ (see *Grant Thornton International Ltd v. JBPB & Co* [2013] HKEC 477).

The Court may direct a summons to be issued if it considers it appropriate to give the other party an opportunity to be heard in an inter partes hearing.

Once leave to enforce is granted, the Court’s order must be drawn up by, or on behalf of, the applicant and personally served on the respondent, delivered to his or her last known or usual place of business or abode, or in such other manner as the Court may direct.

The award may be enforced 14 days after the date of service of the Court’s order on the respondent or, under Order 73, Rule 10(6) of the RHC, the respondent may apply by way of summons and affidavit to set aside the order granting enforcement of the award within 14 days of being served. Note also that if an ‘application for setting aside or suspending’ an award has been made, then ‘the court before which enforcement of the award is sought . . . may, if it thinks fit, adjourn the proceedings for the enforcement of the award’ (HKAO, sections 86(4)(a), 89(5)(a), 98D(5)(a))

Notwithstanding the 14-day time limit to apply for leave to set aside the enforcement order, the Court has power to grant an extension of time under Order 3, Rule 5 of the RHC. In *Astro Nusantara International BV and Others v. PT First Media TBK* [2018] HKCFA 12, the Court of Final Appeal granted an extension of time for the award debtor to challenge the enforcement orders notwithstanding a 14-month delay, taking into account that the award debtor had a strong case that the relevant awards had been made without jurisdiction over certain parties, and that the delay had not caused the award creditor any uncompensable prejudice.

24 Do courts recognise and enforce partial or interim awards?

Section 71 of the HKAO provides that ‘an arbitral tribunal may make more than one award at different times on different aspects of the matters to be determined’, meaning that partial or interim awards can be recognised and enforced.

25 What are the grounds on which an arbitral award may be refused recognition? Are the grounds applied by the courts different from those provided under article V of the New York Convention?

The major grounds for refusing recognition and enforcement of an arbitral award in Hong Kong are set out under sections 86(1), 89(2), 95(2) and 98D(2) of the HKAO, which substantially replicate the grounds set out in article V(1) of the Convention.

26 What is the effect of a decision recognising an arbitral award in your jurisdiction?

The grant of leave to enforce by the Court is the first step towards recognition and enforcement of an award. The award is enforceable only after expiry of 14 days (or such other period that the Court may fix) from the date of service of the Court’s order granting leave on the award debtor (RHC, Order 73, Rule 10(6)). An award debtor on which such an order is served may, within 14 days of the date of service, seek to resist enforcement as a way of challenging the decision recognising an arbitral award.

Once an award becomes enforceable, it is enforced as though it were a local court judgment (HKAO, section 84). As is the case with a local court judgment, the Court may stay enforcement of the award under Order 47, Rule 1(1) of the RHC, which states that ‘there are special circumstances which render it inexpedient to enforce the judgment’.

27 What challenges are available against a decision refusing recognition in your jurisdiction?

If the Court has refused leave to enforce an award under section 84(1) of the HKAO, an appeal against that decision may be made with leave of the Court pursuant to section 84(3) of the HKAO.

28 What are the effects of annulment proceedings at the seat of the arbitration on recognition or enforcement proceedings in your jurisdiction?

It lies within the Court's discretion to determine whether it will adjourn an application to enforce an arbitral award if an action to remit or set aside the award is pending. The Court will consider factors such as the merits and prospects of success of the setting-aside application (HKAO, sections 86(4)(a), 89(5)(a), 98D(5)(a)).

Note that section 84 of the HKAO is subject to section 26(2), which means that if an application for the enforcement of an arbitral award is made during the period in which a challenge to the appointment of an arbitrator is pending before the courts, and the arbitral tribunal that made the award includes the challenged arbitrator, the Court may refuse enforcement of the award. This usually applies if the award on which enforcement is sought is a partial or interim award, rather than the final award.

29 If the courts adjourn the recognition or enforcement proceedings pending annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security?

Sections 86(4)(b), 89(5)(b) and 98D(5)(b) of the HKAO provide that the Court can order security to be posted if an application for setting aside or suspension of the award has been made by a party.

The chief factors likely to be considered by the Court when deciding whether or not to order security include (1) the strength of the grounds of challenge to the award and (2) the possible difficulty in enforcing the award if security is not ordered. (See *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corp* [1993] 2 Lloyd's Rep 208 CA (Eng); *L v. B* [2016] HKCU 1165 at [7].)

30 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an arbitral award is set aside after the decision recognising the award has been issued, what challenges are available?

Under section 89(2)(f)(ii) of the HKAO, the court before which enforcement of the award is sought has discretionary powers to refuse enforcement if an award has been 'set aside or suspended by a competent authority of the country in which, or under the law of which, it was made'. If the award has been set aside at the seat of the arbitration, the enforcing court in Hong Kong could nevertheless decide to enforce the award or it could proceed to allow enforcement of the award before the set-aside application has been completed.

Service

31 What is the procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction? If the extrajudicial and judicial documents are drafted in a language other than the official language of your jurisdiction, is it necessary to serve these documents with a translation?

The procedure for service with respect to applications to the court for leave to enforce arbitral awards is governed by Order 65 of the RHC (service of documents in connection with proceedings within Hong Kong).

Order 65 prescribes that service can be effected by personal service, by post or by placing the documents through the letterbox of the defendant at his or her usual or last known address, or in the case of a corporation, at its registered address.

If it appears that it is impracticable to serve the documents in any of the aforementioned methods, the claimant can apply to the court for an order of substituted service (RHC, Order 65, Rule 4). Substituted service of a document is effected by taking such steps as the court may direct to bring the document to the notice of the defendant. Such an application is generally made by affidavit *ex parte*. The affidavit should clearly state the type of substituted service proposed, and it must show that the writ is likely to reach the defendant or come to his or her knowledge if the method of substituted service is allowed.

If the extrajudicial and judicial documents are drafted in a language other than English or Chinese, it is necessary to serve these documents with a translation (as per section 4 of the High Court Civil Procedure (Use of Language) Rules (Cap. 5C)). However, translations of judicial documents can be supplemented at a later stage (as set out in Practice Direction 10.2).

32 What is the procedure for service of extrajudicial and judicial documents to a defendant outside your jurisdiction? Is it necessary to serve these documents with a translation in the language of this jurisdiction? Is your jurisdiction a party to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)? Is your jurisdiction a party to other treaties on the same subject matter?

There are different procedures that apply to service out of the jurisdiction, depending on the type of extrajudicial and judicial document being served. For documents related to arbitration, the following rules apply.

Order 73, Rule 7 of the RHC applies to summonses or orders made under the HKAO or any orders made thereon other than those by which an application for leave to enforce an arbitral award is made.

Order 73, Rule 10(5) of the RHC applies to an order made further to an *ex parte* application seeking leave to enforce an arbitral award.

Pursuant to Order 73, Rule 7, summonses or orders made under the HKAO or any orders made thereon can be served out of the jurisdiction with leave of the Court provided that:

- the summons or order relates to an arbitration governed by Hong Kong law save if the application is for leave to enforce an arbitral award;
- the arbitration has been, is being or is to be held within Hong Kong; or
- the originating summons is one by which an application is made under section 45(2) (interim measures) or section 60(1) (inspection, photographing, preservation, custody, detention, sale, sampling or experimenting of any relevant property) of the HKAO.

Before leave will be granted, it must be demonstrated to the Court that the case is proper for service out of jurisdiction under Rule 7(4) of the RHC.

Pursuant to Order 73, Rule 10(5), an order made *ex parte* granting leave to enforce an arbitral award can be served without leave. If, however, service needs to be effected outside the jurisdiction, pursuant

to Order 11, Rule 1(1)(m), an originating summons by which an application is made to enforce an arbitral award or any orders made thereon can be served out of the jurisdiction with leave of the Court. Service in these circumstances is permissible with leave whether or not the arbitration is governed by Hong Kong law.

If the extrajudicial and judicial documents served on a defendant are drafted in a language other than English or Chinese, it is necessary to serve these documents with a translation (as per section 4 of the High Court Civil Procedure (Use of Language) Rules (Cap. 5C)). However, translations of judicial documents can be supplemented at a later stage (as set out in Practice Direction 10.2).

Hong Kong is a party to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention). On 1 July 1997, the Hague Convention ceased to apply to service of documents between Hong Kong and Mainland China, as such service was no longer international in nature (see RHC Commentary 69/4/1).

There are arrangements in place for service of documents between Hong Kong and Mainland China (the Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts), and between Hong Kong and Macau (the Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Cases between the Hong Kong Special Administrative Region and the Macau Special Administrative Region).

Identification of assets

33 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction? Are there any databases or publicly available registers providing information on award debtors' interests in other companies?

Certain databases are publicly available in Hong Kong and can be used for the identification of assets. For example, land records with information about property assets are kept by the Land Registry, and information pertaining to companies is contained in the Companies Registry. Both of these registries are open to the public.

34 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Section 84 of the HKAO provides that, with leave of the Court, an arbitral award may be enforced in the same manner as a judgment of the Court, subject to the provisions of the HKAO, meaning that orders facilitating the enforcement of judgments, such as the ability to examine judgment debtors under Orders 48 and 49B of the RHC, are also available in relation to the enforcement of arbitral awards.

Pursuant to Order 48 of the RHC, on an ex parte application of the award creditor, the Court may order the award debtor to attend before the Registrar, or such officer as the Court may appoint, and be orally examined on whether (i) there are any debts owing to the award debtor by other persons, and (ii) the award debtor has any other property or financial resources that could be used for satisfying the award. If the award debtor is a limited company, the order can be made against a senior officer of the company.

Pursuant to Order 49B of the RHC, when the award is for the payment of a specified sum of money, on an ex parte application of the award creditor, the Court may order an examination of the award debtor regarding his or her assets, liabilities, income and expenditure and of the disposal of any assets or income. If it appears to the Court that there is reasonable cause to believe that an order to appear before the Court for examination may be ineffective to secure the award debtor's attendance, the Court may (1) order that the award debtor be arrested and brought before the Court on the day following the day of arrest (RHC, Order 49B, Rule 1(1)) and (2) make an order prohibiting the award debtor from leaving Hong Kong (RHC, Order 49B, Rule 1(2)).

Further, pursuant to Order 38, Rules 13 and 14 of the RHC, the judgment debtor may apply for an order to (1) require a non-party witness to attend any proceedings in the cause or matter and produce any document considered by the Court to be necessary, or (2) compel the attendance of a non-party witness to give evidence or to produce documents or other material evidence.

Order 38 does not apply to discovery applications against non-party banks, to which section 21 of the Evidence Ordinance applies. Section 21 provides: 'On the application of any party to any proceedings, the court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's record for any of the purposes of such proceedings.' The court in *Pacific King Shipping Holdings Pte Ltd v. Huang Ziqiang* [2015] HKEC 76 noted that, although it could grant such an order in the appropriate circumstances, it 'would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer'.

Enforcement proceedings

35 What kinds of assets can be attached within your jurisdiction?

A wide variety of assets can be attached, including immovable, movable, intangible or other forms of property.

36 Are interim measures against assets available in your jurisdiction?

Both arbitral tribunals and courts are empowered to issue interim measures in support of claims advanced in arbitral proceedings.

Pursuant to section 35 of the HKAO, unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures upon the request of any party. These measures may be granted to a party to:

- maintain or restore the status quo pending determination of the dispute;
- take any action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process;
- preserve assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant or material to the resolution of the dispute.

Pursuant to section 45 of the HKAO, the Court also may grant interim measures in support of arbitration upon the application of any party. The power conferred by section 45 may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under section 35 in relation to the same dispute, though the Court may decline to exercise this power if 'the interim measure sought is currently the subject of arbitral proceedings' or if it 'considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal' (HKAO, section 45(4)).

Award creditors may apply to the Court for interim measures against assets in support of enforcement proceedings. However, award creditors cannot apply such interim measures against assets owned by a sovereign state. Foreign states enjoy absolute immunity from enforcement and jurisdiction in Hong Kong, unless the foreign state has agreed to waive its sovereign immunity (see *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* [2011] 14 HKCFAR 95). With respect to China, because Hong Kong is a Special Administrative Region of the PRC, China will have crown immunity as opposed to sovereign immunity, although the practical effect is similar. Whether or not a Chinese entity, such as a state-owned enterprise, would be able to shield its assets through crown immunity would depend on a test of control (ie, whether or not the entity in question is able to exercise powers independent from the Chinese government), in which case it is less likely to benefit from crown immunity. (See *The Hua Tian Long* (No.3) [2010] 3 HKC 557.)

Pursuant to article 4 of the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (2020), Hong Kong

courts are expressly empowered to issue interim measures either before or after accepting an application for enforcement of a Mainland arbitral award.

Pursuant to 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 Administrative Region, parties to certain institutional arbitrations seated in Hong Kong are permitted to apply to mainland Chinese courts for interim measures in support of their arbitral claims.

37 What is the procedure to apply interim measures against assets in your jurisdiction?

Pursuant to section 35 of the HKAO, an award creditor can apply directly to an arbitral tribunal seated in Hong Kong for interim measures against assets. There is no requirement to obtain prior court authorisation to make such an application. Section 36 of the HKAO requires a party to show that (1) the interim measure is needed to avoid harm that could not be adequately compensated by damages and (2) there is a reasonable possibility that the claim would succeed on the merits. Further, unless the parties have agreed otherwise, section 37 of the HKAO allows a party 'without notice to any other party, [to] make a request for an interim measure' (ie, a party can apply for an interim measure on an ex parte basis).

The Court can grant interim measures under section 45 of the HKAO and this power can be exercised irrespective of whether similar powers may also be exercised by an arbitral tribunal under section 35 of the HKAO in relation to the same dispute. According to Order 29, Rule 1(2) of the RHC, through which the Court grants interim measures, where 'the applicant is the plaintiff and the case is one of urgency, such application may be made ex parte on affidavit'. Applicants seeking urgent aid from the courts must act with diligence and speed in serving the documents initiating the proceedings, as the court will assess any delay in light of the prejudice suffered (*VE Global UK Ltd v Charles Allard Jr* [2017] HKEC 2135 at [23] and [28]).

38 What is the procedure for interim measures against immovable property within your jurisdiction?

With respect to an application for interim measures, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The general procedure for interim measures therefore applies to immovable property.

39 What is the procedure for interim measures against movable property within your jurisdiction?

With respect to an application for interim measures, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The general procedure for interim measures therefore applies to movable property.

40 What is the procedure for interim measures against intangible property within your jurisdiction?

With respect to an application for interim measures, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The general procedure for interim measures therefore applies to intangible property.

41 What is the procedure to attach assets in your jurisdiction?

The procedure to attach assets in Hong Kong is to apply to the Court for the relevant order. The two main orders by which assets may be attached are garnishee orders and charging orders.

Garnishee order

Pursuant to Order 49, Rule 1 of the RHC, in certain circumstances, award creditors, for the purpose of enforcing an award, may apply to the Court for a garnishee order. Order 49, Rule 2 of the RHC states that an application for a garnishee order must be made *ex parte*, supported by an affidavit or affirmation that:

- states the name and the last known address of the judgment debtor;
- identifies the judgment to be enforced and states the amount remaining unpaid under it at the time of the application for the garnishee order;
- states that to the best of the information available to, or belief of, the applicant, the garnishee is within the jurisdiction and is indebted to the judgment debtor, and includes the sources of the applicant's information or the grounds for his or her belief; and
- where the garnishee is a bank having more than one place of business, states the name and address of the branch at which the judgment debtor's account is believed to be held or, if it be the case, that this information is not known to the applicant.

The garnishee order initially will be an order *nisi*. The Court may grant the award creditor an order absolute on further consideration of the matter. The garnishee should pay the amount specified in the order to the award creditor, and any payment made by the garnishee in compliance with the order shall be a valid discharge of his or her liability towards the award debtor to the extent of the amount paid (RHC, Order 49, Rule 3).

Charging order

For the purpose of enforcing an award, the Court may make a charging order, on any property of the award debtor, to secure the payment of any debt due or to become due under that award (RHC, Order 50, Rule 1). A charging order can be imposed on the following types of property: land or real estate, securities and funds in court (High Court Ordinance, Section 20A(2)).

An application for a charging order may be made *ex parte*, supported by an affidavit or affirmation that:

- identifies the award to be enforced and states the amount remaining unpaid under it at the date of the application;
- states the name of the award debtor and of any creditor whom the applicant can identify;
- gives full particulars of the subject matter of the intended charge; and
- verifies that the interest to be charged is owned beneficially by the award debtor (RHC, Order 50, Rule 1(3)).

Unless the Court otherwise directs, the supporting affidavit or affirmation may contain statements of information or belief with the sources and grounds for that information or belief (RHC, Order 50, Rule 1(4)).

An order made by an *ex parte* application will be an order *nisi*. Upon further consideration of the matter, the Court may make the charging order absolute. The charging order, however, is not a direct mode of enforcement, but is rather an indirect mode in the sense that it provides the award creditor with security, in whole or in part, over the property of the award debtor. To obtain the actual proceeds of the charge, the award creditor must then proceed to apply further for an order to sell the specified assets and satisfy his or her award (RHC, Order 50, Rule 3).

42 What is the procedure for enforcement measures against immovable property within your jurisdiction?

With respect to an application for attachment, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The procedure to attach all types of property in Hong Kong is to apply to the Court for such orders. The two main orders by which assets may be attached are through garnishee orders and charging orders.

43 What is the procedure for enforcement measures against movable property within your jurisdiction?

With respect to an application for attachment, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The procedure to attach all types of property in Hong Kong is to apply to the Court for such orders. The two main orders by which assets may be attached are through garnishee orders and charging orders.

44 What is the procedure for enforcement measures against intangible property within your jurisdiction?

With respect to an application for attachment, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The procedure to attach all types of property in Hong Kong is to apply to the Court for such orders. The two main orders by which assets may be attached are through garnishee orders and charging orders.

45 Are there specific rules applicable to the attachment of assets held by banks? Is it possible to attach in your jurisdiction sums deposited in bank accounts opened in a branch or subsidiary of a foreign bank located in your jurisdiction or abroad? Is it possible to attach in your jurisdiction the bank accounts opened in a branch or subsidiary of a domestic bank located abroad?

Garnishee orders may be obtained in respect of bank accounts opened in a branch or subsidiary of a domestic or foreign bank located in Hong Kong, but not in respect of bank accounts opened in a branch or subsidiary of a domestic or foreign bank located abroad.

Under Hong Kong law, an interim order may also be issued to restrain a party from diminishing their assets, including funds held in bank accounts located in Hong Kong or elsewhere. This is known as a Mareva injunction, for which an application may be made ex parte.

Recognition and enforcement against foreign states

46 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

In 2011, the Hong Kong Court of Final Appeal held in *Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95 that an arbitral award against a foreign state cannot be enforced in Hong Kong unless the foreign state has waived its sovereign immunity, and that the waiver must be made 'in the face of the Court'. In that case, the Court observed that when a state enters into 'an arbitration agreement with a private individual or company, it involve[s] merely the assumption of contractual obligations vis-à-vis the other party to the agreement. That act did not constitute a submission to any other State's jurisdiction'.

47 What is the procedure for service of extrajudicial and judicial documents to a foreign state? Is it necessary to serve extrajudicial and judicial documents with a translation in the language of the foreign state?

The procedure for service of extrajudicial and judicial documents to a foreign state is governed by Order 11, Rule 7 of the RHC.

Subject to the sovereign state having waived its immunity (see *Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95), after obtaining leave to serve under Order 11, Rule 1, a person who wishes to have the writ served on the state must lodge in the Registry:

- a request for service to be arranged by the Chief Secretary;
- a copy of the writ; and
- except where the official language of the state is English, or the official languages of that party include English, a translation of the writ in the official language or one of the official languages of that state.

Documents duly lodged will then be sent by the Registrar to the Chief Secretary for the writ to be served on the state.

48 May a foreign state invoke sovereign immunity (immunity from jurisdiction) to object to the recognition or enforcement of arbitral awards?

The doctrine of absolute immunity applies under Hong Kong law. An arbitral award against a foreign state cannot be recognized or enforced in Hong Kong unless the foreign state has waived its immunity (*Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95).

49 May award creditors apply interim measures against assets owned by a sovereign state?

The doctrine of absolute immunity applies under Hong Kong law. Interim measures cannot be obtained against assets owned by a foreign state unless the foreign state has waived its immunity (*Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95).

50 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? Are there exceptions to immunity?

The doctrine of absolute immunity applies under Hong Kong law. Assets belonging to a foreign state are immune from enforcement in Hong Kong, unless the foreign state has waived its immunity (*Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95).

51 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? What are the requirements of waiver?

It is possible for a foreign state to waive immunity from enforcement in Hong Kong. The waiver must be made 'in the face of the Court' (*Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95).

52 Is it possible for a creditor of an award rendered against a foreign state to attach the assets held by an alter ego of the foreign state within your jurisdiction?

It follows from the general principle that an arbitral award against a foreign state cannot be enforced in Hong Kong unless the state has waived its sovereign immunity that, in the absence of waiver, award creditors cannot attach the assets held by an alter ego of the foreign state (*Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95).



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Debevoise & Plimpton LLP has successfully represented clients in Asia-related arbitrations for decades. The firm's arbitration practice in Asia reflects Debevoise's global strength in the area. It is one of very few law firms in the world to combine sophisticated international arbitration, general commercial dispute resolution and public international law capacity in four major international arbitration centres: New York, London, Hong Kong and Paris. The Asia team has a strong track record advising on the most complex international disputes for leading multinationals, international organisations, sovereigns and non-governmental organisations. Clients benefit from a team of internationally renowned arbitration lawyers. The firm has a deep bench of partners, counsel and associates who focus on arbitration in the region. The senior members of the team are also heavily involved in shaping the arbitration environment in Asia, taking leadership roles on bodies such as the Hong Kong International Arbitration Centre and the Singapore International Commercial Court Committee. The team's long track record of work on arbitration in Asia, coupled with a deep level of involvement in the region's arbitration community, is incredibly powerful. It gives the team the experience and perspective needed to advise clients on their most critical arbitrations.

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