Arbitrating in China – What Interim Measures are Available from the Courts?

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The recent revisions to the Chinese Civil Procedure Law (the "**CPL**") made some significant amendments to the arbitration law in China. In particular, the new CPL for the first time provides for pre-arbitration preservation measures to be available from the Chinese courts. The revisions will come into force on 1 January 2013.

Under the existing CPL, only parties to potential court litigation are entitled to apply directly to the Chinese courts prior to the commencement of litigation proceedings for pre-litigation preservation of assets (Articles 93). If, however, the parties have agreed in their contract to resolve any disputes arising out of the transaction by arbitration, under the current regime neither of them will be able to apply for conservatory measures until **after** they have commenced the arbitration. This means that they would be likely to have missed the best opportunity for imposing conservative measures on the evidence or assets which are in the possession of the opposing side. New Articles 81 and 101 of the CPL 2012, when they take effect next year, will fill in this major gap by providing parties to potential arbitration proceedings with the opportunity to apply directly to the Chinese courts (either on an *ex parte* or on notice basis) for pre-arbitration preservation of evidence and preservation of assets respectively.

These new articles will therefore considerably alleviate what has been criticised as a significant disadvantage of arbitration in China as compared with court litigation, i.e. the lack of effective interim measures as a safeguard to any final arbitral awards. The effectiveness of any available interim measures is, therefore, likely to become less important when parties are considering whether to select arbitration as the dispute resolution method in their China-related contracts.

Although introducing the pre-arbitration preservation measures will provide a solution to one of the major problems surrounding the issue of interim measures for arbitration in China, there remain a few unresolved concerns which are worth noting.

First, under the current regime, parties to arbitration are not able to apply **directly** to the court for a conservatory measure both before **and** during arbitral proceedings. Although the new law addresses the former, allowing pre-arbitration applications made directly to the court, position during arbitration proceedings is unchanged. According to Article 256 of the current CPL (also Articles 28, 46 and 68 of the Chinese Arbitration Law), parties to arbitration will have to initially submit an application for preservation measures to the relevant arbitral institution, such as the China International Economic and Trade Arbitration Commission ("**CIETAC**"), and it is that institution who would then forward this application onto the competent court. The court may finally make an order if it considers it

appropriate.

Such a “two step” approach to conservatory measures where the arbitral institution acts as a middle-man may not achieve the desired effect in practice. Conservatory measures, by their nature, usually require swift action. Although most applications for conservative measures in China are made on an *ex parte* basis, the current application process inevitably takes more time than a direct application to the court. This may allow the opposing side an opportunity to hide, transfer or dissipate the evidence or assets concerned, before a court order is obtained. This outdated practice has long been subject to criticism in the Chinese arbitration community.

While the new provisions in respect of pre-arbitration measures will greatly alleviate the issue (this will no doubt become a further advantage of taking pre-action conservatory measures for arbitration in China), this “two step” relay approach will still be applicable to any applications for conservatory measures made **during arbitral proceedings** according to new Article 272 of the CPL (also Articles 28, 46 and 68 of the Chinese Arbitration Law). This rather awkward procedure is mirrored in Article 21 (1) of the CIETAC rules 2012 which states:

> “Where a party applies for conservatory measures pursuant to the laws of the People’s Republic of China, the secretariat of CIETAC shall forward the party’s application to the competent court designated by that party in accordance with the law.”

Therefore, an application for conservatory measures in relation to arbitral proceedings in China will be subject to different procedural requirements depending on whether the application is made during or prior to arbitral proceedings. Such a distinction may result in further complication of the issue of interim measures. In a potential CIETAC arbitration, therefore, in order to avoid triggering the application of the procedural rules set out in Article 21 (1) of the CIETAC Rules 2012 and to achieve the best possible result, parties are well advised to make any application for conservatory measures **before** filing a request for arbitration to CIETAC.

Secondly, it is questionable whether the pre-arbitration conservatory measures provided for in Articles 81 and 101 would be equally applicable to an application made in advance of a prospective “foreign” arbitration to be held outside China and administered by a non-Chinese institution. With some optimism, one may expect that the pre-arbitration conservatory measures may also benefit parties to potential offshore arbitrations. This view draws support from the very similar procedures provided for under the Chinese Maritime Special Procedure Law where pre-arbitration conservatory measures have been applied by Chinese maritime courts to international arbitration for many years.

However maritime matters are treated differently in China as a special area of law and are dealt with by specialised maritime courts and judges who are prone to follow international practice based on the Special Procedure Law. By contrast, the general pre-arbitration conservatory measures will be dealt with before ordinary civil courts where judges tend to adhere to the traditional interpretation of the law and procedure. In this regard, it is notable that Chinese courts have previously shown their reluctance to enforce interim measures ordered by foreign arbitral tribunals (*Hemofarm DD, et al. v. Jinan Yongning Pharmaceutical Co. Ltd.* [2008] Min Si Ta Zi No. 11). They have also previously refused to issue interim measures for the purpose of enforcing an foreign arbitral award, on the basis that the interim measures provided under Chinese law were only available to domestic arbitrations. Furthermore, foreign related arbitrations are dealt with in the CPL under a separate section which only provides for preservation of assets made **during** arbitral proceedings, as discussed above in respect to new Article 272.

One would not therefore be surprised to see Chinese courts being prepared only to narrowly apply the new pre-arbitration conservatory measures to applications in connection with domestic arbitrations. Even if they were willing to grant an order for interim measures, the court may subsequently refuse to recognise any arbitral proceedings that are administered by a foreign arbitral institution, meaning that such an interim order would be likely to be revoked by the court upon a challenge from the other side. That said, we must wait for this issue to be clarified in judicial practice or through a judicial interpretation from the Chinese Supreme People's Court in the future.

Finally, Article 100 of the revised CPL will introduce some new interim measures into the general civil procedure in China. Under the existing regime, Chinese law only allows three types of interim measures: preservation of evidence, preservation of assets and advance execution. Therefore, Chinese courts are not empowered to grant other interim measures having an effect of compelling or prohibiting a party to perform certain actions (arguably advance execution may include court prohibitive orders, but its scope of application is very limited and unclear (Art 106 of the new CPL)), which courts in many other jurisdictions have the power to order. The new Article 100 will rectify this major omission in the CPL and explicitly provide Chinese courts with the power to order, upon the request of a party, specific performance or injunctive measures.

This reform is no doubt a significant step forward in Chinese civil procedure. However, on the face of the new Article 100, no express reference is made to arbitration which indicates that these new interim measures will not be available to parties to arbitration. This will unfortunately create a further disadvantage to arbitration in China, and will become an important factor to consider in deciding whether to choose to arbitrate or litigate any China-related disputes.

Through the revisions to the CPL, Chinese regulators have once again shown their commitment to putting in place a pro-arbitration legal regime in China. The reform made in respect of arbitral interim measures will considerably facilitate the resolution of disputes by arbitration in China and make it a more attractive dispute resolution method. However, these revisions do not yet go far enough and many issues remain to be resolved. Compared with the regimes in other major jurisdictions, it may be fair to say that the reform of the Chinese arbitral regime still has a long way to go; but this is nonetheless an encouraging first step.

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