Full Implementation of the Arbitration (Amendment) Ordinance 2021: Avoid Falling Between Two Stools

The Hong Kong Arbitration (Amendment) Ordinance 2021 (the "2021 Amendment"), which will be fully implemented on May 19, 2021,[i] will remove the restriction currently under Section 93 of the Arbitration Ordinance[ii] that prohibits parties from enforcing an arbitral award in Hong Kong if an application to enforce the award has already been made in the Mainland unless the award is not fully satisfied by the enforcement in the Mainland or elsewhere.

The implementation of the 2021 Amendment is widely welcomed, as it eliminates the possible situation where an applicant falls between two stools, as discussed in the case below.

Analysis

Section 93 reflects Article 2 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong (the "Original Arrangement"), which restricts an applicant who intends to enforce an arbitral award from filing applications for enforcement with the relevant Courts of the Mainland and Hong Kong "*at the same time*."

As explained in *Shenzhen Kai Loong Investment and Development Co. Ltd. v CEC Electrical Manufacturing (International) Co. Ltd.* [2001-2003] HKCLRT 649, the activities restricted by Section 93 included double enforcement as well as double recovery (i.e., an applicant should not be allowed to make concurrent applications in Hong Kong and in the Mainland to double-enforce an arbitral award, which may result in double recovery).

However, such restriction may result in the winner in an arbitration falling between two stools, as in the case of *CL v SCG* [2019] HKCFI 398. Below is a quick recap of what happened:

- February 17, 2011 – CL won an arbitral award, whereby SCG was ordered to pay about US$2.1M.
- July 7, 2011 – CL applied to the Shenzhen Intermediate People's Court in the Mainland to enforce the award.
- March 1, 2016 – The Mainland court made a final ruling and rejected CL's application for enforcement.
- February 6, 2018 – CL applied to courts in Hong Kong to enforce the award.
- In a decision dated February 18, 2019, the Hong Kong Court of First Instance held that the six-year limitation period to enforce the award commenced in 2011 (i.e., soon after the award was rendered) and expired in 2017. Therefore, CL's application to the Hong Kong courts in 2018 was too late, and thus time-barred.

Apparently, CL fell between two stools. On one hand, when CL filed the application for enforcement in the Mainland in 2011, CL was prohibited from applying in Hong Kong at the same time because of Section 93. On the other hand, when CL applied in Hong Kong in 2018 after the application in the Mainland had been rejected, it was too late, thus time-barred.

In hindsight, CL should have filed an application in Hong Kong as soon as its application was rejected by the Mainland Courts in March 2016, or in any event before the six-year limitation period ended in 2017. In reality, however, CL was unfortunately left with no remedy in the Mainland or in Hong Kong.

In the Decision in the CL case, the Hong Kong Court of First Instance observed that "*However unfair may be the consequence*," any remedy "*can only be provided by statutory amendment. In the meantime, applicants will have to consider withdrawing and procuring determination of a pending application for enforcement on the Mainland, before applying for enforcement in Hong Kong prior to the expiry of the relevant limitation period*."

In light of the above, the 2021 Amendment removes the restriction against filing in both jurisdictions at the same time, which is consistent with the observation of the Hong Kong Court of First Instance.

The 2021 Amendment is also a reflection of the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong

(the “Supplemental Arrangement”) dated November 26, 2020, which lifts the restriction on enforcing an arbitral award in both Mainland China and Hong Kong “at the same time” by replacing Article 2 of the Original Arrangement with Article 3 of the Supplemental Arrangement. The Supplemental Arrangement also provides that (1) 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, and (2) 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, which is designed to address the mischief of double recovery discussed in the *Shenzhen Kai Loong* case.

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