

Hong Kong and Mainland China Agree upon Bilateral Arrangement Regarding Interim Measures for Arbitration

Kluwer Arbitration Blog

April 2, 2019

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Please refer to this post as: Peter Yuen, Helen H. Shi, Damien McDonald, Olga Boltenko, Matthew Townsend, 'Hong Kong and Mainland China Agree upon Bilateral Arrangement Regarding Interim Measures for Arbitration', Kluwer Arbitration Blog, April 2 2019, <http://arbitrationblog.kluwerarbitration.com/2019/04/02/hong-kong-and-mainland-china-agree-upon-bilateral-arrangement-regarding-interim-measures-for-arbitration/>

In a significant development for the region, Mainland China and Hong Kong have announced a bilateral arrangement by which the Chinese courts will now recognise and enforce interim measures in support of institutional arbitration seated in Hong Kong (the “Arrangement”).^[fn] 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.^[/fn]

As China has no equivalent measures in place with any other non-Mainland jurisdictions, the Arrangement will further enhance Hong Kong’s attractiveness as a seat for China-related international arbitrations. Parties may now conduct “offshore” arbitration in Hong Kong whilst keeping open the potential for interim measures in Mainland China.

Background

Under PRC law the power to grant interim relief in support of arbitration rests exclusively with the courts. Importantly, whilst the PRC courts are known to award interim relief in support of domestic arbitration proceedings, they have historically been unwilling to award such measures in support of arbitrations seated outside of Mainland China.

This treatment extends to arbitration proceedings in Hong Kong, which following its 1997 handover to the PRC retains its own separate legal system based upon English common law. Whilst the two jurisdictions have entered into reciprocal arrangements with respect to the enforcement of arbitral awards and court judgments (signed in 2000 and 2019 respectively), neither instrument covers interim measures in support of arbitration.

Consequently, international commercial parties agreeing arbitration clauses have in the past had no option but to arbitrate in Mainland China if they wish to ensure the availability of interim measures in the PRC.

Recent developments had however pointed to a potential change in approach and practice by the PRC courts. For instance, as previously reported in this blog, the Wuhan Intermediate People’s Court in central China granted interim relief to a Claimant in a Hong Kong seated arbitration. However, as there is no system of precedent in China’s legal system, such cases do not formally bind other courts.

The Arrangement

The Arrangement was signed on 2 April 2019 and will come into force on a date to be announced. It empowers the PRC courts to grant interim measures in support of administered Hong Kong arbitration proceedings.

The Arrangement has certain limitations. It applies only to arbitrations administered by specific institutions, of which a full list will be published in due course. It does not however extend to 'ad hoc' (i.e. unadministered) arbitrations. PRC law does not permit such arbitrations domestically, although in 2009 the PRC Supreme People's Court confirmed that arbitration awards rendered in ad hoc proceedings in Hong Kong were enforceable in the PRC.

Perhaps most importantly, the relief in question is typically limited to preservation measures against assets or property. Although PRC courts have since 2017 also been empowered to grant mandatory or prohibitory injunctions (Chinese Civil Procedure Law, article 100), such orders will rarely be granted.

The Arrangement also provides for reciprocal rights to the effect that a party to arbitral proceedings in Mainland China may apply to the Hong Kong courts for interim measures (a relief which is already available under Hong Kong law).

Significance of the Arrangement

The Arrangement is an important development. It provides parties to China-related transactions with a welcome additional option when selecting the seat of arbitration. As an alternative to arbitrating in Mainland China, such parties can now agree to arbitrate in Hong Kong, whilst being assured that they have the possibility of applying for interim relief in Mainland China.

The new instrument therefore further consolidates Hong Kong's position as a unique jurisdiction for the resolution of China-related disputes through arbitration. Hong Kong already occupies a hybrid position as a part of the PRC sovereign State which nonetheless maintains its own independent common law system, and judiciary. On the one hand it is a separate independent jurisdiction, whilst on the other it enjoys cultural, linguistic and geographical proximity to the Mainland. The new Arrangement further enhances Hong Kong's claim to be the premier jurisdiction for resolving China-related international disputes.