DEACONS
的近律師行

February 2024

Newsletter

Litigation & Dispute Resolution

What's inside?

New Hong Kong-Mainland reciprocal enforcement of judgments regime comes into effect

Joseph Kwan

Hong Kong has become the only jurisdiction in the world to have such a wide reciprocal enforcement regime with Mainland China. This has placed Hong Kong in a special position in the resolution of cross-border disputes.

The Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) (the "Ordinance") came into effect on 29 January 2024 and provides a more cost-effective and straightforward mechanism for cross-border enforcement of judgments. The Ordinance applies to judgments made on or after 29 January 2024 and makes provisions for:

- enforcing a Mainland judgment in Hong Kong, by way of application to the Hong Kong court for registration of the judgment; and
- facilitating the recognition and enforcement of a Hong Kong judgment in the Mainland, by way of application to the Hong Kong court for a certified copy of the judgment and Certificate.

The Ordinance applies to a wide range of Hong Kong and Mainland judgments, given in proceedings which are civil or commercial in nature (or criminal in nature, where the judgment contains an order for the payment of money) and which do not fall within the list of "excluded judgments" in the Ordinance.

The new law will bring benefits such as:

- removing the need to re-litigate those disputes whose judgments have been made in Hong Kong or the Mainland;
- expanding the types of judgments that can be enforced/recognised. The new law covers monetary judgments and non-monetary judgments;
- removing the requirement for the parties to have agreed to the exclusive jurisdiction of a Hong Kong or Mainland court;
- expanding the levels of courts whose judgments will be enforced/recognised.

Major changes in the 2024 CIETAC Arbitration Rules

Joseph Chung and Vivien Wong

The 2024 CIETAC Arbitration Rules came into force on 1 January 2024.

CIETAC, one of the leading PRC arbitral institutions, has incorporated a wide range of revisions in the 2024 Rules, to reflect recent developments and trends in international arbitration. The aim of the revisions is to enhance parties' flexibility, autonomy and efficiency in CIETAC arbitrations and ensure that CIETAC arbitrations are up to international standards and expectations.

This article gives an overview of the key updates and changes made in the 2024 Rules.

Expansion of Tribunal Powers

- **Determining jurisdiction (Articles 6, 14, 18):** Under the 2024 Rules, once the tribunal is constituted, it is automatically empowered to determine its own jurisdiction (including resolving disputes over jurisdiction with respect to joinder proceedings). This contrasts with the position under the previous 2015 Rules, where the power to determine jurisdiction primarily lay with CIETAC and the tribunal only had power to determine jurisdiction where CIETAC considered it necessary to delegate such power to the tribunal.

- **Interim Award (Article 49):** The 2024 Rules make it clear that the tribunal is able to render an interim award on its own initiative, where it deems necessary or upon a party's request.

- **Early Dismissal (Article 50):** Another new feature under the 2024 Rules is that a party may now request and the tribunal is empowered to grant an early dismissal of a claim or counterclaim in whole or in part on the ground that the claim or counterclaim is manifestly without legal merit, or is beyond the jurisdiction of the tribunal. To avoid undue delay of the proceedings, a request for early dismissal must be made as early as possible and no later than the submission of the Statement of Defence or the Reply to the Counterclaim.

Embracing digital tools and electronic means of communication

The 2024 Rules have been modified to meet the demands of the digital era.

- **Mode of Submission of Request for Arbitration (Article 11):** It is expressly provided that a Request for Arbitration can be submitted in writing and/or via CIETAC's online case filing system.

- **Service of documents (Article 8):** In addition to traditional means of delivery, all documents, notices and materials in relation to the arbitration may now be validly served by electronic means. This includes sending by email or other electronic means agreed by the parties or via the digitalized information exchange system of CIETAC or other information system easily accessible to parties.

- **Hard copies (Article 21):** Submission of hard copies are no longer compulsory unless required by the Arbitration Court or the tribunal.

- **Oral hearing (Article 37):** After consulting the parties and taking into consideration the circumstances of the case, the tribunal now has the option to decide whether to conduct an oral hearing by virtual conference or other appropriate means of electronic communication. The Arbitration Court will provide administrative and logistical support for virtual hearings.

- **Signing of awards (Article 52):** Arbitrators are now permitted to sign arbitral awards electronically and the awards may be delivered to the parties in electronic form, where the parties agree or where CIETAC deems it necessary.

Consolidation of Arbitration involving multiple contracts

Modifications have also been made to enhance efficiency and flexibility in resolving complex international disputes.

- **Addition of contracts (Article 14):** Under the previous 2015 Rules, a claimant may initiate a single arbitration concerning disputes arising out of or in connection with multiple contracts. Under the 2024 Rules, the claimant may also apply to add contracts to an arbitration after the arbitration has commenced. The tribunal is empowered to decide applications to add contracts in the arbitral proceedings if such application is made after

constitution of the tribunal. However, an application to add contracts during the proceedings may be denied if it is made too late and may delay the proceedings.

- **Contracts involving related subject matter (Articles 14 and 19):** Under the 2024 Rules, arbitrations can now be commenced under multiple contracts and arbitrations can be consolidated where the relevant contracts have "related subject matters", provided that the other requirements for a single arbitration under multiple contracts or consolidation are met.

Measures to enhance users' experience of CIETAC arbitration

CIETAC has also included changes which ensure that practices and procedures in CIETAC arbitrations are aligned with international standards and recent judicial decisions on arbitration-related issues in other jurisdictions.

- **Non-compliance with escalation dispute resolution clause (Article 12):** Failure to negotiate or mediate as agreed in the arbitration agreement shall neither prevent the claimant from applying for arbitration nor prevent the arbitration court from accepting the case, unless the applicable law of the arbitration proceedings or the arbitration agreement provides otherwise. This is in line with the recent decision of the Hong Kong Court of Final Appeal in C v D [2023] HKCFA 16.

- **Conservatory Measures (Article 23):** In alignment with international standards and to better serve parties from multiple jurisdictions, CIETAC may now forward a party's application for conservatory measures to any courts outside of Mainland China, even before a notice of arbitration has been issued. This new provision provides for pre-arbitration conservatory measures to be ordered by a competent court in urgent situations.

- **Appointment of Arbitrators (Articles 22, 26, 27):** The 2024 Rules expressly provide for the Chairman of CIETAC to interfere in the appointment of arbitrators, if the procedures for forming the tribunal agreed by the parties are manifestly unfair or unjust, or if a party abuses its rights in a way that results in undue delay of the arbitral proceedings. The President of the Arbitration Court may interfere where there is an issue of conflict of interest regarding the appointment of arbitrators and the parties' representatives. This aims to protect the due process of the arbitration.

The parties may now agree that the presiding arbitrator in a three-arbitrator tribunal be jointly nominated by the party-nominated arbitrators. The parties enjoy greater flexibility in the appointment of arbitrators. Meanwhile, the Chairman of CIETAC retains the residual power to appoint arbitrators, where the parties and/or the party-nominated arbitrators fail to appoint arbitrators within the time limit stipulated under the Rules, to avoid undue delay in the proceedings.

Third Party Funding (Article 48)

New provisions on third party funding reflect the marked increase in the use of third party funding in arbitration globally and the trend for an increasing number of jurisdictions, including Hong Kong, to allow third party funding in arbitration. Under the new provisions, the funded party has the obligation to inform the Arbitration Court about such funding arrangement without delay, and the tribunal may take into account the existence of third party funding in deciding the costs of the arbitration.

Provision for Ad Hoc Arbitration (Article 2)

Article 2 of the 2024 CIETAC Rules enables CIETAC to provide an extensive range of administration and supporting services for *ad hoc* arbitration, including but not limited to (1) offering guidance and consultation on the application of the arbitration rules, (2) appointing arbitrators and deciding on challenges to arbitrators, (3) providing oral hearing services, (4) scrutinizing draft awards, (5) managing arbitrators' remuneration etc. Such provision of services is subject to the parties' agreement or request and to such agreement not being inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings. The inclusion of this new provision prepares for the anticipated removal of the prohibition of ad hoc arbitration in cases where Mainland China is the seat under PRC arbitration law.

Limitation of Liability (Article 86)

The 2024 CIETAC Rules now include a provision that expressly excludes civil liability for acts and omissions in connection with the arbitration under the Rules, and any obligation to testify in relation to the arbitration, on the part of CIETAC, its staff members, arbitrators, emergency arbitrators and relevant persons engaged by the tribunal, unless otherwise provided in the law applicable to the arbitration.

Comments

Compared with the previous 2015 Rules, the 2024 Rules have expanded a number of provisions and incorporated the latest developments and trends in international arbitration. The changes will be welcomed by parties, as the 2024 Rules

will cater for the increase in complexity and cross-border nature of disputes nowadays. For instance, the expansion of the tribunals' powers to grant an early dismissal of claims or counterclaims upon a party's request which promotes the cost effectiveness in CIETAC arbitrations and provisions relating to third party funding. All in all, the modifications show CIETAC's commitment to enhancing efficiency and flexibility required in resolving complex international disputes and respecting due process and party autonomy in arbitrations.

Series of Family disputes relating to mental capacity issues – Challenges on Enduring Powers of Attorney

Sherlynn Chan and Hazel Wong

Enduring Powers of Attorney (EPAs) have become a very hot topic in our community, which is aging and has seen an increase in the early onset of strokes in people between the ages of 18 and 55, as shown in a recent survey by the Medical Faculty of Hong Kong University.

Enduring Powers of Attorney

So, what exactly is an EPA and how is it different to a general Power of Attorney? An EPA is a legal document made under the Enduring Powers of Attorney Ordinance (Cap. 501) (EPAO), whereby a person (the Donor) appoints someone else (the Attorney) to handle his/her financial affairs. The key difference is the "enduring" power granted to an Attorney under the EPA, which enables the Attorney to handle the Donor's financial affairs **even after** the Donor becomes mentally incapacitated. On the other hand, **a conventional/general Power of Attorney** becomes **invalid** when the Donor becomes mentally incapacitated.

According to statistics from the High Court Registry, the number of registrations of EPAs nearly doubled from 560 in 2020 to 1,109 in 2021 and continues to rise. With the increasing use of EPAs, it is important for people to be aware of potential challenges to EPAs and ways to prevent disputes relating to them.

Challenges to mental capacity of Donor

One common type of challenge is whether the Donor had the requisite mental capacity at the time of executing the EPA.

In the case of *To Lee Wah Samuel v Yum Huin Ming & Another [2019] HKCFI 1441,* the Judge laid down the relevant test for mental capacity in relation to the execution of an EPA.

Mrs To has 3 sons and 2 daughters. She executed two EPAs, appointing her youngest son as the Attorney to deal with all her assets. Her eldest son later sought to challenge her mental capacity at the time of execution of the two EPAs.

The Judge confirmed the test for determining the issue of capacity in execution of an EPA with reference to the EPAO and the Powers of Attorney Ordinance (Cap. 31). In gist, a person is mentally incapable of executing an EPA if he/she is suffering from a mental disorder or mental handicap and is either (i) unable to understand the effect of the power of attorney or (ii) by reason of his/her mental disorder or mental handicap, unable to make a decision to grant a power of attorney. Alternatively, if the person is unable to communicate to any other person an intention to grant a power of attorney, even though the other person has already made a reasonable effort to understand him/her, he/she does not possess the requisite mental capacity for the making of EPA.

Under common law, an adult is presumed to have mental capacity, unless it is shown otherwise and the burden is on the party asserting otherwise to prove that a person has no such capacity. The Judge found that the Plaintiff had failed to discharge the burden of proving that Mrs To did not have the requisite mental capacity to execute the two EPAs based on the expert medical evidence adduced.

This type of challenge against the validity of an EPA is becoming more and more common, especially where the children of a family are divided into two or more camps, with one camp taking control of the patriarch/matriarch's financial affairs through an EPA.

From our experience, a lot of these disputes arise from the lack of communication and transparency between family members. Such disputes may be avoidable if the Donor notifies or involves the other adult children in the rationale and making of the EPA, thereby reducing mistrust and suspicion.

Attorneys' fiduciary duties

As one would expect, an Attorney owes a fiduciary duty to the Donor. This is specifically set out under s.12 of the EPAO, which provides that the Attorney has a duty to exercise his power honestly with due diligence, keep proper accounts and records, not to enter into any transactions where a conflict of interest would arise with the Donor and not to mix the property of the Donor with other property.

S.11(1) of the EPAO offers protection to the Donor, by providing that the Court may, on the application of an interested party, require the Attorney to produce records and accounts and make an order for their auditing; revoke or vary the Attorney's powers; or in cases where the Court is satisfied that the interests of the Donor so require, to remove the Attorney.

Other challenges

Other challenges to EPAs may include challenges to the scope of authority and the exercise of powers by the Attorney. Stay tuned for our next article(s) and case updates covering these topics.

Our Family and Vulnerable Client Practice team at Deacons is experienced in handling contentious matters relating to mental capacity and EPAs, as well as family wealth planning, using such tools as EPAs. Please reach out to us if you would like to know more.

Series on Children Matters – Children Relocation

Sherlynn Chan and Rachael Leung

Deacons' Family Law Practice was recognized as the "*Family and Matrimonial Firm of the Year*" in the Benchmark Litigation Asia-Pacific Awards 2023, and has extensive experience in handling diverse children matters in addition to financial matters.

In 2023, we published a series of articles on Mainland/ Hong Kong Cross-Boundary Marriages (see Article 1 on Matrimonial Property rights, Article 2 on Nuptial Agreements, Article 3 on Division of Matrimonial Assets, Article 4 on Asset Dissipation, and Article 5 on Third Party Interests in Family Proceedings). This year, we will focus on children matters, such as relocation, return of children to Hong Kong, wardship, custody, care and control.

This first article will explore the issue of permanent relocation of children from Hong Kong to other jurisdictions. The following is an example of the type of advice often sought from our clients regarding relocation:

> *"I am from Singapore and followed my husband to Hong Kong after we got married. We are now in the middle of our divorce proceedings and unable to agree on the care arrangements for our 8-year-old son. Can I just leave Hong Kong with our child pending conclusion of the proceedings?*

Court Procedures

The Child Abduction and Custody Ordinance (Cap.512) provides that if there are ongoing proceedings concerning the custody or access of a child, a person must not remove the child out of Hong Kong without the consent of each party to the proceedings. The court may make an order prohibiting the removal of the

child out of Hong Kong. Accordingly, parents cannot unilaterally remove their children out of Hong Kong temporarily or permanently, without seeking leave from the court.

The Matrimonial Causes Rules (Cap.179A) stipulates a requirement for parents to make an application for leave to remove their child(ren) permanently from Hong Kong.

For children born to unmarried parents, even though birth mothers are the sole legal custodian of their child(ren) pursuant to the Guardianship of Minors Ordinance (Cap.13) (GMO), they still have the responsibility to make a formal application to the court for relocation and inform the birth father[1]. Fathers of children born outside wedlock, on the other hand, will require orders or declarations under the GMO and/or Parent Child Ordinance (Cap.429) to acquire parental rights over their child(ren) before seeking leave from the court for relocation.

The court will take a dim view of parents who unilaterally remove their child(ren) from Hong Kong and usually order their prompt return.

The Legal Principles

The principles of the English landmark case of *Payne v Payne [2001] Fam 473* were adopted by the Hong Kong Court of Appeal in *SMM v TWM [2010] HKLRD 37 CA,* and set out guidance to our courts on approaching relocation applications as follows:

1. The first step is to assess the genuineness of the application and whether the relocating parent's proposals are practical and realistic.

   > *"Is the mother's [father's] application genuine in the sense that it is not motivated by some selfish desire to exclude the father [mother] from the child's life? Then ask, is the mother's [father's] application realistic, i.e. founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow"*

   Usually, the relocating parent's proposal will set out the detailed plans for him/her and the child(ren) in the new country, including housing/accommodation, schooling, healthcare, finances, and support network (in particular, ties to extended families and whether one is in a new relationship). Another critical element of the proposal is the willingness of the relocating parent to facilitate access between the child and the stay-behind parent, and the actual access plan.

2. If the application is opposed by the stay-behind parent, the Court will consider the impact on him/her, the genuineness of the opposition and the extent of the detriment to his/her future relationship with the child.

   > *"If, however, the application passes these tests then there must be a careful appraisal of the father's [mother's] opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him [her] and his [her] future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal [paternal] family and homeland?"*

   The court will carefully appraise the reasons for objection and determine whether it is motived by genuine concern for the future of the child's welfare, or whether it is driven by ulterior motives or spiteful retaliation. In some cases, the court may be of the view that maintaining the status quo is in the best interests of the child. In the Court of Appeal case of *CN v LYP [2023] HKCA 1173 §124,* one of the Judges commented that:

   > "*At the same time, experience and common sense will tell us that, generally speaking, it will be less disruptive to the life of a child if he or she is to be relocated together with a parent who is the primary carer and a child of tender years is best being looked after by the mother".*

3. The Court will also consider the impact on the relocating parent, if his/her application is refused.

[1] LCH v JMC [2019] HKCFI 1894 §43

"What would be the impact on the mother [father], either as the single parent or as a new wife [husband], of a refusal of her[his] realistic proposal?

In many scenarios involving expatriate families, the relocating parent who is the primary carer of the children, may not have the necessary support network in Hong Kong after the divorce. Not allowing them to return to their home country may negatively impact their emotional wellbeing and ability to care for the children, especially when the stay behind parent has a new partner or is unable to spend meaningful and quality time with the child.

4. Finally, the Court will consider the child's welfare as the paramount consideration in reviewing the application.

"The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate."

Since the Court's paramount consideration is the best interests of the child and his/her welfare, in determining the same, the court will usually consider the factors set out in the welfare checklist (Welfare Checklist) in the *Children's Proceedings (Parental Responsibility) Bill*[2] (which has yet to be passed into law in Hong Kong), such as the child's ascertainable wishes and views, his/her physical, emotional and education needs, and relationship with each parent and other persons etc.

Other Matters Considered by the Court

(a) Social investigation report (SIR)

The SIR is a material piece of evidence which the court will consider when assessing a relocation application. It is also common for the court to call for an international SIR to collect information on the child's potential life in the new country.

The SIR is written by a social welfare officer (SWO) of the Social Welfare Department. As the "eyes and ears" of the court, the SWO will interview the child, the parties and other people who are involved in his/her upbringing, such as his/her maternal grandparents and class teachers. Apart from interviewing the child with each parent separately, the SWO may also interview the child alone if he/she is of appropriate age.

The SIR will contain the SWO's factual findings and recommendations to the court. Whilst the court is not bound by such recommendations, it is "*highly desirable*" that the judge should explain why he/she departs from them[3].

(b) The Child's View

One factor listed in the Welfare Checklist is the child's view, where ascertainable in light of his/her age and understanding. As a general rule, the court will treat a child's view as follows[4]:-

- For children above 10 years old, the court will give considerable weight to their views.
- For children between 6 to 10 years old, they are regarded as in the intermediate stage.
- For children under 6 years old, their views are treated as often indistinguishable in many ways from the wishes of the main carer (assuming normal development).

---

[2] Please refer to section 3 (2) of the Children Proceedings (Parental Responsibility) Bill for the full welfare checklist. Link: https://www.lwb.gov.hk/en/parentalresponsibility_consult/doc/Draft_Bill_(Eng).pdf.

[3] *WSM v FSY*, CACV352/2004, unreported, 27 July 2005 §22

[4] These principles are set out in the English case of *Re L (A Child) (Contact: Domestic Violence) [2001] Fam 260* which have been widely adopted in cases in Hong Kong such as *CN v LYP*.

However, there are exceptions in some cases, such as *CN v LYP,* whereby the Court of Appeal held that the Family Court Judge erred in placing little or no weight to a 7-year-old girl's views and preference on relocation, as the Court of Appeal found that the child had "*attained a sufficient degree of maturity for the court to take account of her views*".

To facilitate the court in hearing the child's views, the Judiciary issued "*Practice Direction - PDSL5 Guidance on Meeting Children*" to assist judges in deciding whether it is appropriate to interview a child, and if so, in what circumstances and in accordance with what safeguards. However, it is important to note that the purpose of the child meeting the judge is to "*enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her*", but not to gather evidence, which is the responsibility of the SWO.

Recent case law in Hong Kong

CN v LYP [2023] HKCA 1173

This case is unusual in the sense that relocation of the children was inevitable and the Court was mainly required to determine the location of the relocation – whether Dongguan with the mother or Singapore with the father.

The mother is a Mainland resident and the father is a Singapore national. Following the breakdown of the marriage, the father returned to Singapore on his own in late 2020, whilst the mother unilaterally removed the elder child from Hong Kong to the Mainland without the father's consent, and left the younger child in her sister's care in Hong Kong. In the following few years, the mother would visit Hong Kong frequently to look after the younger child through repeated renewal of her double-entry permit. Since the father's return to Singapore, he only had physical access to the children 4 times.

In emphasizing the children's developmental and emotional needs to maintain physical ties with the mother, the Court of Appeal overturned the Family Court's decision allowing the father, who was almost a stranger to the children, to relocate them to Singapore and instead, granted leave to the mother to relocate the children to Dongguan.

SG v GDV [2023] HKFC 15

The father applied to permanently remove the children to the USA on the premise that the mother would have one hour daily online access and three round trip tickets to the USA each year paid for by him. The mother opposed the application because she feared that her relationship with the children would cease after relocation. Given the father's past consistent efforts in sabotaging the mother's relationship with the children, the court accepted that the father would not try to maintain the same after relocation.

Whilst the father appeared to be generous in purchasing 3 sets of round-trip tickets to the USA for the mother each year, the court considered such offer to be "disingenuous", as it did not cover accommodation and other costs of the trip for the mother, who was unemployed, had no stable income and extremely limited savings. Further, in dismissing the father's application, the court accepted the expert evidence of a USA immigration law expert that it would be very difficult for the mother to visit, let alone to immigrate, to the USA given her immigration history and employment status.

Conclusion

At the end of the day, each case depends on its own facts, and the court will consider all relevant factors and circumstances before arriving at a decision which is fair and reasonable to the parents, with the best interests of the child as the paramount consideration.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters involving children issues. Please reach out to us if you would like to know more.

Want to know more?

Joseph Kwan
joseph.kwan@deacons.com
+852 2825 9324

Richard Hudson
richard.hudson@deacons.com
+852 2825 9680

Carmen Ng
carmen.ng@deacons.com
+852 2825 9502

KK Cheung
k.k.cheung@deacons.com
+852 2825 9427

Joseph Chung
joseph.chung@deacons.com
+852 2825 9647

Justin Yuen
justin.yuen@deacons.com
+852 2825 9734

Paul Kwan
paul.kwan@deacons.com
+852 2826 5354

Peter So
peter.so@deacons.com
+852 2825 9247

Sherlynn Chan
sherlynn.chan@deacons.com
+852 2825 9328