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Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures: Interpretations from a Mainland China Perspective – Part I

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Introduction

On April 2, 2019, the Supreme People's Court ("**SPC**") and the Department of Justice ("**DOJ**") of the Hong Kong Special Administrative Region ("**HKSAR**") 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* ("**Arrangement**"). This post provides some views on the *Arrangement* as informed by the laws of Mainland China (see earlier discussions on this by Yuen, Shi, McDonald et al here and by Coënt and Thong here).

A. Court Practices Pre-dating the Arrangement

First, in terms of applications prior to the arbitral proceedings or at the stage of recognition of arbitral awards, there was no public precedent where the party applied for property preservation and succeeded. There were no specific laws or regulations on this point either.

Second, courts in the Mainland would not grant the application submitted during an arbitral proceeding. For example, Shanghai First Intermediate People's Court rejected such an application in *DONGWON F&B* [2014] Hu Yi Zhong Shou Chu No.2, ruling that since the applicant had submitted the request for arbitration to the Korean Commercial Arbitration Board and the arbitration was not in China, it lacked legal basis for accepting the application for property preservation.

As an exception to this rule, Article 21(2) of the *Interpretation of the Supreme People's Court on the Application of the Special Maritime Procedure Law of the People's Republic of China* (Fa Shi [2003] No.3, "**Interpretation on Maritime Procedure Law**") stipulates that "Where …… the relevant dispute has already been submitted for arbitration while the involved property is within the People's Republic of China, if a party applies for property preservation to the maritime court of the place where the property is located, the maritime court shall accept the application".

Accordingly, courts in the Mainland could accept the application for property preservation submitted during an extraterritorial maritime arbitral proceeding. For instance, in 2010, Ningbo Maritime Court in its ruling ([2010] Yong Hai Fa Zhong Bao No.1) granted the application for property preservation in accordance with Article 17 of the *Special Maritime Procedure Law of the People's Republic of China* and Article 21(2) of the *Interpretation on Maritime Procedure Law*. In 2016, Wuhan Maritime Court, after the party to the arbitral proceeding administered by Hong Kong International Arbitration Center ("**HKIAC**") having provided guarantees, held in its ruling ([2016] E 72 Cai Bao No.427) that the application for property preservation was consistent with the existing laws and supported the application in accordance with Article 28 of the *Arbitration Law of the People's Republic of China* ("**Arbitration Law**") and Article 103 of the *Civil Procedure Law of the People's Republic of China* ("**Civil Procedure Law**"). However, it should be noted that according to Article 18 of the *Interpretation on Maritime Procedure Law*, the property to be preserved was limited to vessels, cargos carried by a vessel, and fuel and supplies of a vessel.

Third, courts in the Mainland did not apply a consistent approach in deciding applications for property preservation at the award recognition stage. In 2016, Haikou Maritime Court initially granted the application for property preservation in a case of recognition of an arbitral award rendered by London Maritime Arbitrators Association. However, after the respondent appealed for reconsideration, the court revoked its previous ruling due to the lack of legal basis ([2016] Qiong 72 Xie Wai Ren No.1). On the contrary, in 2018, Guangzhou Maritime Court granted the application for property preservation prior to the application for the recognition of a Hong Kong arbitral award on the ground that the party had provided sufficient guarantees and met the legal requirements ([2018] Yue 72 Cai Bao No.72) under Article 100, 102 and 103(1) of the *Civil Procedure Law* and Article 487(1) of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*.

B. Comments and Suggestions on the Approach of the Arrangement

1. *Exclusion of Ad-hoc Arbitration*

According to Article 2 of the *Arrangement*, "Arbitral proceedings in Hong Kong" shall be seated in Hong Kong and administered by an institution or permanent office, which means that the *Arrangement* only applies to institutional arbitrations, excluding *ad hoc* arbitrations.

The reason of exclusion may be the relatively conservative attitude of the judicial practice in the Mainland towards *ad hoc* arbitration. At present, the judicial practice in the Mainland allows parties to submit their disputes to *ad hoc* arbitrations under very limited circumstances. Article 9(3) of *Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones* (Fa Fa [2016] No.34) stipulates that "If two enterprises registered in Free Trade Zones agree that relevant disputes shall be submitted to arbitration at a particular place in the Mainland, according to particular arbitration rules, or by particular personnel, the arbitration agreement may be determined as valid". Although this provision does not

explicitly define "arbitration at a particular place in the Mainland, according to particular arbitration rules, or by particular personnel" as *ad hoc* arbitration, it is widely accepted that the SPC has allowed *ad hoc* arbitration in the Mainland between enterprises registered in the Free Trade Zones through the above provision. However, the provision is a mere guideline. There is still a long way for the full acceptance of *ad hoc* arbitration in the Mainland.

2. ***Jurisdiction of the Courts***

The Arrangement does not state whether the intermediate people's courts, which accept the applications for court-ordered interim measure, shall have jurisdiction over foreign-related matters.

I suggest that the SPC should make clarifications on this matter. Although the cases involving foreign elements regulated under the *Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements* (Fa Shi [2002] No. 5, "**Jurisdiction Provisions**") do not include applications for court-ordered interim measure in extraterritorial arbitral proceedings, the intermediate people's courts under Article 2 of the Arrangement should be limited to those with jurisdiction over cases involving foreign elements.

First, it would suit the purpose of the *Jurisdiction Provisions* of submitting cases involving foreign elements to courts with better experience and professional competence by specifying the jurisdiction of relevant courts.

Second, the *Jurisdiction Provisions* specify that only courts with jurisdiction over cases involving foreign elements may hear cases on revocation, recognition and enforcement of international arbitral awards. Considering the close connection between enforcement of arbitral awards and court-ordered interim measures, it would impede the enforcement procedures if the matters were heard before different courts (*i.e.* courts that hear the applications for court-ordered interim measures and courts that hear cases of enforcement). For instance, Hebei Tangshan Intermediate People's Court has no jurisdiction over cases involving foreign elements. The foreign-related cases within its territorial jurisdiction are submitted to Hebei Langfang Intermediate People's Court instead. Therefore, if a party to an arbitral proceeding in Hong Kong intends to request for property preservation against certain assets located in Tangshan, it must submit the request to Hebei Langfang Intermediate People's Court.

3. ***List Specifying the Courts and the Corresponding Territorial Jurisdiction***

If the intermediate people's courts under the *Arrangement* are indeed limited to those with jurisdiction over cases involving foreign elements, the SPC should make a list specifying the courts and the corresponding territorial jurisdiction.

To begin with, the parties or attorneys to arbitral proceedings in Hong Kong may have little knowledge of the rules or judicial practice in the Mainland. It will eliminate uncertainty if a list is available as guidance. Further, according to Article 1(1)(4) of the *Jurisdiction Provisions*, the SPC is entitled to appoint courts which originally have no jurisdiction over cases involving foreign elements to hear foreign-related cases. In the decade since the promulgation of the *Jurisdiction Provisions*, quite a few

intermediate people's courts have exercised jurisdiction over foreign-related cases after applications were submitted to the SPC. However, the parties must look up to relevant responses or replies by the SPC to ascertain whether a specific intermediate people's court is competent to hear foreign-related cases.

Second, it is not clear whether the concentration of jurisdiction for certain courts in the Mainland will affect the applications for court-ordered interim measure in arbitral proceedings in Hong Kong.

For example, according to the *Regulations on the Jurisdiction of Beijing Fourth Intermediate People's Court (2018 Revision)*, Beijing Fourth Intermediate People's Court shall have jurisdiction over the following cases: (i) cases of recognition and enforcement of foreign arbitral awards which are within the territorial jurisdiction of courts in Beijing; and (ii) cases of recognition and enforcement of Hong Kong, Macao and Taiwan arbitral awards. Considering that Beijing Fourth Intermediate People's Court will hear cases of recognition and enforcement of Hong Kong arbitral awards, Beijing High People's Court may wish to clarify whether the parties to arbitral proceedings in Hong Kong should also submit applications for court-ordered interim measure to Beijing Fourth Intermediate People's Court.

Further, the *Arrangement* does not provide for possible remedies of a party to arbitral proceedings in Hong Kong when a court in Mainland refuses to accept the case of application for court-ordered interim measure based on lack of jurisdiction. It is suggested that the SPC issue relevant rules to specify the remedies under this circumstance.

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