ALERT MEMORANDUM

The New Supplemental Arrangement Concerning Enforcement of Arbitral Awards between Mainland China and Hong Kong

August 25, 2021

The "Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region" (the "**Supplemental Arrangement**") was signed on November 27, 2020. It entered into force partially on the same day and partially on May 19, 2021. Significantly, the Supplemental Arrangement modifies and expands the existing "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region" (the "**Enforcement Arrangement**"), which entered into force on February 1, 2000.

The modifications simplify enforcement proceedings and enhance judicial support to parties subsequent to arbitration proceedings bridging Mainland China (the "**Mainland**") and the Hong Kong Special Administrative Region ("**Hong Kong**"), including as follows:

- A party can now simultaneously seek enforcement of an arbitral award in Hong Kong and on the Mainland.
- The scope of the Enforcement Arrangement has been extended to cover not only the enforcement, but also the preceding recognition of arbitral awards.
- Parties to arbitration proceedings with a seat in one of the two jurisdictions may now also apply to the courts of the other jurisdiction for interim measures after the rendering of the arbitral award.
- Finally, the Supplemental Arrangement specifies that all arbitral awards (and not only those rendered in arbitrations administered by certain arbitration institutions) having a seat in Hong Kong may be enforced on the Mainland and vice versa, thus shifting from the previously applied "*institution*"-based approach toward the internationally recognized "*seat*"-based approach.

This Alert Memorandum analyzes and summarizes the most prominent elements of the Supplemental Arrangement which are likely to be of significance to practitioners and users of arbitration in or related to the Mainland and Hong Kong.

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1. Introduction

The Mainland-Hong Kong relationship is, from an arbitration perspective, characterized by two important elements that are highly significant for users and practitioners alike: (i) the People's Republic of China ("**PRC**") is by far the largest market in the Asia-Pacific Region for arbitration,[1] and has thus been referred to by some as a "*world arbitration powerhouse,*"[2] while (ii) Hong Kong is well known in its own right as one of the preeminent venues for international arbitration and for its arbitration-friendly court system and its sophisticated legal infrastructure.[3]

At the same time, owing to Hong Kong's status as a special administrative region and the diverging laws on the Mainland and in Hong Kong, obstacles have persisted until now concerning the recognition and enforcement of arbitral awards between the two jurisdictions. The PRC acceded to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") in 1987 and Hong Kong did so in 1977 (following a declaration made on behalf of Hong Kong by the United Kingdom).

Accordingly, for many years the recognition and enforcement of arbitral awards between the PRC and Hong Kong was largely governed by the New York Convention. This changed after the PRC resumed the exercise of its sovereignty over Hong Kong in 1997 pursuant to the so-called Handover. Once the PRC extended the territorial application of the New York Convention to Hong Kong, uncertainty arose among practitioners as to whether the New York Convention was still applicable to recognition and enforcement of arbitral awards between the Mainland and Hong Kong.[4]

The Mainland and Hong Kong resolved this lack of certainty in 1999 by signing the Enforcement Arrangement.[5] It provided for terms of mutual enforcement of arbitral awards in reliance largely on the New York Convention. Some 20 years later, the Supplemental Arrangement now amends the existing Enforcement Arrangement.[6] Whereas the Mainland has implemented the Supplemental Arrangement by means of judicial interpretation, Hong Kong has amended its Arbitration Ordinance (Cap. 609) (the "**Arbitration Ordinance**").[7]

As a result, the Supplemental Arrangement brings significant changes with regard to the recognition and enforcement of awards on the Mainland or in Hong Kong (**2. below**), the scope of the awards to be recognized (**3. below**), the bringing of simultaneous enforcement actions (**4. below**), and petitions for interim measures before state courts (**5. below**).

[1] In 2018, Chinese arbitration institutions handled more than 540,000 cases, with an aggregate amount in dispute of nearly RMB 700 billion (*cf.* Fei Ning, Jiang Hong, et al., Annual Review on Commercial Arbitration in China (2020), Commercial Dispute Resolution in China, pp. 3-4).

[2] Fei Ning, Jiang Hong, et al., Annual Review on Commercial Arbitration in China (2020), Commercial Dispute Resolution in China, p. 52.

[3] Choong/Moser, "4. Hong Kong SAR" in Asia Arbitration Handbook (2011), p. 192, paras. 4.16-4.19.

[4] After the Handover, it was considered unclear whether Hong Kong-seated arbitral awards should be viewed as "foreign" or "domestic" pursuant to Article I(1) of the New York Convention for purposes of enforcement on the Mainland and vice versa. For a discussion of the scope of Article I(1) of the New York Convention, *see* the Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL Secretariat (2016), Article I, paras. 41-63, available here. *See* also Choong/Moser, "4. Hong Kong SAR" in Asia Arbitration Handbook (2011), p. 256, para. 4.387; Moser/Morgan, National Report for Hong Kong 2021, ICCA International Handbook on Commercial Arbitration, p. 128.

[5] Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region. An English translation is available here.

[6] Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region. An English translation is available here.

[7] Articles 1 and 4 of the Supplemental Agreement entered into force on November 27, 2020; amendments to the Arbitration Ordinance were required for Articles 2 and 3 of the Supplemental Arrangement. Hong Kong adopted these by means of an Ordinance to amend the Arbitration Ordinance (the "**Arbitration (Amendment) Ordinance 2021**"), which entered into force on May 19, 2021. The Arbitration (Amendment) Ordinance 2021 is available here.

2. Recognition and enforcement of arbitral awards on the Mainland or in Hong Kong (Article 1)

The Enforcement Arrangement referred only to the "*enforcement of arbitral awards by the Mainland and the HKSAR,*" without mentioning the recognition of arbitral awards.[8] While this ambiguity did not pose difficulties for parties attempting to enforce their Mainland-seated arbitral awards in Hong Kong,[9] the situation was different for parties who sought to enforce their Hong Kong awards on the Mainland, as there was no reciprocal governing legislation.

With the failure of the Enforcement Arrangement to address whether a Hong Kong-seated arbitral award needed to be recognized separately by a Mainland court, divergent case law arose and created uncertainty regarding which procedural steps were necessary to enforce such awards on the Mainland. While some courts considered recognition to be a necessary prerequisite for enforcement,[10] other courts held that a prevailing party could immediately seek enforcement of a Hong Kong-seated award by petition to the respective court on the Mainland.[11]

Helpfully, Article 1 of the Supplemental Arrangement now eliminates this uncertainty. It provides that "[t]*he procedures for enforcing arbitral awards of the Mainland or the HKSAR as specified in the Arrangement shall be interpreted as including the procedures for the recognition and enforcement of the arbitral awards of the Mainland or the HKSAR.*" This approach is in conformity with the New York Convention, Article IV(1).[12]

3. The "seat" of the award approach (Article 2)

Previously, under the Enforcement Arrangement Hong Kong courts could enforce only certain Mainland awards, namely those rendered pursuant to the Arbitration Law of the Mainland by few specified arbitral institutions. These included notably the China International Economic and Trade Arbitration Commission ("**CIETAC**").[13] However, this situation stood in contradiction to the approach of the New York Convention, which in Article I(1) focuses on the place of rendering of the award rather than on the identity of the particular underlying arbitral institution.

Now, as a result of the amendments, Article 2 of the Supplemental Arrangement significantly broadens the scope of Mainland arbitral awards that are able to be enforced in Hong Kong and vice versa. Namely, it provides that the Enforcement Arrangement "*applies to arbitral awards rendered pursuant to the Arbitration Ordinance of the HKSAR as enforced by the People's Courts of the Mainland, and arbitral awards rendered pursuant to the Arbitration Law of the People's Republic of China as enforced by the Courts of the HKSAR.*"[14]

The Supplemental Arrangement thereby follows the approach of the New York Convention, thus allowing for any arbitral award rendered pursuant to the Arbitration Law of the PRC to be enforced in Hong Kong regardless of the administrating arbitral institution.

In so doing, this amendment significantly broadens the scope of potential recognition and enforceability by Hong Kong courts of awards issued pursuant to the Arbitration Law of the PRC, including such awards

[8] *See* Preamble of Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region.

[9] With the Enforcement Arrangement, the Arbitration Ordinance explicitly clarified the process of "*Enforcement of Mainland Awards*" in Part 10, Division 3, Sections 92-98 of the Arbitration Ordinance (Cap. 609). An English translation is available here.

[10] China Coal Jin Min (Fujian) Industry and Trade Co. Ltd v Noble Resources International Pte Ltd (2019) Min Zhi Fu No. 31.

[11] China Coal Jin Min (Fujian) Industry and Trade Co. Ltd v Noble Resources International Pte Ltd (2019) Min Zhi Fu No. 24.

[12] Article IV(1) of the New York Convention ("*1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof.*").

[13] The Supplemental Arrangement, Preamble. The complete list of recognized mainland arbitral authorities was published in the Gazette No. 7226, available here.

[14] With the Arbitration (Amendment) Ordinance 2021, any references to "*a recognized Mainland arbitral authority*" were removed and the definition of "*Mainland award*" was amended in Section 2.

issued by tribunals constituted under the auspices of such other major global institutions as the International Chamber of Commerce ("**ICC**") and the Singapore International Arbitration Centre ("**SIAC**"), to name just two, assuming – notably – the permissibility of administration of arbitrations by such other global institutions on the Mainland.[15] Such permissibility, from the standpoint of current legislation in the PRC, remains uncertain, and for that reason unpredictable.[16]

As a consequence, it cannot be excluded that an award with a Mainland seat administered by a foreign arbitral institution would fall under the scope of the revised Enforcement Arrangement and be enforceable in Hong Kong, following the "*seat*"-based approach, but would not be subject to the Mainland enforcement regime, owing to the "*institution*"-based approach, which still prevails on the Mainland.

In the face of this uncertainty, a recently published consultation draft of revisions to the Arbitration Law of the PRC could lead to a welcome and long-awaited shift in this approach.[17] According to the draft, foreign arbitral institutions will be allowed to conduct foreign-related arbitration business on the Mainland, which might be interpreted to include the administration of arbitrations having their seat on the Mainland. Until then, it is still to be seen whether and how frequently parties in the coming years will indeed provide for and actually be able to implement arbitration agreements providing for such administration with a Mainland seat.[18]

4. Simultaneous enforcement of arbitral awards (Article 3)

Under the Enforcement Arrangement, the prevailing party in an arbitration had to decide whether it would seek to enforce the award before courts either on the Mainland or in Hong Kong, but could not do both. Any simultaneous or "double" enforcement was prohibited to avoid cumulative efforts at enforcement.[19]

Domestic courts in Hong Kong and on the Mainland consistently applied this rule,[20] even in the face of "*unfair consequences*" for the prevailing party.[21] This resulted in the inability of some parties to enforce their award. In one case, a prevailing party in an arbitration with a Hong Kong seat required six years of enforcement proceedings on the Mainland, only to have its petition for enforcement rejected by the Guangdong Higher People's Court of the PRC.[22] Subsequently, the same prevailing party attempted to enforce the arbitral award in Hong Kong. However, the Hong Kong courts rejected the application on the basis of the expiration of the limitation period of six years applicable to the enforcement of certain arbitral awards.[23]

[15] The Mainland has gradually opened its arbitration market to foreign arbitration institutions in recent years, and such institutions as the ICC and SIAC have been allowed to maintain representative offices on the Mainland since 2016, although their permitted activities have so far been limited to advertising and marketing services.

[16] Few Mainland courts have thus far confirmed the validity of arbitration agreements that provide for foreign arbitration institutions to conduct arbitration based on the Mainland, *see e.g.* Anhui Longlide Packaging Co Ltd v BP Agnati SRL (Longlide) [2013] Min Si Ta Zi No. 13 and Daesung Industrial Gases Co Ltd v Praxair (China) Investment Co Ltd [2020] Hu 01 Min Te No. 83.

[17] The Ministry of Justice of the PRC published a consultation draft of revisions to the Arbitration Law of the PRC on July 30, 2021. Comments on the draft can be provided until August 29, 2021. The consultation draft is available here.

[18] For a general discussion of arbitrations administered by foreign arbitral institutions on the Mainland, *see* Kluwer Arbitration Blog, Arbitrations in China Administered by Foreign Institutions: No Longer a No Man's Land? – Part I, Oct. 12, 2020, available here.

[19] *See* Article 2 of the Enforcement Arrangement ("*If the place where the party against whom the application is filed is domiciled or the place where the property of the said party is situated is in the Mainland as well as in the HKSAR, the applicant shall not file applications with relevant courts of the two places at the same time.*"); Section 93 of the Arbitration Ordinance (Cap. 609) ("*A Mainland award is not, subject to subsection (2), enforceable under this Division if an application has been made on the Mainland for enforcement of the award.*"), available here.

[20] *See* Shenzhen Kai Loong Investment and Development Co Ltd v CEC Electrical Manufacturing (International) Co. Ltd [2001-2003] HKCLRT 649.

[21] *See* CL v. SCG [2019] 2 HKLRD 144, HCCT 9/2018.

[22] *Id.*

[23] Section 4(1)(c) of the Limitation Ordinance (Cap. 347): "*The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action*

This case vividly demonstrates that the choice of forum for enforcement could, in the case of protracted and unsuccessful original enforcement proceedings, lead to procedural obstacles based on time bar.[24] Article 3 of the Supplemental Arrangement addresses this potential risk by allowing parties to a Hong Kong- or Mainland-seated arbitration to simultaneously apply for enforcement of the arbitral award in both jurisdictions.[25] Hence, award creditors no longer need to fear the consequences of, for example, an expired limitation period due to successive attempts at enforcement, as they can seek simultaneously to enforce an award in both jurisdictions.

Moreover, Article 3 of the Supplemental Arrangement addresses the issue of double recovery by providing that "[t]*he total amount to be recovered from enforcing the arbitral award in the courts of the two places must not exceed the amount determined in the arbitral award*." In this situation, courts from each jurisdiction may request corresponding information from the other respecting the status of the enforcement proceedings.[26]

5. Interim measures before Mainland and Hong Kong courts (Article 4)

Until now, under the current legal system in the Mainland domestic arbitral tribunals have not been empowered to grant interim measures.[27] Pursuant to Articles 28 and 68 of the Arbitration Law of the PRC,[28] parties to arbitration proceedings with a seat on the Mainland were obliged to submit their application for interim measures to the respective arbitration commission, which in turn would refer the application to the respective Mainland court.[29]

However, in case the seat of the arbitration was outside of the Mainland, the parties could neither apply for interim measures on the Mainland nor seek the enforcement of a foreign arbitral tribunal's order of interim measures by a Mainland court. By contrast, arbitral tribunals seated in Hong Kong as well as courts in Hong Kong were empowered to issue interim measures under the Arbitration Ordinance (Cap. 609) regardless of the seat of the arbitration.[30]

A first milestone in facilitating the recognition and enforcement of interim measures between the Mainland and Hong Kong was the signing of the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings" (the "**Interim Measures Arrangement**") by the Supreme People's Court of the PRC and Hong Kong's Department of Justice on April 2, 2019.[31] Hong Kong, as an exception to the "*mainland China seated arbitration*"-rule regarding interim measures, became the

accrued, that is to say – […] *(c) actions to enforce an award, where the submission is not by an instrument under seal* […]." An English translation is available here.

[24] *See* also A Co v B Co [2021] HKCFI 1477.

[25] Article 3 of the Supplemental Arrangement: "*If the party against whom the application is filed is domiciled or has property in both the Mainland and the HKSAR which may be subject to enforcement, the applicant may file applications for enforcement with the courts of the two places respectively. The courts of the two places shall, at the request of the court of the other place, provide information on its status of the enforcement of the arbitral award. The total amount to be recovered from enforcing the arbitral award in the courts of the two places must not exceed the amount determined in the arbitral award.*" [emphasis added].

[26] *Id*.

[27] Fei Ning, Jiang Hong, et al., Annual Review on Commercial Arbitration in China (2020), Commercial Dispute Resolution in China, p. 53.

[28] *See* Article 28(2) of the Arbitration Law of the PRC, adopted on August 31, 1994: "*Whereas a claimant has applied for a custody to the property, the arbitration commission shall, according to the relevant provisions of the Civil Procedure Law, submit the application of the claimant to the people's court.*" *See* also Article 68: "*Whereas the parties involved in a foreign arbitration case apply for the custody of evidences, the foreign arbitration commission shall submit the application to the intermediate people's court at places where the evidences are produced.*" An English translation is available here.

[29] Kluwer Arbitration Blog, Mainland China-Hong Kong Interim Measures Arrangement Swiftly Put into Use, Oct. 26, 2019, available here.

[30] *See* Section 35(1) of the Arbitration Ordinance (Cap. 609) "*Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures*." *See* also Section 45(2): "*On the application of any party, the Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside Hong Kong, grant an interim measure,*" available here.

[31] Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by

first and only jurisdiction where parties of non-domestic, Hong Kong arbitration proceedings could apply to Mainland courts for interim measures.[32]

The importance and practical relevance of this arrangement was underlined by the fact that only one week after the Interim Measures Arrangement came into effect, the first interim measure was granted by a Mainland court.[33] As of August 10, 2021, the website of the Hong Kong International Arbitration Centre ("**HKIAC**") states that of 49 applications made, 30 resulted in decisions by Mainland courts – 28 granting applications and two rejecting applications.[34]

At the same time, the Interim Measures Arrangement in 2019 did not include any rules on the permissibility of interim measures ordered *after* the rendering of the arbitral award. Post-award interim measures on the Mainland therefore remained unavailable for parties to Hong Kong-seated arbitration proceedings. As a result, the range of conservatory measures was limited, for example in the event that the award debtor opposed enforcement of the award.

Now, Article 4 of the Supplemental Arrangement has closed this gap. It does so by providing that "[t]*he relevant court may, before or after accepting the application for enforcement of an arbitral award, impose preservation or mandatory measures pursuant to an application by the party concerned and in accordance with the law of the place of enforcement*." The provision thus addresses the practical impediment that arose from the implementation of the Interim Measures Arrangement by extending application to all stages of an arbitration proceeding, including post-award measures.

In short, going forward parties to arbitration proceedings seated in Hong Kong can now apply for interim measures, including preservation of property at any time before, during and indeed after the conclusion of the arbitral proceeding.

A third milestone in facilitating the recognition and enforcement of interim measures between the Mainland and Hong Kong is on the horizon. The recently published consultation draft of revisions to the Arbitration Law of the PRC (see **2. above**) foresees that parties be allowed to apply directly to a state court or arbitral tribunal for interim relief after the commencement of the arbitration proceeding. Should the revision as currently worded be adopted, it is likely to lead to a significant simplification for parties when applying for interim relief on the Mainland.

6. Conclusion

The Supplemental Arrangement is in several respects a significant development in the Mainland–Hong Kong arbitration landscape, and thus relevant to all practitioners and users who contemplate providing for arbitration and also conducting arbitral proceedings in these jurisdictions. The new framework clearly strengthens the legal foundation for the conduct of arbitrations and related court proceedings, especially in the Asia-Pacific Region, by largely, if not wholly, eliminating the previously existing inadequacies prevailing pursuant to the Enforcement Arrangement.

Specifically, the further alignment with the New York Convention, as the international standard respecting recognition and enforcement of foreign arbitral awards, is particularly welcome, and likely to engender confidence on the part of foreign practitioners and users.

Most significantly, the enabling of simultaneous enforcement in Hong Kong and the Mainland is a welcome aid to award creditors who, until now, were compelled to choose between pursuing an enforcement action exclusively in Hong Kong or on the Mainland. Additionally, the opportunity to apply for interim measures on the Mainland even *after* the issuance of the arbitral award should serve to provide for greater procedural certainty respecting avenues for recognition and enforcement.

the Courts of the Mainland and of the Hong Kong Special Administrative Region. An English translation is available here.

[32] Fei Ning, Jiang Hong, et al., Annual Review on Commercial Arbitration in China (2020), Commercial Dispute Resolution in China, p. 5.

[33] The HKIAC, The Interim Measures Arrangements: One Year On, available here.

[34] The HKIAC, Interim Measures Arrangement FAQs, available here.

At the same time, it remains to be seen how the shift to a "*seat*"-based approach under Article 2 of the Supplemental Arrangement will concretely impact the attractiveness of the Mainland as an arbitration seat for major foreign arbitral institutions, since still no corresponding amendments have been introduced specifically to the relevant Mainland legislation. It is fair to say that notwithstanding the welcome existence of certain few Mainland court decisions periodically holding that foreign arbitral institutions are not prohibited from administering arbitration on the Mainland, full clarity on the issue will not emerge without specific Mainland legislation to the same effect.

In this regard, the amendments contained in the recently published consultation draft of revisions to the Arbitration Law of the PRC, which foresees that arbitral institutions may facilitate "arbitration-related business," is a commendable step in the right direction. At the same time, it would appear advisable to seek further precision in the draft in order to completely eliminate ambiguities and legal uncertainties.

Furthermore, the Supplemental Arrangement stops short of shifting from an "*institution*"-based approach regarding not only the recognition of awards, but also interim measures on the Mainland. It is still the case that only parties to arbitration proceedings that are conducted by officially recognized arbitration institutions under Article 2 of the Interim Measures Arrangement are permitted to apply for interim measures on the Mainland.[35] In addition, it might have been desirable to include time frames in which courts would be obliged to assess applications for interim relief, which are currently lacking in both the Interim Measures Arrangement and the Supplemental Arrangement. Such stipulations would clearly be conducive to accelerating the pace of court proceedings pending in Mainland courts, and thereby further bolstering the confidence of foreign users in them.

Overall, the Supplemental Arrangement enhances the already existing expectation of the continuous growth of China-related arbitration cases and the rising attractiveness of Hong Kong as an arbitral seat for Mainland-related disputes. This is the case in particular with regard to emerging areas of arbitral activity such as the Belt and Road Initiative and overall Chinese outbound investment.

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[35] Pursuant to Article 2 of the Interim Measures Arrangement: "*The list of such institutions or permanent offices referred to above is to be provided by the HKSAR Government to the Supreme People's Court and be subject to confirmation by both sides.*"