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Enforcement of Hong Kong Arbitral Awards in the Mainland

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Why a Special Arrangement?

- **The ‘One Country, Two Systems’ Principle:** Hong Kong is a Special Administrative Region of China with a common law legal system distinct from the Mainland's civil law system.
- **The Constitutional Framework:** Under the Basic Law, Hong Kong retains its own legal system distinct from Chinese Mainland.
- **A Unique Jurisdictional Relationship:** For legal and judicial purposes, Hong Kong and Chinese Mainland operate as separate jurisdictions within a single sovereign state.
- **The Treaty Gap:** Because Hong Kong is part of China, international treaties like the New York Convention do not apply *between* them. Bilateral arrangements are required.

HK Common Law vs Mainland Legal System

HK (Common Law)	Mainland (Civil Law)
<ul style="list-style-type: none">• Based on English common law heritage.• <i>Stare Decisis</i> (binding judicial precedent).• Adversarial system; heavy reliance on oral advocacy and cross-examination.• Bilingual (English and Chinese).	<ul style="list-style-type: none">• Statute-based; heavily influenced by German and Soviet civil law traditions.• No strict binding precedent (though Supreme People's Court Guiding Cases are highly persuasive).• Inquisitorial system; judges play an active role in fact-finding.• Mandatory Chinese language proceedings

The 1999 Arrangement

- **Full Title:** *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*
- **Effective Date:** February 1, 2000.
- **Scope:** Provides for the mutual enforcement of arbitral awards made in one region by the courts of the other.
- **Key Features:**
 - **Scope of Awards:** Initially applied to awards made by recognised Mainland arbitral authorities (under a list) and awards made in HK under the HK Arbitration Ordinance .
 - **Application:** Applicants must apply to an Intermediate People's Court in the Mainland or the High Court in the Hong Kong SAR .
 - **Required Documents:** Application letter, a certified copy of the award, and a certified copy of the arbitration agreement .
 - **Grounds for Refusal:** The grounds largely mirror Article V of the New York Convention, providing a harmonised standard.

The 2020 Supplementary Arrangement

- **Effective Date:** November 27, 2020 (for certain provisions) .
- **Purpose:** To clarify and improve the 1999 Arrangement based on 20 years of practice .
- **Key Amendments:**
 - **'Recognition' Clarified:** Explicitly states that the term 'enforcement' in the 1999 Arrangement includes both **recognition and enforcement** .
 - **Scope of Awards:** Removed the 'list' of Mainland arbitral institutions. Now applies to all awards made pursuant to the Chinese *Arbitration Law*, creating full parity with HK's coverage of awards under its *Arbitration Ordinance* .
 - **Concurrent Applications:** Allows a party to apply to both a Mainland court and a HK court for enforcement simultaneously if the other party has assets in both places, provided the total amount recovered does not exceed the award amount .
 - **Introduction of Preservation: This is a landmark change.** It allows a party to apply for interim measures (preservation) **before or during** the enforcement application process .

The Mainland-HK Interim Measures Arrangement

- **Full Title:** *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong SAR*
- Came into effect on 1 October 2019.
- **The Exclusive Advantage:** Hong Kong is the **only** jurisdiction outside Chinese Mainland where parties to an arbitration can apply directly to Mainland courts for interim measures.
- **Available Measures in Mainland:**
 - Asset preservation (e.g., freezing bank accounts)
 - Evidence preservation
 - Conduct preservation (injunctions)
- **Requirement:** The arbitration must be seated in HK and administered by a qualified institution (e.g., HKIAC, ICC-HK).

Enforcing HK Awards in the Mainland

- **Jurisdiction:** Intermediate People's Court at the respondent's domicile or where assets are located.
 - In the case of HK, it would be the High Court of HK.
- **Grounds for Refusal:**
 - Invalid arbitration agreement
 - Lack of proper notice / due process violations
 - Tribunal exceeded its authority
 - Procedural irregularities
 - **The ultimate exception:** Enforcement is contrary to the **Social Public Interest of the Mainland (Public Policy)**

The 'Public Policy' Exception

- 'Social Public Interest' (社会公共利益) refers to the fundamental principles of law, national sovereignty, security, and social and public morality.
- **The Historical Fear:** Foreign practitioners worried Mainland courts would use this vaguely defined civil law concept as a protectionist loophole to save local State-Owned Enterprises (SOEs).
- **The Reality:** The Supreme People's Court (SPC) interprets this exception **extremely narrowly**, aligning with international pro-arbitration standards.

What Constitutes ‘Social Public Interest’?

- **What it is NOT (Insufficient grounds for refusal):**
 - Violation of mandatory Chinese administrative regulations (e.g., foreign exchange controls, corporate guarantees)
 - Errors of fact or errors of law made by the HK arbitral tribunal.
 - Economic harm to a domestic Chinese company or SOE.
- **What it IS (Valid grounds for refusal):**
 - Violations of fundamental principles of Chinese law.
 - Infringement on state sovereignty or national security.
 - Violations of basic social morals or good customs.

Chinese Court Case Example

- ***David Dein Consultancy Ltd v. Beijing Zhonghe Guoan Football Club Co. Ltd. (2020)***
 - It was argued that enforcement would harm social public interest because the respondent held state-owned assets.
 - The Beijing Intermediate People's Court rejected this argument. Social public interest should refer to the interests that concern all members of society and are enjoyed by the public, which are different from the interests of the parties to a contract. Although part of Guoan Club's assets are state-owned assets, not all matters related to it can be deemed as social public interest.
 - The Court recognised and enforced the HKIAC award.

Chinese Court Case Example

- ***Farenco Shipping Pte Ltd. v. Eastern Ocean Transportation Co., Ltd. (2018)***
 - Respondent argued that enforcing the award would violate the Chinese Arbitration Law (which requires an explicit arbitration agreement) and the General Principles of the Civil Law (regarding declaration of intent), thereby breaching social public interest.
 - The Guangzhou Maritime Court held that a mere violation of a specific provision of Chinese law does not equate to a violation of social public interest. The public policy exception only applies if recognising and enforcing the award would cause serious damage to the fundamental principles of Chinese law.

When might Public Policy Apply?

- While rare, the exception is not a dead letter. It may apply in cases of:
 - **Severe Fraud/Forgery:** Where the award was obtained through proven criminal fraud that undermines judicial integrity.
 - **Judicial Sovereignty:** Enforcing the award directly contradicts a pre-existing, binding judgment of a Chinese court on the exact same issue.
- *Note:* The threshold of proof remains exceptionally high.

Takeaways

- **Strong Pro-Enforcement Stance:** The 1999 Arrangement, as updated, provides a robust, New York Convention-equivalent framework for the mutual enforcement of awards .
- **Public Policy is a High Bar:** Chinese courts interpret ‘public policy’ extremely narrowly, focusing on protecting fundamental legal principles and social welfare, not on correcting errors of law or fact in commercial disputes. This aligns with international best practice .
- **Increasing Integration:** The 2019 Interim Measures Arrangement and the 2020 Supplementary Arrangement have significantly enhanced the attractiveness of Hong Kong as a seat for arbitration for Mainland entities by allowing for asset preservation in the Mainland .
- **Future Outlook:** The system continues to evolve with the integration of the Greater Bay Area, offering parties in cross-border disputes a predictable and effective legal environment.