



PROPOSED AMENDMENTS TO HONG KONG'S ARBITRATION ORDINANCE—MACAO: THE MISSING PIECE

The Arbitration (Amendment) Bill 2013 (the “Bill”) was gazetted by the government of the Hong Kong Special Administrative Region (“Hong Kong”) on March 28, 2013. The Bill contains a number of proposed amendments to the Hong Kong’s Arbitration Ordinance (Cap. 609) (the “Arbitration Ordinance”), the most significant being the introduction of new provisions relating to the enforcement of arbitration awards made in the Macao Special Administrative Region of China (“Macao”). Another proposed amendment of great significance to arbitration practitioners is the introduction of provisions related to the enforcement of emergency relief granted by an emergency arbitrator. This *Commentary* discusses the purpose and key features of these two amendments proposed under the Bill.

ENFORCEMENT OF MACAO ARBITRATION AWARDS

Although Macao enacted a modern international arbitration law in 1998 (Decree-Law 55/98/M) based largely on the UNCITRAL model law, Macao has never

been considered an attractive place for international arbitration. This is undoubtedly due to issues concerning the enforcement of Macao arbitration awards in other states and other regions of the People’s Republic of China (the “PRC”). Before looking at the proposed amendments to the Arbitration Ordinance, it is worthwhile to review the background concerning these enforcement issues.

Enforcement of Macao Awards in Other States. The ability to enforce an arbitration award in a state other than where the award was made is a very important factor in choosing an appropriate place to hold an arbitration, particularly where the arbitration is of an international nature (for example, one or both of the parties, or their assets, are located in a state other than where the arbitration is held). In this regard, it is important that the award be rendered in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”), which greatly facilitated the mutual enforcement of arbitration awards among its 148 member states.

Although Portugal acceded to New York Convention in 1995, it was not until late 1999 that Portugal declared to the United Nations that the New York Convention would apply to Macao (which was at that time under Portuguese rule) and would take effect as of February 10, 2000. Macao was, however, returned to the PRC on December 20, 1999 (the “Handover”), and although the PRC was also a party to the New York Convention at that time, the PRC did not confirm to the United Nations that it would apply the New York Convention to Macao until July 19, 2005.

Thus, it was not until mid-2005 that it could be said with certainty that the New York Convention applied to arbitration awards made in Macao.

Enforcement of Macao Awards in Mainland China. The enforcement of Macao arbitration awards within other regions of the PRC is another important factor to consider in choosing Macao as a forum for arbitration. There are three separate legal regimes within the PRC, namely mainland China, Hong Kong, and Macao. The New York Convention applies only as between states and is therefore of no use to a party seeking to enforce an arbitration award made in one region of the PRC in another region of the PRC.

As with the return of Hong Kong to the PRC in 1997, a legal vacuum was created upon the return of Macao to the PRC in 1999, in that an arbitration award made in Macao was no longer considered to be a “foreign award” when it came to enforcement in mainland China. Whereas Hong Kong was quick to fill this legal vacuum by way of the Arrangement for Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR signed in June 1999 (the “Hong Kong Arrangement”), Macao did not fill this vacuum until January 1, 2008 upon the signing of the Arrangement between the Mainland and the Macao SAR on Reciprocal Recognition and Enforcement of Arbitral Awards (the “Macao Arrangement”).

Therefore, until 2008, there was no effective mechanism for enforcing a Macao arbitration award in mainland China.

Enforcement of Macao Awards in Hong Kong. Having rectified its enforcement deficiencies in respect of other states and mainland China, there still remained an obvious gap in

the mutual recognition and enforcement of arbitral awards between Hong Kong and Macao. Finally, on January 7, 2013, an agreement called the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR (the “HK-Macao Arrangement”) was signed. The HK-Macao Arrangement is similar to the Hong Kong Arrangement and the Macao Arrangement and completes the missing piece of the puzzle for mutual recognition and enforcement of arbitral awards within all three legal regimes of the PRC.

The HK-Macao Arrangement is in the spirit of the New York Convention and provides that the Hong Kong courts shall recognize and enforce arbitration awards made in Macao pursuant to the laws of arbitration of Macao, and, conversely, the courts of Macao shall recognize and enforce arbitration awards made in Hong Kong pursuant to the laws of arbitration of Hong Kong.

The amendments proposed under the Bill serve to enshrine the HK-Macao Arrangement in the Arbitration Ordinance. In particular, a new section (Section 98A) will be added entitled “Enforcement of Macao Awards,” setting out the formal requirements for enforcing Macao awards in Hong Kong, along with grounds for refusing such enforcement. The grounds for refusing to enforce a Macao award are identical to those for refusing to enforce to an award covered by the New York Convention and for mainland China awards. Thus, for all practical purposes, arbitration awards made in Macao are placed on the same footing as awards made in a New York Convention state when it comes to enforcement.

ENFORCEMENT OF EMERGENCY RELIEF GRANTED BY AN EMERGENCY ARBITRATOR

The Need for Emergency Relief. The ability to obtain interim measures in arbitration proceedings, for example orders to preserve evidence or assets, or orders to obtain security for costs, is a very important aspect of arbitration and, as with enforcement issues, plays a key role in establishing the suitability of a place to hold an arbitration. Unlike litigation, where a judge is available to order interim relief as soon as a writ is served (or sometimes even before a writ is served), upon commencing arbitration proceedings it typically takes

anywhere from two weeks to three months to establish the arbitral tribunal. In the meantime, the parties may be able to make applications to the courts for interim measures in support of the arbitration, such as the preservation of evidence and property; however, such court-ordered interim measures are not possible in every jurisdiction.

In view of the time lag between commencing arbitration proceedings and the establishment of the arbitral tribunal, there is a trend for international arbitration rules to incorporate emergency arbitrator procedures under which an arbitrator can be appointed at short notice by the relevant arbitration institution and can proceed to hear the parties and make orders for so-called “emergency relief.” This applies to the 2010 Arbitration Rules of the Singapore International Arbitration Centre (“SIAC”), as well as the 2012 Rules of Arbitration of the International Chamber of Commerce (“ICC”).

Proposed Amendments to the HKIAC Administered Arbitration Rules. The recent proposed amendments to the Hong Kong International Arbitration Centre (“HKIAC”) Administered Arbitration Rules (which are anticipated to come into effect in May 2013) also incorporate a provision for the appointment of an emergency arbitrator. Under these rules, an application for the appointment of an emergency arbitrator can be made concurrent with, or following, the filing of a Notice of Arbitration.

An application for emergency relief under the proposed amendments to the HKIAC rules will need to include details such as the description of the circumstances giving rise to the application and the underlying dispute, why emergency relief is sought, and why the applicant cannot wait until the tribunal is constituted. An emergency arbitrator will normally be appointed within two days following the HKIAC’s acceptance of the application, and a decision on the application will normally be made within 15 days from the date on which the emergency arbitrator received the file from the HKIAC. There are also new procedural measures, including those relating to an emergency arbitrator’s power to conduct proceedings, the effect of his decision, his ability to act as an arbitrator in subsequent proceedings, and the availability of judicial remedies.

Proposed Amendments to the Arbitration Ordinance. The Arbitration Ordinance is currently silent on the subject of emergency arbitrators, and it is debatable as to whether or not the definition of “arbitral tribunal” would include an emergency arbitrator. This is significant because under Section 61 of the Arbitration Ordinance, an order or direction of an “arbitral tribunal” is enforceable in the same manner as an order or direction of the Court. The amendments introduced by the Bill foreshadow any legal debate on this issue by introducing a new part entitled “Part 3A—Enforcement of Emergency Relief” that expressly provides that emergency relief granted by an “emergency arbitrator” (whether in or outside of Hong Kong) is enforceable in the same manner as an order or direction of the court. An “emergency arbitrator” is defined broadly—it not only covers emergency arbitrators appointed under the arbitration rules of a permanent arbitral institution (such as the ICC or the SIAC), but also under whatever arbitration rules have been agreed to or adopted by the parties.

As with the enforcement of orders or directions of an arbitral tribunal, leave of the Hong Kong court is required to enforce emergency relief made by an emergency arbitrator. However, in contrast to the existing provisions concerning the enforcement of orders or directions of an arbitral tribunal, the proposed provisions for the enforcement of emergency relief provide that the Hong Kong court may refuse to grant leave for enforcement unless the party seeking to enforce the emergency relief can demonstrate that the temporary measures ordered by the emergency arbitrator do one or more of the following:

- “(a) maintain or restore the status quo pending the determination of the dispute concerned;
- (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied;
- (d) preserve evidence that may be relevant and material to resolving the dispute;
- (e) give security in connection with anything to be done under paragraph (a), (b), (c) or (d);
- (f) give security for the costs of the arbitration.”

Thus the scope of emergency relief ordered by an emergency arbitrator that the Hong Kong court will enforce is somewhat more limited than that ordered by an arbitral tribunal, which has no such restrictions. This is perhaps a reflection that the measures ordered by an emergency arbitrator should actually be “emergency” in their nature and will prevent abuse of the emergency arbitrator procedure.

CONCLUSION

The amendments to the Arbitration Ordinance proposed under the Bill complete the missing piece of the enforcement regime for arbitration awards made within different regions of the PRC by putting arbitration awards made in Macao on the same footing as those made in mainland China or New York Convention states for the purpose of enforcement. The amendments also reflect the growing use of emergency arbitrators and clarify that emergency relief ordered by an emergency arbitrator will be enforceable in Hong Kong in broadly the same way as orders and directions of an arbitral tribunal.

The proposed amendments will be welcomed by the international arbitration community and demonstrate Hong Kong’s proactiveness in maintaining itself as a leading regional arbitration center.

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