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Enforcement of Judgments

Hong Kong

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Law and Practice

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1. Identifying Assets in the Jurisdiction

1.1 Options to Identify Another Party's Asset Position

There are various options presently available in Hong Kong to identify the asset position of another party by conducting the following public searches either in person or online at the relevant departments of Hong Kong:

- business registration search at the Inland Revenue Department;
- company search (including directorship search) at the Companies Registry;
- land search at the Land Registry;
- trade mark registration search at the Trade Marks Registry; and
- vehicle search at the Transport Department.

Apart from the above publicly available information, freezing orders and ancillary asset disclosure orders are also available by making applications with basis to Hong Kong courts.

A party can also instruct private investigators or external companies to compile search reports which would comprise information which is not publicly available through their own database. For example, a party can instruct them to:

- conduct a landed property transaction search to determine if a party has been involved in any landed property transactions in Hong Kong, so that the relevant land search can be conducted against the property identified to ascertain if the party owns such property; and
- conduct a marriage search to identify the name of a party's spouse if there is any suspicion that the spouse is holding any assets for such party.

2. Domestic Judgments

2.1 Types of Domestic Judgments

The following types of domestic judgments are available in Hong Kong.

Default Judgment

A default judgment is a judgment without a trial. It is available where a defendant has failed to file an acknowledgment of service or a defence. It applies where the claim is for liquidated damages, unliquidated damages, detention of goods or possession of land, but not where the claim is not squarely within the four types above.

The defendant may apply to the court to set aside a default judgment after default judgment has been entered against the defendant. This is done by way of summons to a master supported by an affidavit. The rationale behind this is that a default judgment is obtained by reason of the defendant's failure to adhere to the procedural rules, but not on the basis of the court's adjudication of the matter after considering the merits.

When setting aside default judgments, the court distinguishes between an irregular judgment and a regular judgment.

The following scenarios give rise to irregularity:

- bad or ineffective service of the writ;
- premature judgment entered before there had been actual default; or
- where the judgment was obtained fraudulently.

Where the default judgment is obtained irregularly, a defendant is entitled as of right to set aside the judgment.

On the contrary, a defendant is not entitled as of right to set aside a regular default judgment. Instead, the defendant must demonstrate that his or her defence has a real prospect of success. Although not a prerequisite, it is good practice for the defendant to provide a reasonable explanation for his or her default.

Summary Judgment

A summary judgment is a judgment without a trial. It is available where a defendant has no defence to a claim – ie, if the defence is “inherently unbelievable” or “practically moonshine”, or if the defendant has failed to raise a triable issue or question. It applies to every action begun by writ other than:

- an action which includes a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment or seduction;
- an action which includes a claim by the plaintiff based on an allegation of fraud;
- an Admiralty action in rem.

Summary judgment can be ordered either by the court on its own initiative or upon the litigating party's successful application. A litigating party includes a defendant making a counterclaim. It is within the court's power to enter summary judgment on all or part of the claim or grant leave (with or without conditions) for the defendant to file a defence.

If, however, the defendant succeeds in demonstrating cause against a summary judgment, leave can be granted to the defendant to defend the action either conditionally or uncon-

ditionally. The decision whether to grant unconditional or conditional leave is a matter of degree. To secure an unconditional leave to defend, triable issues must be shown, and it must be proven that the defendant's evidence is capable of reasonable belief, and that he or she has a fair or reasonable probability of presenting a real or bona fide defence. Otherwise, where a triable issue has been proven but there is evidence suggesting that the defendant's defence is a sham, or that there is little or no substance in his or her defence, then the court will only grant a conditional leave to defend (eg, the defendant may be required to put up a security).

Final Judgments

A final judgment can be obtained for all types of actions, including a claim for a specified amount of money, injunctive relief, specific performance or declaratory relief.

2.2 Enforcement of Domestic Judgments

Domestic judgments, including judgments which are pending appeal (without a stay), are enforceable. However, where the judgments are pending appeal, usually the judgment debtor will apply to the court for a stay of execution of the judgment before the appeal.

The following options and procedures are generally available and involved for enforcing a domestic judgment in Hong Kong.

Charging Order

This is a court order which imposes a charge on any property or securities owned by the judgment debtor to secure the payment of the judgment debt. An application for a charging order involves two stages: (i) charging order nisi on ex parte basis (ie, without notice to the other party); and (ii) charging order absolute on inter partes basis (ie, the other party is notified of the hearing).

Firstly, the judgment creditor may apply ex parte with a supporting affidavit to a master in chambers for an order to show cause. The charging order nisi granted shall then be registered immediately with the Land Registry if the charging order is over a landed property, in order to put any third party on notice of the same. A sealed copy of the charging order nisi which specifies the hearing time and date of the return date hearing for further consideration shall then be served on the judgment debtor.

At the inter partes hearing stage, a master in chambers will determine if the charging Order Nisi should be made absolute. The charging order absolute granted should be immediately registered against the landed property with the Land Registry.

After the granting of the charging order absolute, the judgment creditor can make an application for an order for sale of the

charged property, assets or securities. The judgment debt can then be discharged using the sale proceeds.

Examination Order

The judgment debtor will be cross-examined on oath by the registrar or such officer as the court may appoint to obtain information on his or her assets. The judgment creditor may apply ex parte with a supporting affidavit to a master in chambers. A sealed copy of the order (which is endorsed with a penal notice stating that if the judgment debtor fails to attend the examination without good cause, the judgment debtor may be arrested and brought before the court for examination) shall be personally served on the judgment debtor ordered to attend the examination. The oral examination will usually be heard by a master in open court.

After the oral examination, and depending on the facts of the case, the following orders can be made by the master:

- an order that the judgment debtor satisfy the judgment debt;
- an order for discovery of further documents;
- an order for further examination; or
- an order for imprisonment.

Writ of Execution and FIFA

A bailiff will seize and sell the judgment debtor's property to repay the judgment debt. The judgment creditor shall first issue a writ of execution. Examples of such writ include:

- a writ of fieri facias – FIFA (to obtain the judgment debt);
- a writ of possession (to obtain repossession of the land);
- a writ of delivery (for the delivery of goods); and
- a writ of sequestration (to enforce judgments that require a person to perform an act within a specified time or abstain from performing any act).

For certain writs of execution, the judgment creditor must apply for leave before issuing the same. After the writ of execution is issued, the judgment creditor is required to make appointment with the Bailiff Office of the Bailiff Section to arrange execution. In case of a FIFA, the bailiff may seize the goods and chattels on the judgment debtor's premises to repay the judgment debt.

Garnishee Proceedings

This requires a third party (usually a bank) which owes money to the judgment debtor to pay the money owed directly to the judgment creditor. An application for a garnishee order involves two stages – (i) garnishee order nisi on ex parte basis, and (ii) garnishee order absolute on inter partes basis.

First, the judgment creditor may apply ex parte with a supporting affidavit to a master in chambers. A sealed copy of the gar-

nishee order nisi which specifies the hearing time and date shall then be served on the judgment debtor.

The garnishee order nisi becomes effective after it is duly served on the bank, meaning that the bank will be prevented from advancing any repayment of debt owed to the judgment debtor.

At the inter partes hearing, a master in chambers will determine if the garnishee order nisi should be made absolute. Usually, a garnishee order absolute will be made where the bank does not challenge its liability to pay the debt owed to the judgment debtor, or where the bank is absent in the hearing. The bank will then be ordered to pay the money held in the judgment debtor's account(s) directly to the judgment creditor.

Winding-up/Bankruptcy Proceedings

This will wind-up the judgment debtor company or bankrupt an individual judgment debtor so that the trustee-in-bankruptcy or liquidator (as the case may be) is empowered to look into the assets and affairs of the judgment debtor.

A judgment debtor is deemed unable to pay its debts if execution of the judgment debt against the judgment debtor is unsatisfied in whole or in part. To commence winding-up/bankruptcy proceedings, the most common ground is to demonstrate that the judgment debtor is insolvent by issuing a statutory demand for payment within 21 days, failing which, the judgment creditor may proceed to present a petition. The court will hear the petition and, if satisfied, grant a winding-up/bankruptcy order. The trustee-in-bankruptcy or liquidator shall be appointed to administer and look into the affairs and assets of the bankrupt, and to distribute the assets to repay the debts according to the priority of the unsecured creditors based on the proof of debt.

Stop Order

Where a judgment creditor is entitled to funds in court, a stop order will prohibit the transfer, sale, delivery out, payment or other dealing with such funds, or any part thereof, or the income thereon.

Where a judgment creditor has an interest in the judgment debtor's securities, a stop order will prohibit the registration of a transfer of such securities, the payment of any dividend or interest in respect thereof, and in the case of a unit trust, any acquisition of, or other dealing with the units by any person or body exercising functions under the trust.

An application for a stop order must be made by summons in the cause or matter relating to the funds in court (ie, in pending proceedings), or, if there is no such cause or matter, by originating summons. The summons must be served on every person whose interest may be affected by the order.

Stop Notice

Where a judgment creditor has an interest in the judgment debtor's securities, a stop notice will enable the judgment creditor to be notified of any proposed transfer or payment of such securities. As long as the stop notice has been served and is in force, the entities on which it is served shall not register a transfer of the securities or take any other steps restrained by the stop notice until 14 days after sending notice thereof to the judgment creditor.

An application for a stop notice can be made by filing a notice in the prescribed form with a supporting affidavit. The applicant must then serve an office copy of the affidavit, and a copy of the notice sealed by the court:

- in the case of stock of any body incorporated within Hong Kong, on that body;
- in the case of stock of any body incorporated outside Hong Kong, being stock registered in a register kept in Hong Kong, on the keeper of the register; or
- in the case of units of any unit trust in respect of which a register of unit-holders is kept in Hong Kong, on the keeper of the register.

2.3 Costs and Time Taken to Enforce Domestic Judgments

The costs involved and length of time it takes to enforce a domestic judgment depend on the enforcement action(s) to be taken and whether enforcement is contested. Generally, it would take at least three months at a cost of at least HKD100,000 for an uncontested enforcement action.

2.4 Post-judgment Procedures for Determining Defendants' Assets

The defendant/judgment debtor can be cross-examined under oath to obtain information on what assets he or she holds and where they are located. In addition, where the judgement debtor is wound-up or bankrupt, the liquidator or the trustee in bankruptcy will investigate the assets and affairs of the judgment debtor.

2.5 Challenging Enforcement of Domestic Judgments

A defendant may challenge summary or final enforcement by appealing the judgment and seeking a stay of enforcement. A defendant may challenge enforcement by seeking to set aside the default judgment on the following grounds:

- the defendant was not validly served with the proceedings (eg, a defendant was not physically in Hong Kong when the proceedings were served on him or her, or the proceedings were not served on him or her at their usual or last known

address, or the proceedings have been returned to the plaintiff through the post undelivered to the addressee);

- the judgment was entered against a person who was dead or against a company which was dissolved or struck off the Companies' Register at the material time;
- the default judgment has been entered before the expiry of the prescribed time limit for the defendant to serve the acknowledgment of service or the defence;
- where leave is required to enter a default judgment in exceptional cases (eg. against the Government of the Hong Kong Special Administrative Region – SAR), such leave has not been obtained;
- the judgment was obtained by fraud;
- the Hong Kong courts have no jurisdiction over the dispute.

2.6 Unenforceable Domestic Judgments

Generally, all types of domestic judgments can be enforced.

2.7 Register of Domestic Judgments

There is no central register of all judgments in Hong Kong. Certain (reported and unreported) judgments are publicly available online on the website of the Hong Kong judiciary and/or by subscribing to other paid online platforms such as LexisNexis; the court libraries, and the law libraries at certain universities in Hong Kong would also have hard copies of the judgments.

The judgment generally contains the action number, the names of the parties, the date of the hearing, the date of the judgment, the background of the case, the issues in dispute, the submissions made by the parties and the decision made.

Even after a judgment debtor has paid what is owed, he or she is unable to remove the judgment, and the judgment would remain searchable.

3. Foreign Judgments

3.1 Legal Issues Concerning Enforcement of Foreign Judgments

Hong Kong is not a party to any international treaties/conventions relevant to the enforcement of foreign judgments (such as the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters).

In order for a foreign judgment to be enforced in Hong Kong, it must be registrable under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO) or recognised under the common law.

In order for a judgment granted by a court in the mainland (ie, any part of China other than Hong Kong, Macao and Taiwan)

to be enforced in Hong Kong, it must be registrable under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO).

In addition, separate statutory regimes govern foreign judgments which relate to other specific subject matters:

- the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188) which governs family law matters such as the enforcement of maintenance orders made by a foreign court;
- the Nuclear Material (Liability for Carriage) Ordinance (Cap 479) which regulates liability in respect of injury or damage caused by the carriage of nuclear material in Hong Kong;
- the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap 414) which governs matters in relation to the carriage of oil such as compensation for pollution caused by the discharge or escape of oil from oil-carrying ships and for the liability of shipowners;
- the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) which governs applications for assistance in criminal matters such as investigation, prosecution or ancillary criminal matters; and
- the Probate and Administration Ordinance (Cap 10) which governs probate and letters of administration and the administration of the estates of deceased persons.

FJREO

For a foreign judgment to be registrable under the FJREO:

- the judgment must be from a superior court of a designated country which has reciprocal arrangements with Hong Kong (ie, Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, New Zealand, Singapore, Sri Lanka and The Netherlands);
- the recognition application must be made within six years of the date of the original judgment, or where there have been proceedings by way of appeal against the judgment, after the date of the last judgment;
- the judgment must not have been wholly satisfied;
- if the judgment has been satisfied in part as at the date of registration, the judgment shall be registered only in respect of the balance remaining payable at that date;
- the judgment must be enforceable by execution in the country of the original court;
- the judgment is final and conclusive as between the parties thereto; and
- the judgment is for a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.

MJREO

For a foreign judgment to be registrable under the MJREO:

- the judgment must be from the Supreme People's Court, any higher or intermediate people's court or certain recognised primary people's courts;
- the judgment is in relation to a commercial contract and was given after 1 August 2008;
- the parties to the commercial contract had a written agreement made after 1 August 2008 specifying that the courts in the mainland China have exclusive jurisdiction over the dispute;
- the judgment is enforceable in the mainland;
- the judgment is final and conclusive; and
- the judgment is for a definite sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.

The MJREO is supplemented by the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region, signed between the Hong Kong government and the Supreme People's Court on 18 January 2019 (the "New Arrangement").

The New Arrangement is the third arrangement governing the recognition and enforcement of judgments of civil and commercial nature between the Mainland and Hong Kong, which seeks to provide greater clarity and certainty as well as to widen the scope of application of registration for most of civil and commercial matters.

Under the New Arrangement, the following applies:

- there is no need for an exclusive jurisdiction clause in the agreement for the Mainland judgments to be enforceable in Hong Kong, which is one of the requirements under the MJREO;
- most civil and commercial judgments, including monetary and non-monetary judgments and all types of costs orders, are enforceable except those which are expressly excluded in the New Arrangement, such as certain judgments in relation to succession, administration or distribution of estate, intellectual property rights and bankruptcy (insolvency) and family matters (Article 3 of the New Arrangement);
- types of judgments enforceable are better defined, in the case of the Mainland, this includes any judgment, ruling, conciliatory statement and order of payment, but does not include a ruling concerning preservation measures; and in the case of Hong Kong, includes any judgment, order, decree and allocator, but does not include an anti-suit injunction

or an order for interim relief (Article 4 of the New Arrangement); and

- grounds for refusal of registration are expressly set out (Article 12 of the New Arrangement).

The New Arrangement is not in force yet. It will take effect after both the Mainland and Hong Kong complete all required procedures for implementation. Once it becomes effective, a new legislation to be drafted based on the New Arrangement will be enacted to supersede the MJREO.

Common Law

If a foreign judgment is not from the above-mentioned countries and is therefore not registrable under either the FJREO or the MJREO, the only recourse is for it to be recognised under the common law, provided that:

- it is made by a court of competent jurisdiction over the parties and the subject matter;
- the judgment is final and conclusive upon the merits of the claim in the foreign jurisdiction; and
- the judgment is for a fixed sum of money.

Contrary to the statutory regime, the common law regime does not request reciprocity for the recognition of foreign judgments, which means that Hong Kong courts are free to recognise foreign judgments from a jurisdiction even if that jurisdiction does not recognise Hong Kong judgments.

Although the common law restriction on the recognition and enforcement of foreign non-monetary judgments has never been contested or raised as an issue in Hong Kong courts, in *Jiang Xi An Fa Da Wine Co. Ltd v Zhan King* [2019] HKCFI 2411, the Hong Kong Court of First Instance observed judicial developments in other jurisdictions such as Canada, Cayman Islands and Jersey, in which courts have been more willing to recognise foreign non-monetary judgments.

The recent judicial trend in other jurisdictions leads to the question of whether it is also time for Hong Kong to re-assess the applicability of this common law restriction on the recognition and enforcement of foreign non-monetary judgments. Whilst these observations and comments are made obiter by the Hong Kong Court of First Instance, it may pave way for future reforms to the existing common law regime.

3.2 Variations in Approach to Enforcement of Foreign Judgments

Only those types of judgments which can be registered under FJREO or MJREO or recognised under the common law are enforceable in Hong Kong. Other types of judgments cannot be enforced. Please refer to **3.3 Categories of Foreign Judgments**

Not Enforced for the categories of foreign judgments which cannot be enforced in Hong Kong.

3.3 Categories of Foreign Judgments Not Enforced

Under the FJREO and the common law, only final money judgments can be enforced.

It should be noted that under the common law, a foreign default judgment is considered by the Hong Kong courts to be final and conclusive. In *Fabiano Hotels Ltd v Profitmax Holdings Inc & Ors* [2017] 6 HKC 414, the Court of First Instance took the view that an English default judgment is final and conclusive and is capable of being recognised and enforced in Hong Kong.

In reaching this conclusion, the court referenced and considered at length the authority in other common law jurisdictions, which states that a default judgment is final even though it can be set aside by the very court that rendered it, subject to narrow defences such as “lack of jurisdiction on the part of the foreign court, lack of identity between the parties in the foreign judgment and the party against whom enforcement is sought; fraud in obtaining the judgment; absence of natural justice in the mode by which the judgment was reached and public policy”, as per paragraph 18 of the judgment.

Under the MJREO, only final money judgments in relation to a commercial contract can be enforced.

Other categories of foreign judgments will not be enforced. For example, a foreign Mareva injunction order is not enforceable because it is interlocutory rather than final and so is a foreign order for specific performance because it is not a money judgment. In addition, judgments for a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty will not be enforced.

3.4 Process of Enforcing Foreign Judgments

For a foreign judgment to be registrable under the FJREO, an application may be made ex parte upon supporting affidavit and draft order to a master in the Hong Kong Court of First Instance (CFI) at the Hong Kong High Court. However, the court may direct a summons to be issued, in which case the summons shall be an originating summons. If the judgment is registered, the notice of registration should be served on the judgment debtor.

Similarly, for a foreign judgment to be registrable under the MJREO, an application may be made ex parte upon supporting affidavit and draft order to a master in the CFI. However, the court may direct a summons to be issued, in which case the summons shall be an originating summons. If the judgment

is registered, the notice of registration should be served on the judgment debtor.

For a foreign judgment to be recognised under the common law, fresh proceedings by way of writ of summons must be issued in the CFI based on the judgment. A statement of claim is usually indorsed with the writ of summons. The writ must then be served on the defendant. If the defendant fails to file the acknowledgement of service, the plaintiff may proceed to obtain default judgment.

If, however, the defendant (judgment debtor) has filed an acknowledgment of service, the plaintiff (judgment creditor) may apply for summary judgment by issuing an inter partes summons with a supporting affidavit. The defendant may file an affidavit in response and the plaintiff may file an affidavit in reply. The court will then decide whether the defendant has no defence to the claim for enforcement.

The Hong Kong court can grant partial recognition of the foreign judgment if the judgment at issue contains both registrable matters and non-registrable matters – ie, the Hong Kong court can register only those parts in the judgment which can be registered. It follows that the foreign judgment will only be partially enforced in Hong Kong.

Once a foreign judgment is registered or recognised in Hong Kong, it can be enforced in the same manner as a Hong Kong judgment; for the options, please refer to **2.2 Enforcement of Domestic Judgments**.

3.5 Costs and Time Taken to Enforce Foreign Judgments

For an application under the FJREO or MJREO, the court fee is HKD1,045 on sealing an originating ex parte application.

For an application under common law, the court fee is HKD1,045 on sealing a writ of summons in the Court of First Instance.

Generally, an application under the FJREO or MJREO takes around two to four months, whereas an application under the common law takes around six to 12 months, on the basis that it is uncontested.

Garnishee proceedings are more efficient than the other enforcement methods in the circumstances that there is sufficient money in the debtor’s bank account.

3.6 Challenging Enforcement of Foreign Judgments

The options available to challenge enforcement of a foreign judgment differ depending on the applicable legislation or law under which it is registered or recognised.

FJREO

Under the FJREO, the registration of a foreign judgment can be set aside on the following grounds:

- the requirements for registration under the FJREO were not met – for example, the foreign judgment is not final and/or conclusive;
- the foreign court giving the judgment had no jurisdiction;
- the judgment debtor did not receive notice of the foreign proceedings in sufficient time and did not appear;
- the judgment was obtained by fraud;
- the enforcement of the foreign judgment is contrary to public policy in Hong Kong;
- the rights under the judgment are not vested in the person who made the application for registration; or
- the limitation period for a foreign judgment to be registered under the FJREO (being six years) has lapsed.

MJREO

Under the MJREO, the registration of a foreign judgment can be set aside on the following grounds:

- the requirements for registration under the MJREO were not met – for example, the foreign judgment is not final and/or conclusive;
- the relevant choice of the mainland court agreement is invalid under the law of the mainland unless the original court has determined that the agreement is valid;
- the judgment has been wholly satisfied;
- the Hong Kong courts have exclusive jurisdiction over the case according to the law of Hong Kong;
- the judgment debtor who did not appear in the original court to defend the proceedings was not summoned to appear according to the law of the mainland, or was so summoned but was not given sufficient time to defend the proceedings according to the law of the mainland;
- the judgment was obtained by fraud;
- a judgment on the same cause of action between the parties to the judgment has been given by a court in Hong Kong or an arbitral award on the same cause of action between the parties has been made by an arbitration body in Hong Kong;
- a judgment on the same cause of action between the parties to the judgment has been given by a court in a place outside Hong Kong or an arbitral award on the same cause of action between the parties has been made by an arbitration body in a place outside Hong Kong, and the judgment or award

has already been recognised in or enforced by the courts in Hong Kong;

- the enforcement of the judgment is contrary to public policy in Hong Kong;
- the judgment has been reversed or otherwise set aside pursuant to an appeal or a retrial under the law of the mainland; or
- the limitation period for a foreign judgment to be registered under the MJREO (being two years) has lapsed.

Common Law

- the foreign court giving the judgment had no jurisdiction according to the rules of private international law;
- the judgment was obtained by fraud or in breach of natural justice;
- the judgment is inconsistent with a previous Hong Kong judgment or a foreign judgment which can be recognised in Hong Kong;
- the enforcement of the judgment is contrary to public policy in Hong Kong; or
- the limitation period for a foreign judgment to be recognised under the common law (being six years) has lapsed.

4. Arbitral Awards

4.1 Legal Issues Concerning Enforcement of Arbitral Awards

The following principles set out in *KB v S* [2015] HKEC 2042 apply generally in relation to enforcing an arbitral award in Hong Kong:

- the primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards;
- under the AO, the court should interfere in the arbitration of the dispute only as expressly provided for in the AO;
- subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved;
- enforcement of arbitral awards should be “almost a matter of administrative procedure” and the courts should be “as mechanistic as possible” (*Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604);
- the courts are prepared to enforce awards except where complaints of substance can be made good – the party opposing enforcement has to show a real risk of prejudice and show that its rights have been violated in a material way (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA));
- in dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings,

inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings – in this regard, the conduct complained of “must be serious, even egregious”, before the court would find that there was an error sufficiently serious so as to have undermined due process (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA));

- in considering whether to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited* [2009] 4 HKLRD 353 (CA));
- failure to make prompt objection to the Arbitral Tribunal or the supervisory court may constitute estoppel or want of bona fide (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111);
- even if sufficient grounds are made out, either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 136A-B);
- the Court of Final Appeal clearly recognised in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act bona fide (p 120I and p 137B of the judgment).

4.2 Variations in Approach to Enforcement of Arbitral Awards

Hong Kong categorises arbitral awards into convention awards, non-convention awards, mainland awards and Macao awards.

Under Section 84 of the Arbitration Ordinance (Cap 609) (AO), an arbitral 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 Hong Kong Court of First Instance that has the same effect, but only with the leave of the court. After leave is granted, the Hong Kong Court of First Instance can then enter judgment in terms of the arbitral award.

Specifically in relation to a convention award (being an arbitral award made in a state party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the territory of a State (New York Convention), other than China or any part of China, which is a party to the New York Convention), Section 87 of the AO provides that a convention award is enforceable in Hong Kong either by action in the court, or in the same manner as an award to which Section 84 applies.

Similar provisions can be found in Section 92 for the enforcement of a Mainland award (being an arbitral award made in

the Mainland by a recognised Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China), and in Section 98A for the enforcement of a Macao award (being an arbitral award made in Macao in accordance with the arbitration law of Macao). A non-convention award means an award which is neither a convention award, Mainland award or Macao award.

The overall approach to enforcement does not vary for different types of arbitral awards. Once leave from the court has been granted to enforce an arbitral award, it can be enforced in the same manner as a Hong Kong judgment, subject to possible challenge to the enforcement as explained in **4.6 Challenging Enforcement of Arbitral Awards**.

Further, under the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR signed on 2 April 2019, parties to Hong Kong-seated arbitrations can now seek interim measures from Mainland courts; namely,

- preservation of assets;
- preservation of evidence; and
- preservation of conduct in accordance with PRC laws.

The Arrangement is reciprocal – ie, parties to Mainland-seated arbitrations can also seek interim measures at the Hong Kong High Court.

4.3 Categories of Arbitral Awards Not Enforced

There are no specific categories of arbitral awards which will not be enforced in Hong Kong, subject to possible challenge to the enforcement as explained in **4.6 Challenging Enforcement of Arbitral Awards**.

4.4 Process of Enforcing Arbitral Awards

The first step to enforce an arbitral award would be to obtain leave from the court by way of originating summons. The application may be made on an ex parte basis with an affidavit in support, with a duly authenticated or certified copy of the original award and the arbitration agreement exhibited to the affidavit. For ex parte application, the applicant must make full and frank disclosure of all relevant information. Where the court considers it appropriate for the other side to be heard, it may direct that the application be made inter partes. If the application is contested, the court will list the matter to be heard with a date to be fixed.

Once leave from the court has been granted (and in the absence of any application to set aside the order granting leave), a judgment can be entered in terms of the arbitral award, which can

then be enforced in the same manner as a Hong Kong judgment and please refer to **2.2 Enforcement of Domestic Judgments**.

4.5 Costs and Time Taken to Enforce Arbitral Awards

The costs involved and length of time it takes to enforce an arbitral award depend on the enforcement action(s) to be taken and whether enforcement is contested. Generally, it would take at least two to three months for an uncontested enforcement action in order to enforce the arbitral award. Garnishee proceedings are often more efficient than the other enforcement methods in the circumstances that there is money in the debtor's bank account.

4.6 Challenging Enforcement of Arbitral Awards

Generally speaking, an arbitral award is final under the AO (which applies only where the seating of arbitration is in Hong Kong). There is no automatic right to appeal against an arbitral award, but in the arbitration agreement, the parties may expressly opt for certain provisions in Schedule 2 to the AO, which provide for the right of the parties to challenge the arbitral award on the ground of serious irregularity or question of law. For example, Section 4 of Schedule 2 to the AO provides that parties may challenge an arbitral award on the ground of serious irregularity which has caused or will cause substantial injustice to the applicant, while sections 5 and 6 of Schedule 2 to the AO allows parties to appeal an arbitral award on a question of law.

These provisions are not mandatory; instead, they are opt-in provisions. Therefore, to rely on these optional provisions, parties must make sure that they expressly adopt the opt-in provisions in the arbitration agreement, otherwise, these provisions will not automatically apply. It should also be noted that, however, such grounds for challenge are unusual and the party seeking to appeal has to meet a very high threshold.

When seeking to set aside an order granting leave for enforcement, such application may be granted in different circumstances, depending on the type of the award. Although different sections in the AO applies to different types of awards, the grounds for refusal of enforcement provided under such sections are either the same or substantially similar (save that for non-convention awards, the court may refuse enforcement of the same if for any other reason the court considers it just to do so). One may make attempt to set aside an order allowing for

enforcement of an arbitral award within 14 days after service of such order, but only if it can be showed that:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- the award deals with a dispute not governed by the terms of the submission to arbitration, or contains decisions beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the law of the country where the arbitration took place;
- 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;
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Hong Kong; or
- the award is in conflict with the public policy in Hong Kong.

To appeal an arbitral award, the agreement of all the other parties to the arbitral proceedings is required, otherwise leave must be sought from the court by way of originating summons or summons. The originating summons or summons must contain the grounds of the application. Copies of affidavit evidence to be relied on in the application must be served together with the originating summons or summons. If the application is made with the agreement of all parties to the arbitral proceedings, a copy of the written agreement must also be served alongside the originating summons or summons.

Under Section 5(5) of Schedule 2 of the AO, the Hong Kong Court of First Instance has discretion to give the following remedies on hearing an appeal under Section 5:

- confirm the arbitral award;
- vary the arbitral award;
- remit the award to the arbitral tribunal, in whole or in part, for reconsideration taking into account the decision of the Hong Kong Court of First Instance; or
- set aside the arbitral award in whole or in part.

Gall is a leading independent Hong Kong law firm focusing primarily on dispute resolution. The firm specialises in handling highly complex disputes, many of which involve multi-jurisdictional litigation. Gall's partners have a wealth of experience in a wide variety of litigation, mediation and arbitration. Its core practice areas include commercial litigation, fraud and asset tracing, employment disputes, insolvencies, obtaining emergency injunctive relief remedies, regulatory and crimi-

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