

Comparisons between Hong Kong Arrangement and Macau Arrangement

—on recognition and enforcement of inter-regional arbitral awards

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Abstract — The growth in commercial transactions with Mainland China, Hong Kong Special Administrative Region and Macau Special Administrative Region have lead to an increase in disputes. Recognition and enforcement for inter-regional arbitration in China is becoming more and more important. Macau Arrangement came on stage after Hong Kong Arrangement, so it learns from the successful experience of Hong Kong Arrangement, and improve the deficiency of Hong Kong Arrangement.

Keywords—Hong Kong Arrangement; Macau Arrangement; inter-regional arbitration

I. INTRODUCTION

Arbitration has come to play an increasingly important role in the People's Republic of China. Arbitration benefits parties not only by ensuring procedural fairness, but also by providing predictability, lowering attorney fees, and increasing the privacy and expertise in decision making [1]. As a result of these advantages, arbitration is now the preferred method to resolve international commercial disputes in China. As we can see in the two charts below, both the amounts and the caseload are increasing steadily over the last ten years [2]. The recognition and enforcement of foreign arbitral awards is of paramount importance for the success of international commercial arbitration. Unless parties are assured that at the end of arbitration proceedings they will be able to enforce the award, if not complied with voluntarily, a favorable award will have no practical efficacy. Recognition and enforcement of foreign arbitral awards may be crucial especially when the compulsive power of state courts is necessary for the performance of the award by the unsuccessful party. If the losing party does not comply with the award, there can be no enforcement without resorting to a state power, which will normally be exercised by the courts [3].

Hong Kong and Macau are former colonies of the United Kingdom and Portugal, handed over to China in 1997 and 1999, respectively, in accordance with the Sino-British Sino-Portuguese Joint Declarations (1984) and Sino-Portuguese Joint Declarations (1987). After their reversion to China, these two international covenants granted these territories "a high

degree of autonomy", holding executive, legislative and independent judicial power, including that of final adjudication.

CIETAC Annual Caseload (2006–2015)

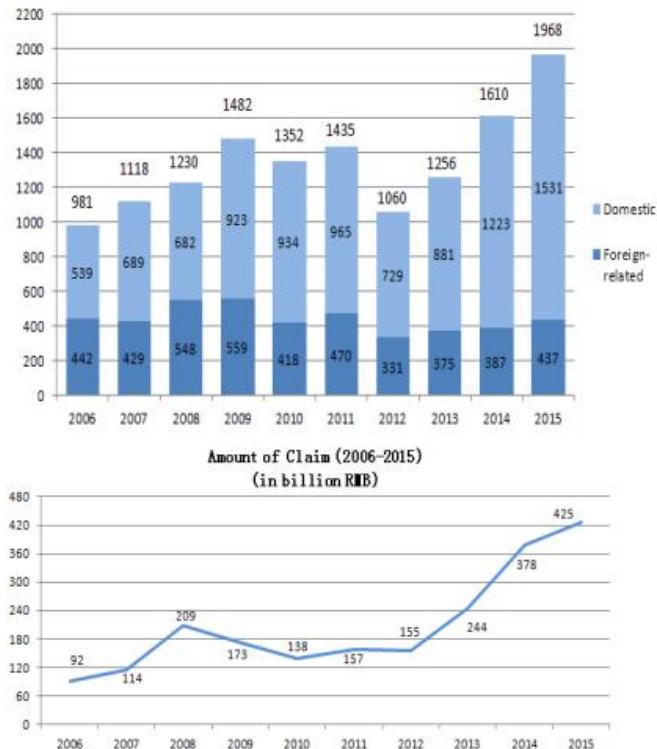


Fig. 1. and 2. CIETAC Amounts and Caseload

on. The socialist system and policies shall not be leading power in those two regions, and the previous capitalist system and way of life shall remain unchanged for 50 years [4]. With closer economic and trade relations with mainland, Hong Kong and Macau, enjoy a special arbitration relationship with the Mainland. Prior to their return to China, arbitral awards from the Mainland were deemed as foreign arbitral awards, and thus the general rule governing this issue was applied. Furthermore, given that the New York Convention was applicable to Hong Kong by virtue of the extension of territorial application made by the United of Kingdom, and the

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recognition and enforcement of arbitral awards between China and British Hong Kong were governed by the New York Convention. The authority of Mainland lined to treated Hong Kong and Macau arbitration as foreign-related arbitration, while actually inter-regional arbitration may be more appropriated, because of the parallel effective legal systems. Nonetheless, in the post-handover era, a new regulatory arrangement between China and its two SARs is necessary [5].

The Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region were adopted at the 1069th meeting of the Judicial Committee of the Supreme People's Court on June 18, 1999. As agreed upon by the representatives of the Supreme People's Court and the Hong Kong Special Administrative Region after negotiations, these Arrangements were issued by the Supreme People's Court in the Mainland in the form of judicial interpretation and came into force on February 1, 2000. This Arrangement is modeled on the New York Convention and the main contents of the Arrangement are as follows:[6]

(1) In accordance with Article 95 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, after negotiations between the Supreme People's Court and the Government of the Hong Kong Special Administrative Region (hereinafter referred to as the "Hong Kong SAR"), the courts of the Hong Kong SAR agree to enforce the arbitral awards made by mainland arbitral institutions in accordance with the Arbitration Law of the People's Republic of China, and the people's courts in the Mainland agree to enforce the arbitral awards made in the Hong Kong SAR in accordance with the Arbitration Ordinance of the Hong Kong SAR;

(2) Where one party fails to perform an arbitral award made in the Mainland or the Hong Kong SAR, the other party may apply for the enforcement of the arbitral award to the competent court at the place of domicile of the respondent or at the place where the respondent's property is located. "Competent court" means the intermediate people's court in the Mainland at the place of domicile of the respondent or the place where the respondent's property is located in the Hong Kong SAR. Where the domicile of the respondent and the places where the respondent's property is located are in both the Mainland and the Hong Kong SAR, the applicant shall not concurrently file applications with the competent courts in both regions. Only when debts cannot be fully repaid through enforcement by the court in one region may the applicant apply for enforcement to the court in the other region regarding the deficit. The total amount repaid through enforcement of the arbitral award by the courts in both regions shall not exceed the amount determined in the arbitral award.

(3) To apply to the competent court for enforcement of an arbitral award made in the Mainland or the Hong Kong SAR, the applicant shall submit a written application for enforcement, an arbitral award and an arbitration agreement. The time limit for an applicant to apply to the competent court for enforcement of an arbitral award made in the Mainland or the Hong Kong SAR shall be governed by the time limit provisions of the laws of the place of enforcement. After

receiving an application for enforcement of an arbitral award submitted by an applicant, the competent court shall process and enforce the arbitral award under the legal procedures of the place of enforcement;

(4) The arrangement is also clarify under which circumstances the competent court may refuse to enforce the arbitral award. This is modeled on the Article 5 of New York Convention. Where the competent court finds that the subject matter of the difference is not capable of settlement by arbitration under the law of the place of enforcement, the enforcement of the arbitral award may be refused. Where the court in the Mainland finds that the enforcement of the arbitral award would be contrary to the public interest of the Mainland, or the court of the Hong Kong SAR decides that the enforcement of the arbitral award in the Hong Kong SAR would be contrary to the public policy of the Hong Kong SAR, the enforcement of the award may be refused;

(5) Regarding applications for enforcement of arbitral awards from July 1, 1997 to the effective date of these Arrangements, both the Mainland and the Hong Kong SAR agree that: Where no application for enforcement of an arbitral award was filed with the court of the Mainland or the Hong Kong SAR for some reasons from July 1, 1997 to the effective date of these Arrangements, if the applicant is a legal person or any other organization, the applicant may file an application within six months after these Arrangements come into force; or if the applicant is a natural person, the applicant may file an application within one year after these Arrangements come into force.

Similar to Hong Kong, the Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards came in 2008. The Arrangement was adopted at the 1437th meeting of the Judicial Committee of the Supreme People's Court on September 17, 2007 and came into force as of January 1st, 2008 [7]. The Macau Arrangement absorbs the advantages of Hong Kong Arrangement and adds some adaptations on conditions and procedures of recognition and enforcement to make it reasonable. There are 16 articles and the main contents are as follows:

(1) When the people's courts in the mainland admit and enforce the civil and commercial arbitration awards made by arbitral institutions and arbitrators of the Macau SAR in accordance with the arbitration laws and regulations of the Macau SAR, and when courts in the Macau SAR admit and enforce the civil and commercial arbitration awards made by arbitration institutions in the mainland in accordance with the Arbitration Law of the People's Republic of China, this Arrangement shall apply;

(2) For an arbitration award made in the mainland or the Macau SAR, if one party concerned refuses to comply with it, the other party may apply to the competent court at the place of domicile, the place of residence or the locality of the property of the party against whom the application for recognition and enforcement is filed. In the mainland, the intermediate people's courts have the right to accept applications for admitting and enforcing arbitration awards. Where two or more intermediate people's courts have

jurisdiction over an application, the party concerned may choose to file the application with one of them;

(3) To apply to the competent court for admitting and enforcing an arbitration award, an applicant shall submit an application form, the identity certificate of the application, the arbitration agreement and the arbitral award or the arbitration mediation;

(4) If one party concerned applies for suspending enforcement, it/he shall submit to the court of enforcement the legal instrument proving that other court has accepted the application to set aside the award;

(5) A court may, before or after accepting an application for admitting and enforcing an arbitration award, take protective measures against the property of the party against whom the application is filed in accordance with the legal provisions of the locality of the court if the application requires to do so;

(6) From December 20th, 1999 to the date when this Arrangement comes into force, the time limit for a party concerned to apply to the mainland for admitting and enforcing an arbitration award made by an arbitration institution or arbitrator in the Macau SAR shall calculated since the date when this Arrangement comes into force.

In a word, the Macau Arrangement absorbs the advantages of Hong Kong Arrangement and adds some adaptations on conditions and procedures of recognition and enforcement to make it reasonable.

II. CONDITIONS AND PROCEEDINGS

The conditions and proceedings, in Hong Kong Arrangement, are mostly similar to those in the New York Convention. But the review is limited to procedure, paying efforts to review neither the verification of the facts nor the applicable law.

A. Conditions

There existed two kinds of situations of refusing reorganization and enforcement, except these two kinds of situations, the arbitration awards should be granted reorganization and enforcement. The first kind is five classes of cases which must be established on evidences provided by parties. Another kind situation is that the courts have the power to initiate examination to the award, and can do some discretion on judging the nature of arbitral of the dispute and the application of the “public policy” [8].

B. Jurisdiction

If apply for the enforcement of an award in the mainland, the court, which has jurisdiction, is either the intermediate courts in the respondent locality or the one in the property locality. Only one court can the applicant apply to. If the duty property is insufficient to cover the award, while the applicant have the right to apply to the other court. And the just court enjoyed the jurisdiction of the application of the reorganization and enforcement of an arbitration award in HK especially referred to the High Court of Hong Kong SAR.

C. Duration

The duration to put forward application in HK Arrangement is regulated as follows: “ During July, 1, 1997 to the effective date of this arrangement, legal persons or other organizations applicants hadn’t put forward the application for some reasons could apply in 6 months after the effective date, if the applicants are natural persons, the application can be done in 1 year after the effective date.” The applications refused after July 1, 1997 but prior to the effective date of this arrangement, can be applied again.

III. ADAPTATIONS OF MACAU ARRANGEMENT

A. Scope of the courts which have jurisdiction on execution application

In Hong Kong Arrangement, if either party fails to fulfill arbitral awards made in the Mainland or Hong Kong, the other party can apply for the relevant courts, which is in respondent locality or the place property situated. While the Macau Arrangement adds the competence of the habitual residence court, according with rules on domicile and habitual residence in modern private international law and our domestic law. In this way, the Macau Arrangement expand the scope of the courts for choose only find to resolve the passive conflict of the single domicile.

B. Level of the trial court

Either the Hong Kong Arrangement or the Macau Arrangement appointed the intermediate courts in mainland court accept the enforcement of the arbitral award. Even though writing in the Hong Kong Arrangement only express enforcement instead of enforcement and recognition, we still can consider that both recognition and enforcement of the arbitral award made in the HK or Macau SAD should be hold in intermediate court in the Mainland. In Hong Kong, the court receiving the arbitral award made in mainland is the Supreme Court of Hong Kong SAD.

However, in Macau, the court differs on various actions, intermediate courts have authority to recognition and primary courts have authority to enforcement. The authority of intermediate courts can avoid the liberty on examining of the validity of the awards and push the practice of the enforcement. Due to the more prudence of recognition than of enforcement, the leading tenet is that the Macau model consistent with the mainland model, following the main preference to mutual recognizing arbitral awards to push enforcement.

There are three reasons for this difference. First, Hong Kong and Macau do not belong to the same legal system. Second, the court systems in the two districts differ far away. Last, Hong Kong Arrangement came out earlier than Macau Arrangement.

C. The expanding option range of application courts

According to the Article 3 of Macau Arrangement, if the places all in mainland rather respectively in the mainland and he Macau SDR, parties only can apply to the intermediate

court in one of them rather than apply to all of them at the same time.

This arrangement totally poles apart from Hong Kong practice that refuses parties respectively applying to relevant courts in both sides; only when the property located in one side is insufficient to discharge, can parties apply to the other side court for enforcement. Macau Arrangement accounting for parties' benefits, adopted a more reasonable and more human on way increasing the possibility of repeat examine and the workload to the court to ensure parties' interests to the hilt.

D. Writs the court required

Besides the petition, award and arbitral agreement, Macau Arrangement also require identification paper, the reference or identification and date of the application arbitration award and conciliation statement.

E. Not recognize and execution

Macau Arrangement regulates separately, the five conditions cannot be recognition, and the regulations on procedures, arbitral matters, or the constitution of arbitral tribunal are similar with Hong Kong Arrangement. However, with "Under the execution place law, the matters in disputes cannot be solved in arbitration, and then the award cannot be recognized and enforced." Macau Arrangement has separate provision between recognition and enforcement, in addition to the above conditions.

F. The reservation of public order

Same with Hong Kong Arrangement, Macau Arrangement have contents on the reservation of public order [9], however, Macau Arrangement adds the violation of basic principles to the reservation of public order. Besides public order and social public interests, it is the Macau Arrangement that the most clearly has the violation of basic principles currently contained the reservation of public order in currently judicial circle.

IV. RELATIVE IMPROVEMENT AND PROGRESS OF MACUA ARRANGEMENT

A. Suspension of execution

In Macau Arrangement, one party apply to courts for enforcement, while the other party apply to court for repealing the award, if the respondent tender guarantee and applying for suspension of execution, the court can decide to suspend execution. This more agile model of great significance in practice offers more procedures for courts in settling disputes like this.

B. Property preservation

This is the greatest light spot in Macau Arrangement. The appeal of building property preservation regulations never disappeared, national legislation always have margin on

weather parties can put forward the property preservation before or after applying for enforcement. Even the latest "explanation on some application issues of arbitration law of the People's Republic of China" also had no provisions for this margin, which easily lead lag in judicial practice cannot offer efficient and timely protection to parties' interest.

V. CONCLUSIONS

Compared Hong Kong Arrangement, the Macau Arrangement is more abundant and superior, especially including privations on property preservation. Hong Kong Arrangement has no regulations on property preservation, even Hong Kong laws have relating regulations, before the court judges enforcing the award, Hong Kong laws have no clear provisions on whether parties can apply for property preservation, so the arrangement is a big progress not only for enforcement of awards but for national legislations relating arbitral [10].

Because property preservation often existed in urgency situations, if take effective measures were not taken in time, the other party very likely transfer and disperse property. The set in Macau Arrangement is second to none and brighten everyone's eyes in this way to guarantee effective realization of the parties' lawful rights and interests, preventing debtor surreptitiously withdrawn funds, transfer-in asset for evading of loans, making arbitral award a dead letter. What's more, allowing applicant's property preservation have is instructive to completing our arbitration property preservation system and give a big push to development of arbitral undertakings.

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