Enforcement of arbitral awards in Hong Kong: overview

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ENFORCEMENT OF ARBITRAL AWARDS
Definitions and preliminary proceedings

1. What is the definition of an arbitral award in your jurisdiction for the purpose of enforcement proceedings?

With enforcement, arbitral awards made outside Hong Kong are classified into four categories:

- Convention awards, which means awards made in a state or the territory of a state (other than China) that are a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).
- Mainland awards, which means awards made in mainland China (People’s Republic of China) by a recognised tribunal authority in accordance with the Arbitration Law of the People’s Republic of China.
- Other foreign awards, which means any other foreign awards that do not fall within the above two categories. Other foreign awards include awards obtained in Hong Kong and Taiwan.
- Macao awards, which means awards made in Macao in accordance with the arbitration law of Macao, are enforceable in the same way (section 9B(1), Arbitration Ordinance (Cap 609)(AO)).

Although there are definitions of “convention awards”, “mainland awards” and “Macao awards”, there is no statutory definition of “award” or “arbitral award” for the purpose of enforcement proceedings. However, “an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with leave of the Court” (section 84, AO).

According to section 84 of the AO, it appears that, in the context of enforcement, an award has a broad meaning that covers any award given by an arbitral tribunal in an arbitral proceeding.

2. Are decisions in preliminary/provisional proceedings recognised and enforceable?

With enforcement, the rules that apply to the three types of awards are slightly different. However, enforcement will be refused for all three types of awards if the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made:

- Other foreign awards (section 86(1)(i), Arbitration Ordinance (Cap 609) (AO).
- Convention awards (section 89(2)(i), AO.
- Mainland awards (section 95(2)(i), AO).

Applicable conventions

3. What conventions is your jurisdiction a contracting party to?

Except for the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), Hong Kong has not entered into any multilateral conventions or bilateral treaties in respect of recognition and enforcement of foreign arbitral awards.

Enforcing awards

4. What is the applicable statutory framework for enforcement of awards?

An award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a Court of First Instance judgment that has the same effect, but only with the leave of the court. If leave is granted, the court can enter judgment in terms of the award.

Enforcement of an award can be refused under different circumstances, depending on the type of the award in question:

- Convention awards (section 89, Arbitration Ordinance (Cap 609)(AO)).
- Mainland awards (section 95, AO).
- Other foreign awards (section 86, AO).

5. What are the grounds for refusing enforcement?

Domestic awards

The grounds for refusing enforcement that are applicable to “other foreign awards” apply to Hong Kong awards (section 86, Arbitration Ordinance (Cap 609) (AO).

International awards

Convention awards and mainland awards. Grounds for refusal are contained in the AO (see Question 2). Other grounds for refusal of enforcement for convention awards and mainland awards are as follows (section 89 and section 95, AO):

- A party to the arbitration agreement was under some incapacity.
- The arbitration agreement was not valid under the governing law of that agreement or the law of the seat of arbitration.
- The party against whom the award is to be enforced was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or otherwise unable to present its case.
• The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.

• The procedure of the arbitration or the composition of the arbitral authority was not in accordance with the arbitration agreement or the law of the seat of arbitration.

• The award is for a dispute that is not capable of settlement by arbitration under the law of Hong Kong.

• It would be contrary to public policy to enforce the award.

Those grounds are exhaustive so the courts cannot refuse to enforce a convention or mainland award based on other reasons.

Other foreign awards. With foreign awards, the grounds for refusal of enforcement are essentially the same as those applicable to convention and mainland awards. However, unlike convention and mainland awards, the courts can refuse the enforcement of other foreign awards based on any other reason as the court considers it just to do so (section 86(2)(c), AC). The common law position on the enforcement of other foreign awards is that the court will refuse leave to enforce only if there are real grounds for doubting the validity of the award or where the award is not in a form that can be entered as a judgment. This section is possibly intended to preserve these residual grounds for refusing enforcement.

The courts can also reject registration of a judgment if at the date of the application for registration either (section 4(1), Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319)):

• It has been wholly satisfied.

• It could not be enforced by execution in the country of the original court.

6. Is the enforcing court required to examine the refusal grounds during the enforcement proceedings ex officio?

The person against whom enforcement is sought must prove if any of the grounds of refusal exists (sections 86 and 89, Arbitration Ordinance (Cap 609)).

7. What is the effect of pending challenge proceedings in the foreign state where the decision is granted?

With enforcement of foreign arbitral awards, if leave to enforce is granted, an order giving leave will be drawn up and served on the debtor. Within 14 days after service of the order, the debtor can apply to set aside the order. The award is not enforced until after the expiration of that period or until the application is finally disposed of where the debtor applies to set aside the order.

8. What types of arbitral awards are enforceable?

The courts take a pro-enforcement approach to foreign arbitral awards and there is no limit to the types of awards that can be enforceable. It is possible to assume that all types of awards can be enforceable subject to any applicable grounds for refusal of enforcement.

9. Can parties seek to enforce only part of the award?

In JJ Agro Industries (P) Ltd v Texuna International Ltd [1992] 2 HKLR 391, the Court held that “if an award contained an objectionable part it would be absurd if the remainder of the award was to fail as well”. Provided that the non-objectionable part is severable from the objectionable part, it is possible to enforce the non-objectionable part of the award. See also sections 86(3), 89(3) and 95(3) of the Arbitration Ordinance (Cap 609).

10. Are any class of awards excluded from recognition and enforcement? If so, what types of awards?

All types of awards are generally enforceable unless there is an applicable ground for refusal of enforcement (see Question 8).

11. Will service that does not conform to the requirements of international treaties/regulations in force automatically result in a denial of the enforcement of an award?

For all three types of awards, there is no separate ground of refusal of enforcement on a requirement of proper service. However, if the debtor who is the object of the award was not given proper notice of the appointment of the arbitrator or of the arbitral proceeding or he was otherwise unable to present his case, the enforcement of the award will be refused on application (section 86(1)(c), section 89(2)(c) and section 95(2)(c), Arbitration Ordinance (Cap 609)).

This ground has rarely been successfully invoked and the courts generally adopt the view that the violation of the right of due process must be very serious to warrant non-enforcement of the award.

12. What methods of service are not acceptable against defendants domiciled in the state where enforcement is sought?

See Enforcement of judgments in Hong Kong, Question 10.

Public policy

13. Which country's public policy applies? Does the court approach the issue differently depending on whether the award is a domestic or international award?

Domestic awards

Public policy is not defined in the Arbitration Ordinance (Cap 609). However, the applicable “public policy” is the public policy of Hong Kong.

International awards

The courts’ approach towards the issue of whether the enforcement of an international award is contrary to the public policy of Hong Kong is the same as the approach adopted towards a domestic award (see above, Domestic awards).

14. In which cases and against which awards has the principle of public policy generally been applied?

With enforcement of foreign awards, it is not clear from the law whether refusal on public policy grounds is only limited to
procedural issues or has been extended to the substance of the award. However, most of the case law on this ground is only related to procedural defects, such as bias and misconduct of arbitrators. Nevertheless, public policy considerations can, it is submitted, encompass matters of substantive law.

The public policy ground has normally been invoked in the following cases:

- Where an award was tainted by an appearance of bias (Gao Haiyan v Keeneye Holdings Ltd [2011] HKCE 514).
- Where an award has been procured by behaviour that is criminal, fraudulent, corrupt, oppressive or otherwise immoral or unconscionable (Qinhuangdao Tongda Enterprise Development Co v Million Basic Co Ltd [1993] 1 HKLR 173.

However, the public policy ground for refusing enforcement is narrowly construed and applied and is not used to deal with every conceivable type of procedural error or shortcoming. In Hebei Import & Export Corporation v Polytech Engineering Company Limited [1999] 1 HKLRD 665, the Court of Final Appeal held that "contrary to public policy" means "contrary to the fundamental conceptions of morality and justice of the forum in which enforcement is sought". This is consistent with the Hong Kong courts' pro-enforcement approach towards arbitral awards.

**ENFORCEMENT PROCEEDINGS**

**Procedure**

15. **What is the procedure for enforcing arbitral awards?**

**Domestic awards**

For all three types of arbitral awards, leave can be sought from the courts to enforce the award as a judgment of the court (section 84(1), section 87(1)(b) and section 92(1)(b), Arbitration Ordinance (Cap 609) (AO)).

If leave is granted, the court will in practice enter judgment in terms of the award. Alternatively, the holder of a foreign award can also enforce it by bringing an action on it in Hong Kong. The cause of action is the breach of the arbitration agreement by the other party to the arbitration for not performing the award. This route is not popular as it is procedurally cumbersome. The onus is on the party seeking enforcement to take the matter to trial or persuade the court that the conditions for summary judgment are met. Using the statutory route described above, the burden is shifted to the defendant to prove that any grounds for refusal of enforcement exists.

**Ex parte or on notice.** The holder of the award can file an ex parte application supported by an affidavit to the Court of First Instance (CFI) for leave to enforce the award as a judgment.

**Applicable court.** The enforcement proceedings are in the CFI. Therefore, if the applicant is a corporation, a solicitor must be engaged.

**Limitation period.** Section 4(3) of the Limitation Ordinance (Cap 347) (LO) stipulates that no enforcement proceedings can be brought after the expiration of 12 years from the date on which the cause of action accrued (that is the effective date of the arbitral award).

**Timing.** The length of enforcement proceedings is generally reasonable, although time frames vary depending on whether or not the other party contests the enforcement. Uncontested proceedings can take as little as two to three months.

**Court fees.** The applicant must pay the court fees (Schedule 1, High Court Fees Rules (Cap 4D)) as follows:
- HK$1,045 on sealing a writ of summons (at the start of the proceedings).
- HK$1,045 each on sealing each document used for execution such as a writ of execution, a writ of possession and a prohibition order (at the time of execution).

**Recourse.** Appeal from a decision of the court to grant or refuse leave to enforce an arbitral award is possible because a decision of the court under the AO is to be treated as a CFI judgment. However, a decision of the court regarding leave to enforce an arbitral award can be appealed only with the leave of the court (section 84(3), AO).

**International awards**

The same applies to international awards.

**Ex parte or on notice.** This is the same as domestic awards (see above, Domestic awards).

**Applicable court.** This is the same as domestic awards (see above, Domestic awards).

**Limitation period.** This is the same as domestic awards (see above, Domestic awards).

**Timing.** This is the same as domestic awards (see above, Domestic awards).

**Court fees.** This is the same as domestic awards (see above, Domestic awards).

**Recourse.** A decision of the court to grant or refuse leave to enforce a convention award or a mainland award can be appealed without the leave of the court. Leave is required to appeal other international awards, which include Macao awards (sections 98A(1) and 84(3), AO).

16. **Can the enforcing court review the foreign award if all formalities were complied with and if the award meets all requirements?**

The courts do not review the foreign award where the award meets all requirements for enforcement and no ground of refusal has been invoked. Section 87(1) of the Arbitration Ordinance (Cap 609) (AO) (exhaustively) sets out a list of grounds on which an award can be set aside. However, this setting aside procedure applies only to awards given by tribunals seated in Hong Kong (section 5, AO).

**Formalities**

17. **What are the documentary requirements for enforcement?**

**Documentary requirements**

In the affidavit filed by the award holder in support of his application for leave to enforce the foreign award, a duly authenticated original award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it must be exhibited sections 88, 89 and 94, Arbitration Ordinance (Cap 609) (AO); order 73, rule 10(3), Rules of High Court (Cap 4A) (RHC).

**Authentication**

The original award must be duly authenticated. Where a copy of the award is submitted instead, this must be duly certified. The award must be duly authenticated or certified according to the requirements of the state in which the award was given.

However, the “duly authenticated” and “duly certified” wordings have been interpreted broadly by the courts, holding it to be sufficient that the court is satisfied that it is dealing with a proper and genuine award. In Guangdong New Technology Import and Export Corp Jiangmen Branch v Chiu Shing [1991] 2 HKC 460, a copy of the award with an affirmation by the producing party’s
Hong Kong solicitors that the document is a true copy of the duly authenticated award was held to be sufficient.

18. Is it required to translate the award into the language of the state where enforcement is requested?

Translations
The arbitral award must be translated into English or Chinese (the traditional Chinese script rather than the simplified form that is adopted in mainland China) if it was not made in either of those two languages (sections 85(c), 88(c) and 94(c), Arbitration Ordinance (Cap 609) (AO)).

Other languages
The official languages of Hong Kong are traditional Chinese and English.

Certification
It is necessary for the translation of an arbitral award to be certified by an official or sworn translator or by a diplomatic or consular agent (sections 85(c), 88(c) and 94(c), AO).

19. What is the format of the application for a declaration of enforceability?

An action for a declaration of enforceability can be started by a writ of summons or by originating summons (order 5, rule 4 and order 15, rule 16, Rules of High Court (Cap 4A)).

20. What information must be included in the application regarding the award, the claim as awarded in the award, the facts and legal grounds of the case, and that the judgment is no longer appealable?

An application for leave to enforce a foreign arbitral award must include information as required under the Rules of High Court (Cap 4A) (RHC), which includes but is not limited to (order 73, rule 10(3), RHQ):

- The name and address of the debtor and the applicant respectively.
- The fact that the award has not been complied with or the extent to which it has not been complied with as at the date of the application.

Information other than that set out in order 73, rule 10(3) of the RHC is not required. It is also necessary to exhibit the arbitration agreement and the original award to the supporting affidavit (see Question 20).

21. Is it possible to request the enforcing court for provisional measures pending the enforcement proceedings?

It is possible to request the enforcing court for provisional measures pending the enforcement proceedings (section 21, Arbitration Ordinance (Cap 609) (AO)). The court can grant an interim measure, in relation to any arbitral proceedings that have been or are to be commenced in or outside Hong Kong, on application by any party (section 45(2), AO). Provisional measures can include an interim measure:

- An injunction (sections 35(2) and 45(9), AO).
- An order for preservation of assets out of which a subsequent award may be satisfied (section 35(1), AO).
- An order for preservation of relevant and material evidence (section 35(1), AO).

However, the court requires the party requesting an interim measure to provide appropriate security unless it considers this inappropriate or unnecessary to do so (section 40, AO).

22. Is it required to convert the value of the award into the local currency?

It appears that there is no requirement for the value of the award in a foreign currency to be converted into Hong Kong dollars.

23. Can the enforcing court stay the enforcement proceedings pending the outcome of proceedings to set aside the award at the seat of arbitration? If so, will the court order the party seeking the stay to provide security?

If an application for setting aside the award has been made to a competent authority at the seat of arbitration, the enforcing court can:

- Adjourn the enforcement proceedings for that award if it thinks fit (sections 86(4)(a), 89(5)(a) and 98(5)(a), Arbitration Ordinance (Cap 609) (AO)).
- Order the person against whom the enforcement is invoked to give security (sections 86(4)(b), 89(5)(b) and 98(5)(b), AO).

The decision or order of the court to adjourn the enforcement proceedings or to order that security is given is not subject to appeal (sections 86(5), 89(6) and 98(6), AO).

ACTUAL ENFORCEMENT

24. What is the enforcement procedure when there is a declaration of enforceability?

If the applicant succeeds in the enforcement proceedings, the foreign award becomes enforceable as if it were a judgment given by the court. Therefore, the same actual enforcement procedure for a normal local judgment applies (see Enforcement of judgments in Hong Kong, Question 16).

25. Can defendants oppose the actual enforcement procedure, and if so, on what grounds/defences?

Defendants can oppose the actual enforcement procedure on the grounds set out in sections 86, 89 or 95 of the Arbitration Ordinance (Cap 609), which are the grounds for refusing enforcement (see Question 5).

PROPOSALS FOR REFORM

26. Are any changes to the law currently under consideration or being proposed?

There are currently no proposed changes to the law.
ONLINE RESOURCES

Hong Kong Department of Justice Bilingual Laws Information System


Description. This website sets out all the current ordinances and subsidiary legislation of the Hong Kong Special Administrative Region, in both English and Chinese. This website is an official website and is maintained by the Department of Justice of the Hong Kong Government.

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