

INTERIM MEASURES IN AID OF ARBITRATION: ARRANGEMENT BETWEEN MAINLAND CHINA AND HONG KONG TO TAKE EFFECT ON 1 OCTOBER 2019

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 is seen as particularly important for arbitrations involving Mainland Chinese parties or assets, as it makes Hong Kong the first (and only to date) seat of arbitration outside Mainland China where the parties can access the PRC court system in pursuit of interim measures in aid of offshore arbitration.

INTRODUCTION

On 26 September 2019, the Supreme People's Court of the PRC (SPC) and the Department of Justice of Hong Kong (HKDoJ) announced that 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) will come into effect in both Mainland China and Hong Kong on 1 October 2019.

As reported before (click [here](#)), the Arrangement was entered into by the SPC and HKDoJ on 2 April 2019, pending further internal processes taking effect.

The Arrangement is seen as particularly important for arbitrations with Mainland Chinese parties or assets, as it makes Hong Kong the first (and the only to date) seat of arbitration outside Mainland China where the parties can access the PRC court system in pursuit of interim measures in aid of offshore arbitration.

Under Hong Kong law, Hong Kong courts may grant interim relief in support of arbitrations seated outside Hong Kong, including Mainland China. The Arrangement does not modify the powers and practice of Hong Kong courts. Therefore this briefing focuses on the PRC courts' order of interim measures in aid of arbitrations seated in Hong Kong.

SCOPE OF APPLICATION

When an arbitration satisfies the following requirements, the parties in the arbitration may apply to a competent PRC court for interim measures:

Key issues

- Parties to arbitrations seated in Hong Kong can now apply to the Mainland courts for interim measures in support of those offshore proceedings.
- The arbitration must be administered by an institution acknowledged by the SPC and the HKDoJ and includes, among others, the HKIAC, ICC and CIETAC HK.
- Interim measures include asset preservation, evidence preservation and conduct preservation (similar to prohibitory or mandatory injunctions).
- Applications may be made in advance or in the course of arbitration.

- The arbitration is seated in Hong Kong. This may be (i) expressly agreed by the parties in the arbitration agreement, or (ii) ascertained by the arbitral tribunal in the absence of the parties' agreement; and
- The arbitration is administered by any of the institutions mutually acknowledged by the SPC and the HKDoJ, which currently includes the following:
 - Hong Kong International Arbitration Centre (HKIAC);
 - China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center (CIETAC HK);
 - International Court of Arbitration of the International Chamber of Commerce - Asia Office (ICC);
 - Hong Kong Maritime Arbitration Group;
 - South China International Arbitration Center (HK); or
 - eBRAM International Online Dispute Resolution Centre. (eBRAM stands for Electronic Business Related Arbitration and Mediation. It is a platform that as the name suggests, enables electronic resolution of disputes by arbitration and mediation co-founded by the Hong Kong Law Society and Bar Association and backed by the Hong Kong government.)

After taking effect, and importantly, the Arrangement will apply to arbitrations commenced after the effective date of 1 October 2019 and also to those commenced and pending prior to the effective date.

The Arrangement does not apply to investor-State arbitrations arising out of investment treaties.

PROCEDURES AND STANDARDS OF APPLICATION

Under PRC law, interim measures include asset preservation, evidence preservation and conduct preservation (which has similar effects as prohibitory or mandatory injunctions under common law).

The Arrangement sets out the general procedures for such application as discussed below.

- Timing: an applicant may apply for interim measures either in advance of the commencement of arbitration, or in the course of arbitration.
- Proper forum: the applicant may apply before the PRC court located at the place (i) where the party subject to the application is domiciled, (ii) where the asset subject to preservation is located; or (iii) where the evidence subject to preservation is located.
- Standards: the applicant shall furnish a written application with relevant evidence, detailing the following matters, among other things:
 - Interim measures sought, including the amount of asset preservation sought, or content and time period of conduct preservation sought;
 - The factual and legal basis for the application, including elaboration on how the circumstances constitute an emergency, the irreparable harm the applicant would suffer and/or the reason why it would be difficult to enforce the award if no interim measure is granted;
 - Clear information on or specific indication as to the asset or evidence the subject of the preservation application; and

- Evidence of assets in Mainland China that could be offered by the applicant as fortification for the interim measure application.

Under PRC law, the PRC court shall make a ruling on an interim measure application made in advance of arbitration within 48 hours. For an application made in the course of arbitration, PRC law does not prescribe any specific time frame, but the PRC court shall make a ruling within 48 hours if it considers the circumstances to be urgent.

If the applicant of a pre-arbitration application does not provide the PRC court with evidence showing commencement of arbitration within 30 days upon the PRC court's grant of interim measure, the PRC court shall discharge the interim measure.

POTENTIAL IMPACT

The Arrangement is the seventh mutual judicial assistance arrangement between Mainland China and Hong Kong. These arrangements have covered major judicial assistance aspects including the mutual recognition and enforcement of arbitral awards, as well as civil and commercial court judgments, service of process and taking of evidence.

The integrated approach to dispute resolution reflected in the Arrangement gives parties contracting with Mainland Chinese parties or dealing with assets or projects in Mainland China a stronger reason to choose Hong Kong as an arbitral seat as they can now obtain onshore interim relief. Importantly this option is also available to parties who already have Hong Kong selected as the seat in their contracts or are already involved in Hong Kong seated arbitrations and meet the necessary requirements.

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