Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino

Second Edition

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This article was first published in May 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-575-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE KB

ALSTON & BIRD LLP

BGP LITIGATION

CARMIGNIANI PÉREZ ABOGADOS

CECIL ABRAHAM & PARTNERS

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Challenging and Enforcing Arbitration Awards*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and more in-depth books and reviews. We also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature earlier than others. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes – and soon evidence and investor-state disputes – in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the original group of editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

Alas, as we were about to go to press, we were stunned by the unexpected demise of one of those editors, Emmanuel Gaillard. This news was as big a shock as I can recall. Emmanuel was one of three or four names who define international arbitration in the modern era. It was a delight to know him, and a source of huge satisfaction that he respected GAR, and it is hard to imagine professional life without him. Our sympathies go to his family and beloved colleagues, who I have no doubt will keep at least some of the magic alive.

David Samuels

London
April 2021

Contents

Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial – leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 166 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 163.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2020, *Global Arbitration Review*'s daily news reports contained hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2021, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Uganda fails to knock out rail-claim award
- Iranian state entity fails to overturn billion-euro award
- US Supreme Court rejects Petrobras bribery appeal
- Spanish court sets high bar for award scrutiny
- Swiss award against Glencore upheld on third attempt
- Tajik state airline escapes Lithuanian award
- Dutch court refuses to stay Yukos awards
- Undisclosed expert ties prove fatal to ICSID award
- Brazilian airline's award enforced in Cayman Islands
- ICC arbitrators targeted in Kenyan mobile dispute

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, in summer 2017, I raised the possibility of doing a book on the subject with David Samuels (Global Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in early April. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said almost 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide begins with a particularly welcome and inciteful foreword by Alan Redfern, recognised worldwide as one of the most thoughtful and experienced practitioners in our field. The guide is then structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this second edition, the 14 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and the special case of ICSID awards.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 26 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 51 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

London
April 2021

Part II

Challenging and Enforcing Arbitration Awards: Jurisdictional Know-How

26

Hong Kong

Tony Dymond and Cameron Sim[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of 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 (e.g., 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)).

1 Tony Dymond is a partner and Cameron Sim is a senior associate at Debevoise & Plimpton.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

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

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.

Appeals from an award

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

Time limit

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]).

Award

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.

Competent court

6 Which court has jurisdiction over an application for the setting aside of an arbitral award?

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).

Form of application and required documentation

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)).

Translation of required documentation

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 Section 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.

Other practical requirements

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).

Form of the setting-aside proceedings

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.

Suspensive effect

11 Do setting-aside proceedings have suspensive effect? May an arbitral award be recognised or enforced pending the setting-aside proceedings in your jurisdiction?

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).

Grounds for setting aside an arbitral award

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 (e.g., 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.

Decision on the setting-aside application

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).

Effects of decisions rendered in other jurisdictions

14 Will courts take into consideration decisions rendered in the same matter in other jurisdictions or give effect to them?

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

Applicable legislation for recognition and enforcement

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 Administration Region (the 1999 Arrangement) allows for the enforcement of arbitral awards as between 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.

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.

The New York Convention

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

Time limit

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).

Competent court

18 Which court has jurisdiction over an application for recognition and enforcement of an arbitral award?

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).

Jurisdictional and admissibility issues

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 (e.g., assets located in Hong Kong), although this is not a statutory requirement.

Form of the recognition proceedings

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.

Form of application and required documentation

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.

Translation of required documentation

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.

Other practical requirements

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.

Recognition of interim or partial awards

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.

Grounds for refusing recognition of an arbitral award

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.

Effect of a decision recognising an arbitral award

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'.

Decisions refusing to recognise an arbitral award

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.

Recognition or enforcement proceedings pending annulment proceedings

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.

Security

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].)

Recognition or enforcement of an award set aside at the seat

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

Service in your jurisdiction

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).

Service out of your jurisdiction

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?

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).

Identification of assets

Asset databases

33 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

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, which is open to public searches.

Information available through judicial proceedings

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 (1) there are any debts owing to the award debtor by other persons, and (2) 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

Attachable property

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.

Availability of interim measures

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 (i.e., 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.

Procedure for interim measures

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' (i.e., 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]).

Interim measures against immovable property

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.

Interim measures against movable 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.

Interim measures against intangible 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.

Attachment proceedings

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).

Attachment against immovable property

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.

Attachment against movable property

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.

Attachment against intangible property

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.

Attachments against bank accounts

45 Is it possible in your jurisdiction to attach bank accounts opened in a branch or subsidiary of a foreign bank located in your jurisdiction or abroad? Is it possible in your jurisdiction to attach 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*.

Enforcement against foreign states

Applicable law

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'.

Availability of interim measures

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

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

Service of documents to a foreign state

48 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.

Immunity from enforcement

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

Assets belonging to a foreign state are immune from enforcement in Hong Kong, unless the foreign state has waived immunity.

Waiver of immunity from enforcement

50 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).

Piercing the corporate veil and alter ego

51 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).

Appendix 1

About the Authors

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Tony Dymond is a partner at Debevoise & Plimpton and co-chair of the firm's Asia arbitration practice. His practice focuses on complex, multi-jurisdictional disputes in both litigation and arbitration. Mr Dymond has advised clients in a wide range of jurisdictions, having spent the past 20 years in London, Hong Kong and Seoul. He is widely acknowledged as a leading lawyer in high-value disputes arising from large-scale projects, particularly in the energy and infrastructure sectors.

Mr Dymond is consistently recognised by the legal directories as a leader in his field. He is included in *The Legal 500*'s inaugural International Arbitration Powerlist and recommended in *The Legal 500 UK* (2020) for international arbitration and construction disputes. Described as 'a lawyer's lawyer', 'an exceptional legal mind' and 'thoughtful and able to reduce complex issues to their key components', the guide also hails him as 'one of the few lawyers who genuinely understands construction and engineering delay matters' and a 'prolific, top-class strategic thinker'. *Chambers UK* (2020) also recommends Mr Dymond for his construction disputes work, with commentators describing him as an 'exceptionally capable' and 'fantastic lawyer who puts his heart and soul into every case'. Clients find him 'very sound and a safe pair of hands'. He is named by *Who's Who Legal* as a Thought Leader in construction, and by Expert Guides as one of the UK's leading construction law practitioners.

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Cameron Sim is a senior associate at Debevoise & Plimpton, based in Hong Kong. Mr Sim specialises in commercial arbitration and he acts in proceedings worldwide under all major arbitration rules. He is admitted in New York, Hong Kong, England and Wales, and Australia and has appeared as advocate before tribunals seated in both Europe and

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

The Guide to Challenging and Enforcing Arbitration Awards is a comprehensive volume that addresses this new reality. It offers practical know-how on both sides of the coin: challenging, and enforcing, awards. Part I provides a full thematic overview, while Part II delves into the specifics seat by seat, covering 26 jurisdictions.

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ISBN 978-1-83862-575-7