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ASIA/PACIFIC



Hong Kong

A Game Changer: Interim Measures from the Mainland Chinese Courts in Support of Hong Kong Arbitrations

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The ‘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 Special Administrative Region’ came into force on 1 October 2019, making Hong Kong the first jurisdiction outside of Mainland China where interim measures in aid of arbitral proceedings may be obtained.

Opening remarks

From 1 October 2019 onwards, parties to arbitrations seated in Hong Kong which are administered by one of six specified arbitral institutions in Hong Kong, including the Asia Office (Hong Kong) of the ICC International Court of Arbitration,¹ can apply for interim measures in support of their arbitrations from the Mainland Chinese courts, regardless of when the arbitration commenced. Arbitrations seated in any other jurisdiction will not enjoy such benefits.

This major development will give parties to disputes between a Mainland Chinese party and a foreign party another compelling reason to choose Hong Kong as their seat of arbitration, in addition to Hong Kong’s other advantages as a seat of arbitration, such as its independent judicial system, large talent pool of lawyers and experts, hearing facilities, etc. This segment of the arbitration market concerning disputes between a Mainland Chinese party and a foreign party (such as parties from other Asian countries, Europe and Africa) is only expected to grow² in view of the inevitable rise of the People’s Republic of China (‘PRC’) as a global economic superpower and the implementation of the One Belt, One Road initiative. The One Belt, One Road initiative is a massive transport and infrastructure development strategy launched by the PRC government in 2013, which is aimed at developing transport and infrastructure links with

the PRC along six economic corridors spanning Asia, Europe and Africa, covering approximately 65 countries across three continents.³

Background

On 2 April 2019, the Department of Justice in Hong Kong and the PRC Supreme People’s Court signed the ‘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 Special Administrative Region’ (the ‘Arrangement’).⁴ The Arrangement came into force on 1 October 2019 (coinciding with the PRC National Day) pursuant to a judicial interpretation by the PRC Supreme People’s Court handed down on 26 September 2019 in the People’s Court Daily⁵ and as announced by the Department of Justice in Hong Kong on the same day.⁶

The Arrangement is necessary even though Hong Kong is part of the PRC because under the ‘One Country, Two Systems’ principle, Hong Kong maintains a legal system that is distinct and separate from Mainland China. An example of this distinction is that Hong Kong adopts the common law system, but Mainland China adopts the civil law system. This is the seventh arrangement on mutual legal assistance signed

1 See ICC news (8 Oct. 2019), ‘ICC confirmed as authorised institution under China-Hong Kong arrangement on interim relief’, ICC being the only non-Chinese institution included.
2 See article published in the South China Morning Post ‘Is this just the beginning of ‘belt and road’ disputes between China and its partners?’ (8 Oct. 2018).

3 In Jan. 2018, ICC created the Belt and Road Commission to promote and develop ICC’s existing services to support Belt and Road disputes. For more information, see <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/>.

4 The full text of the Arrangement can be accessed at https://www.doj.gov.hk/pdf/2019/arbitration_interim_e.pdf.

5 The announcement in the People’s Court Daily can be accessed at http://rmfyb.chinacourt.org/paper/html/2019-09/26/content_160433.htm?div=-1

6 See the press release of the Department of Justice in Hong Kong.

between the PRC Supreme People's Court and Hong Kong government. Other arrangements concern subjects like the recognition and enforcement of judgments in civil and commercial matters,⁷ arbitral awards,⁸ cross-border service of legal documents,⁹ etc.

The key rationale behind the Arrangement is to allow parties to arbitrations seated in Hong Kong to apply to the Mainland Chinese courts for interim measures provided that those arbitrations are administered by arbitral institutions, dispute resolution institutions or permanent offices that fulfil certain qualifying criteria. The qualifying criteria include:

1. arbitral institutions established or headquartered in Hong Kong, with their principal place of management located in Hong Kong;
2. dispute resolution institutions or permanent offices set up in Hong Kong by international intergovernmental organisations of which the PRC is a member; or
3. dispute resolution institutions or permanent offices set up in Hong Kong by other arbitral institutions which satisfy the relevant criteria set by the Hong Kong Government (such as the number of arbitration cases and the amount in dispute, etc.)

According to an announcement of the Department of Justice in Hong Kong on 12 April 2019,¹⁰ the criteria that dispute resolution institutions or permanent offices set up in Hong Kong have to satisfy under limb (3) above are:

- > the dispute resolution institution or permanent office has been established in Hong Kong for five years or more, during which period it has continuously been operating the business of administering arbitration cases; and
- > in the past three years, the dispute resolution institution or permanent office has been administering no fewer than three arbitration cases seated in Hong Kong, at least one of which involves a party who is not a permanent resident or legal person of the Hong Kong Special Administrative Region; and

7 The full text of this arrangement can be accessed at <https://www.doj.gov.hk/eng/mainland/pdf/mainlandrej20060719e.pdf>. A summary of the key features of this arrangement can be found at <https://www.doj.gov.hk/eng/topical/pdf/mainlandrej20060717e.pdf>.

8 The full text of this arrangement can be accessed at <https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf>.

9 The full text of this arrangement can be accessed at <https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual1e.pdf>.

10 The announcement can be accessed at https://www.doj.gov.hk/eng/public/concerning_mutual_assistance.html#below.

- > in the past three years, the total amount in dispute in arbitration cases seated in Hong Kong and administered by the dispute resolution institution or permanent office was not less than HK\$ 12 million.

After receiving applications from interested arbitral institutions, dispute resolution institutions and permanent offices, the Department of Justice in Hong Kong has published a list of six arbitral institutions, dispute resolution institutions or permanent offices that have met these qualifying criteria:¹¹

- > China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong Arbitration Center
- > eBRAM International Online Dispute Resolution Centre
- > International Court of Arbitration of the International Chamber of Commerce – Asia Office
- > Hong Kong International Arbitration Centre (HKIAC)
- > Hong Kong Maritime Arbitration Group
- > South China International Arbitration Center (Hong Kong)

The Department of Justice in Hong Kong may update this list or consider future applications from time to time.

The Arrangement sets out three categories of interim measures that an applicant may obtain from the Mainland Chinese courts, namely (1) a property preservation order, (2) an evidence preservation order, and (3) a conduct preservation order. Essentially, the Arrangement requires an applicant to demonstrate its entitlement for interim measures under Mainland Chinese law. For example:

1. a property preservation order prevents the respondent from dissipating assets in order to frustrate the enforcement of an award;
2. an evidence preservation order ensures that the respondent produces evidence which may be destroyed or difficult to obtain subsequently; and
3. a conduct preservation order would either prohibit the respondent from doing any specified acts that would upset the status quo (e.g. the respondent selling property to which the applicant claims ownership) or compel the respondent to do specified acts to maintain the status quo.

11 The list of institutions is available at https://www.doj.gov.hk/eng/public/pr/20190930_pr1.html.

The Mainland Chinese court has a discretion to order security as a condition for granting the interim measure. If the interim measure is sought before commencement of the arbitration, security must be provided.¹²

The Arrangement applies to applications for interim measures regardless of whether the arbitration was commenced before or after the Arrangement came into force. Interim measures may be sought before the Mainland Chinese court either before or during an arbitration, provided the application is made before the award is issued. However, if interim measures are obtained before the arbitration is commenced, the interim measure may be discharged after 30 days if the PRC court does not receive a letter from the arbitral institution, dispute resolution institution or permanent office confirming that the arbitration has commenced.

One unique feature is that the Arrangement provides that, if the interim measure is sought during an arbitration, applications for interim measures in the Mainland Chinese courts are to be submitted to the appropriate Mainland Chinese court (i.e. the Intermediate People's Court where the assets, evidence or the respondent is located) through the arbitral institution, dispute resolution institution or permanent office administering the arbitration. This provision aligns the procedure of making applications for interim measures with Mainland Chinese law. However, the Supreme People's Court has issued a memorandum recognising that such a procedure would not be conducive to the urgent nature of applications for interim measures. Hence, parties to Hong Kong seated arbitrations should be allowed to file their applications directly to the Mainland Chinese court and let the Mainland Chinese court confirm the authenticity of the application with the relevant arbitral institution, dispute resolution institution or permanent office. By contrast, it would be up to the parties themselves to make the application to the appropriate court in most other jurisdictions, such as Hong Kong and Singapore.

Notwithstanding that the Arrangement provides for a reciprocal right for parties to arbitrations seated in Mainland China to obtain interim measures in the Hong Kong courts, the Hong Kong Arbitration Ordinance (Cap. 609) has always allowed parties to arbitrations seated outside Hong Kong to apply to the Hong Kong courts for interim measures even before the Arrangement was signed.¹³ Hence, the position for PRC seated arbitrations in Hong Kong effectively remains unchanged by the Arrangement.

¹² See Arts. 100 and 101 of the PRC Civil Procedure Law.

¹³ Section 45(2) of the Hong Kong Arbitration Ordinance (Cap. 609), which came into force on 1 June 2011 provides

Implications for parties and lawyers

Before the Arrangement, if interim measures were critical to the successful resolution of a dispute between a Mainland Chinese party and a foreign party, the only recourse for a foreign party was to agree to the jurisdiction of the Mainland Chinese courts or an arbitration seated in Mainland China during contract negotiations. Such a status quo was generally unfavourable to foreign parties who may feel compelled to litigate or arbitrate against a Mainland Chinese party seen to enjoy a 'home ground' advantage.

Now, the Arrangement gives Hong Kong arbitrations the added significant advantage that its regional competitors lack. The importance of being able to obtain such interim measures cannot be overstated. This is because interim measures serve the important function of ensuring that an arbitration or the enforcement of an arbitral award does not become illusory or a pyrrhic victory.

For example, if the claimant to an arbitration concerning a non-disclosure agreement cannot obtain a conduct preservation order against the respondent to restrain disclosure pending the award, then an award prohibiting the respondent from making such a disclosure may be cold comfort to the claimant as irreparable damage would most likely have been done. Similarly, if a respondent is found to be dissipating assets to frustrate the potential enforcement of an award, it may be pointless for the claimant to obtain a substantial award if the dissipation of assets cannot be restrained by a property preservation order pending the award.

The benefits of the Arrangement also extend Hong Kong's lead as a dispute resolution hub for disputes arising from the One Belt One Road initiative. Arbitral institutions or permanent offices will have a strong incentive to set up offices in Hong Kong to benefit from the Arrangement. The Arrangement ties in with the other advantages that Hong Kong has as a hub for international commercial arbitration, such as a large

that: 'On the application of any party, the Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside Hong Kong, grant an interim measure. Section 45(5) provides that: In relation to arbitral proceedings which have been or are to be commenced outside Hong Kong, the Court may grant an interim measure under subsection (2) only if (a) the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong under this Ordinance or any other Ordinance; and (b) the interim measure sought belongs to a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the Court'.

talent pool of lawyers and experts, an independent judiciary, the adoption of the common law system, a sophisticated arbitration statutory regime based on the UNCITRAL Model Law (incorporating the 2006 amendments on interim measures) and the list goes on.¹⁴

Parties who want to take advantage of the Arrangement for their potential disputes between a Mainland Chinese party and a foreign party should ensure that the arbitration agreement provides that:

- > the seat of arbitration is Hong Kong; and
- > one of the six qualifying arbitral institutions, dispute resolution institutions or permanent offices are specified as the body responsible for administering the arbitration.

It is worth mentioning that parties may need to engage Mainland Chinese lawyers to help them make the application for interim measures as only Mainland Chinese lawyers can represent parties before the Mainland Chinese courts. The Arrangement also offers a good opportunity to PRC law firms to be more involved in arbitrations seated in Hong Kong.

However, this Arrangement may have unintended consequences where Mainland Chinese parties with greater bargaining power may insist on *ad hoc* arbitration in Hong Kong so as to keep the seat of arbitration on Chinese soil while avoiding the risk of interim measures being taken against them.

Conclusion

It remains to be seen how well the Arrangement will be received by arbitration users and how it will effectively be applied by the Mainland Chinese courts, but the general consensus is that the Arrangement is greatly welcomed by all in the arbitration community. The Arrangement is a reflection of the close judicial cooperation between Hong Kong and Mainland China under the 'One Country, Two Systems' principle and further reinforces Hong Kong's position as a world-class dispute resolution centre.

¹⁴ In less than a month following the coming into force of the Arrangement, the HKIAC announced that five applications for interim measures to preserve assets in the Mainland Chinese courts have been made in ongoing Hong Kong seated arbitrations administered by the HKIAC. In each case, the HKIAC issued a letter to confirm its acceptance of the case and to transfer the application to the relevant Mainland Chinese court. The applicant then submitted its application together with the HKIAC's letter to the Mainland Chinese court directly. Out of the five applications, one was granted by the Shanghai Maritime court on 8 Oct. 2019. (See HKIAC Press Release on 11 Oct. 2019: <https://www.hkiac.org/news/five-interim-relief-applications-under-new-arrangement>.)