

Hong Kong Mainland Cooperation in Arbitration Matters

by Steven C. Nelson and Ray Liu Esq.

The advantages enjoyed by Hong Kong as a center for arbitration of commercial disputes involving parties in Mainland China have been further enhanced by new measures to strengthen the cross-border recognition and enforcement of such awards. On November 27, 2020, the Supreme People's Court of China and the government of the Hong Kong Special Administrative Region (the "**HKSAR**") signed a Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR (the "**Supplemental Arrangement**").

As its name implies, the Supplemental Arrangement adds to and improves upon an earlier document called the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the "**Arrangement**"), which came into effect in February 2000. The Arrangement functionally replicated certain features of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the global bedrock of modern international commercial arbitration. When Hong Kong reverted to Chinese sovereignty in 1997, the HKSAR became part of the People's Republic of China (the "**PRC**"), with the result that the Convention, which operates only as between its Contracting States, ceased to apply as between the HKSAR and the PRC.

The principal feature of the Convention that is mirrored in the Arrangement is that requiring enforcement by the courts in each Contracting State of arbitral awards rendered in the territory of another State, allowing refusal of enforcement only on limited grounds. Under a procedure established by the Supreme People's Court in 1995, a lower PRC court proposing to refuse enforcement of an award covered by the Convention must give prior notice to the Supreme People's Court and follow its instructions in further proceedings. That procedure has been applied to cases requiring enforcement of Hong Kong awards under the Arrangement as well and, as with Convention awards, is generally seen as enhancing award enforcement in the PRC.

The Supplemental Arrangement fills certain gaps in the Arrangement as originally

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promulgated. First, it makes clear that Arrangement applies to the recognition as well as the enforcement of awards subject to its provisions. This is important in light of the treatment of the two aspects as separate procedures in the PRC courts. Second, it removes the earlier limitation of covered awards to those rendered in arbitrations administered by designated arbitral institutions, so that all awards rendered in Hong Kong (whether institutional or *ad hoc*) are now entitled to recognition and enforcement. Third, while it originally allowed a party to apply for enforcement in either Hong Kong or the Mainland, but not in both unless and until an application in one of the two failed to yield sufficient assets to satisfy the award, it now allows contemporaneous applications in both jurisdictions.

Finally, the Supplemental Arrangement allows courts in both jurisdictions to order conservatory measures before, as well as after, their acceptance of an application for enforcement of an arbitral award. This last revision brings the provisions of the Arrangement into line with the separate Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings, adopted in October 2019, which allows Mainland courts to provide interim measures such as asset-preservation orders in aid of Hong Kong arbitrations, and *vice versa*.

All of these initiatives have been promulgated jointly by the Supreme People's Court and the HKSAR government through its Department of Justice. They reflect the continuing policy on both sides of strengthening the legal framework for arbitration as a means of resolving disputes, particularly those arising out of the increasing engagement of Chinese companies in the global economy, and to add to the distinctive advantages and attractiveness of Hong Kong as a situs of such arbitrations in cases where parties do not wish to arbitrate in the Mainland.

Dorsey's bilingual Hong Kong and China-based arbitration and litigation practice covers a wide range of disputes, primarily concerning Sino-Foreign commercial and financial business arrangements such as fund investments, joint ventures, cooperative technology development, manufacturing, agribusiness, health care, pharmaceuticals and biotechnology. Among other things, we were among the first law firms successfully to utilize the aforementioned Arrangement on Interim Measures to obtain a court-ordered asset-preservation freeze in the Mainland in aid of a Hong Kong arbitration.