

Noteworthy Points on Limitation Periods Applicable to Award Enforcement in the Chinese Mainland and Hong Kong: A Brief Summary and Update

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For awards issued in cases administered by the China International Economic and Trade Arbitration Commission (“**CIETAC**”) Hong Kong Arbitration Center, parties can enforce them in the Chinese mainland and Hong Kong out of the many other possible jurisdictions. What they cannot do, however, is to simultaneously enforce the award in both jurisdictions. This is expressly prohibited under the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the “**Arrangement**”).

Enforcement of awards in either jurisdiction may take time. Parties need to consider the sequence of enforcement applications in both jurisdictions. Therefore, understanding the many differences in limitation periods can be crucial for parties in their enforcement strategies.

Chinese Mainland

Pursuant to Article 239 of the Civil Procedure Law of the People's Republic of China (Revised in 2017) (the "**Civil Procedure Law**"), the limitation period applicable to applications for enforcement of awards is two years.

The starting point for the calculation, and the rules on refreshment and suspension of the limitation period, are worth noting.

The Starting Point to Calculate Limitation - Statute and Case

Pursuant to Article 239 of the Civil Procedure Law, the limitation period (of two years) shall be calculated from the date of the deadline to perform the orders stated in the award. Where the award does not specify a deadline, the limitation period shall be calculated from the effective date of the award.

That said, the Shanghai courts departed from this default position in *Shanghai Jwell Machinery Co., Ltd. v Retech Aktiengesellschaft* (2008) Hu Yi Zhong Zhi Zi No. 640-1 ("**Jwell v Retech**"), a case discussed and passed by the Adjudication Committee of the Supreme People's Court. In this case, the CIETAC award became effective in September 2006 but no PRC courts had jurisdiction over its enforcement at that time, because neither the award debtor, Retech Aktiengesellschaft ("**Retech**"), nor its assets were within the Chinese mainland. The award creditor, Shanghai Jwell Machinery Co. Ltd ("**Jwell**"), subsequently applied for enforcement in Switzerland but in vain. In the summer of 2008, Jwell identified assets belonging to Retech in an exhibition in Shanghai hence it applied for enforcement against those assets.

After finding that Jwell had not been idle in exercising its right to enforce the award, the No. 1 Intermediate Court of Shanghai held that the limitation period for Jwell to apply to a Chinese mainland court for enforcement of the award shall be calculated from the date on which Retech's assets came within the Chinese mainland. That date was almost two years after the date of the CIETAC award.

Refreshment and Suspension

Jwell v Retech is consistent with legislative position of the Chinese mainland on limitation, in that it aims to protect both the procedural and substantive rights of the creditor if he or she has been diligently attempting to enforce the award.

This legislative position is also reflected in the rules on the refreshment or suspension of the calculation of limitation. Article 140 of the General Principles of Civil Law of the People's Republic of China (the "**General Principles of Civil Law**") provides that: "*[t]he limitation shall be interrupted if legal proceedings are commenced or if an interested party demands or agrees to fulfilment of its obligations. Calculation of the limitation period shall commence anew from the time of interruption*".

Previously, there were differing opinions on whether enforcement proceedings are considered legal proceedings that will interrupt the calculation of the limitation period. But such doubt was cleared by Article 28 of the Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China (the "**Interpretation**"). Article 28 states that the calculation of the limitation period will be interrupted on the date of commencement of the enforcement proceedings, the date when the parties reach a settlement, or the date when one of the parties proposes or agrees to enforce.

Both the General Principles of Civil Law and the Interpretation have not clarified when the calculation of the limitation period should restart following the commencement of enforcement proceedings. However, it is commonly understood by academics and practitioners that the period of the enforcement proceedings should not be counted in the limitation period. That is to say, the limitation period shall reset on the date of commencement of enforcement proceedings, but the calculation of the limitation period shall restart only when the enforcement proceedings conclude.

Alternatively, parties are entitled to have the calculation of limitation period suspended if one of the statutory conditions under the General Principles of Civil Law is triggered, e.g. force majeure under Article 139 of the General Principles of Civil Law.[fn]See also Article 27 of the Interpretation.[/fn]

On 8 June 2020 the Supreme People's Court issued the Guiding Opinions on Several Issues Concerning the Lawful and Proper Trial of Civil Cases Involving the

COVID-19 (III) Fa Fa [2020] 20, in which it stated that the refreshment and suspension rules mentioned above also apply to Hong Kong or foreign-seated arbitrations in addition to arbitrations seated in the Chinese mainland.

Hong Kong

Section 4(1) of the Limitation Ordinance (Cap. 347) (the “**Limitation Ordinance**”) provides that: “[t]he following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say... (c) actions to enforce an award, where the submission is not by an instrument under seal.”

If the submission is by an instrument under seal, the limitation period is 12 years according to section 4(3) of the Limitation Ordinance.

For parties seeking award enforcement in Hong Kong, issues arise as to the application of section 4(3) and whether there are similar refreshment or suspension rules under the laws of Hong Kong as those in the Chinese mainland. These two questions have been addressed in Hong Kong case law, as explained below.

Execution by Seal

In *Wang Peiji v Wei Zhiyong* [2019] HKCFI 2593; [2019] HKEC 3446 (“**Wang Peiji v Wei Zhiyong**”), the award creditor argued that because the award of the Guangzhou Arbitration Commission was executed by seal, the applicable provision was section 4(3) of the Limitation Ordinance which provides for a limitation period of 12 years.

Deputy High Court Judge Hall-Jones rejected this argument. He held that the relevant consideration should be whether the underlying contract, rather than the award, was executed by seal. Therefore, the limitation period of six years under section 4(1)(c) of the Limitation Ordinance applied and the enforcement order made earlier was set aside.

No Suspension

There is no legislation in Hong Kong that specifically provides for the suspension or refreshment of the limitation period, for a party who first attempts to enforce the award in the Chinese mainland.

In *Wang Peiji v Wei Zhiyong*, the award creditor argued that the limitation period should be suspended for the period in which the award creditor was engaged in enforcement proceedings before the Chinese mainland court. In an effort to distinguish the ruling in another Hong Kong case, *CL v SCG* [2019] 2 HKLRD 144, the award creditor in *Wang Peiji v Wei Zhiyong* also argued that its enforcement proceedings in the Chinese mainland went on for a fair amount of time and were rather successful, so it could not have been expected to cease its efforts there. Despite these arguments, the Court found that Hong Kong law (which includes the Arrangement) does not provide for limitation periods to be suspended while the successful party attempts enforcement in the Chinese mainland.