

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

Kluwer Arbitration Blog

July 24, 2019

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Please refer to this post as: Wei Sun, 'Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures: Interpretations from a Mainland China Perspective - Part II', Kluwer Arbitration Blog, July 24 2019,

<http://arbitrationblog.kluwerarbitration.com/2019/07/24/arrangement-concerning-mutual-assistance-in-court-ordered-interim-measures-interpretations-from-a-mainland-china-perspective-part-ii/>

In Part I of this post I discussed how the *Arrangement* excluded ad-hoc arbitration and how it raised certain issues on jurisdiction of the courts. In Part 2, I discuss other aspects of the *Arrangement*.

1. Interaction between Arrangement and CICC

The interaction between the *Arrangement* and the China International Commercial Court ("**CICC**") is also worth close attention.

The SPC set up the CICC in 2018 according to the *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions*. The CICC is competent to hear applications for court-ordered interim measure in arbitral proceedings administered by certain international commercial arbitration institutions.

Specifically, the SPC published the *Notice on Determining the First Group of International Commercial Arbitration and Mediation Institutions Included in the "One-Stop" Diversified Mechanisms for Resolving International Commercial Disputes* (Fa Ban [2018] No.212), announcing the first group of international commercial arbitration and mediation institutions.

It should be noted that HKIAC is currently not among the first group of arbitration intuitions. If HKIAC is listed in the arbitration institution under the *Provisions on Establishment of the CICC* in the future, the parties to arbitral proceedings administered by HKIAC may submit applications for court-ordered interim measure to more than one competent court in the Mainland.

I suggest that the parties be permitted to submit their applications for court-ordered interim measure to competent intermediate people's courts instead of the CICC. Firstly, pursuant to Article 2 of the *Provisions on Establishment of the CICC*, the CICC can hear cases nationwide. It may bear a big caseload with a relatively small number of personnel. Secondly, Article 6 allows the CICC to designate a lower court to enforce its ruling on the court-ordered interim measure. It is possible that the

enforcement of the ruling will be carried out by a lower court even if the parties have submitted their applications to the CICC, which will prolong the enforcement procedure. Considering that time is of essence, it may better serve the interest of parties to submit the applications for court-ordered interim measure to competent intermediate people's courts.

2. Failure of Arbitration Institutions

Article 3(2) of the *Arrangement* writes "Where an application for interim measure is made after the relevant institution or permanent office has accepted the arbitration case, the party's application shall be passed on by the said institution or permanent office". We encountered in previous practice that the arbitration institutions in the Mainland refused to pass on applications for court-ordered interim measure. We suggest that the SPC should promulgate rules to specify relevant remedies.

3. Judicial Approach towards Property Preservation

In my experience most courts in the Mainland are likely to issue property preservation applications with broad boundaries. For example, it is not uncommon to find a ruling that "the property worth X RMB should be preserved" without specifying the types of asset or the method of preservation, which makes it easier for the enforcement judge to exercise considerable discretion in issuing preservation measures against various assets located by the judge or the applicant. However, some courts in the Mainland have their own "local policies" for property preservation, which may create uncertainty for applicants under the *Arrangement* uncomfortable. For example, unlike most of the courts in the earlier example, the Beijing Third Intermediate People's Court will list in the ruling the specific type of the asset and the method of preservation. Some courts are also reluctant to allow certain assets such as inventory to be preserved because it is difficult to identify the ownership of the inventory. I think it will be helpful to parties if the SPC takes the opportunity of the signing of the *Arrangement* to provide more detailed guidance to all kinds of court-ordered interim measures.

4. Duration of Court-ordered Interim Measures

The existing laws, regulations and judicial interpretations fail to specify the duration of conduct preservation. Article 13 of the *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Examining Cases Involving Conduct Preservation in Intellectual Property Disputes* (Fa Shi [2018] No. 21) prescribes that "Where a people's court rules to take conduct preservation measures, it shall reasonably determine the duration of the preservation according to the applicant's request or the specific circumstances of the case. The validity of the ruling to stop the infringement of intellectual property shall generally be maintained until the judgment for the case takes effect". Although this rule is for conduct preservation in intellectual property disputes, it can be inferred for the *Arrangement* that courts will similarly take into account the applicant's request, the nature of the conduct to be preserved and other factors to determine the duration of preservation.

5. Burden of Proof

Further to Article 11 of the *Provisions of the Supreme People's Court on Several Issues concerning the Handling of Property Preservation Cases by the People's Courts* (Fa Shi [2016] No.22, "**Provisions on**

Property Preservation”), the courts in the Mainland will sometimes use the online system to search for the property. However, based on our experience, the courts normally will not do so for cases of property preservation in arbitral proceedings. The applicant needs to provide information of the property. The courts are also cautious that this does not turn out to be a fishing expedition.

6. Guarantee for Court-ordered Interim Measures

Article 5(1)(5) of the *Arrangement* requires the party to provide information about the property to be used as a guarantee. The guarantee for preservation during litigation or arbitral proceedings usually will not exceed 30% of the value of property to be preserved while the guarantee for preservation prior to litigation or arbitral proceedings should be equivalent to the requested amount of property to be preserved.

Cash and guarantee insurance are the most common types of guarantees. Real property shall be located in the Mainland if it is used as a guarantee. The court will seize the real property after which it cannot be transferred or be set on more encumbrances. Some courts refused to accept real property as a guarantee due to the possibly long period of time for appraisal of the value of such real property.

Courts in the Mainland usually will not accept guarantees provided by non-financial institutions such as a parent company guarantee. The concern relates to practical enforceability of these parent companies.

7. Retrospective Effect of the Arrangement

The *Arrangement* does not provide whether it has retrospective effect, *i.e.* whether it applies to arbitral proceedings prior to the *Arrangement* coming into effect or only to arbitration agreements signed or arbitral proceedings initiated afterwards. The purpose of the *Arrangement* is to support the arbitrations in both the Mainland and Hong Kong. Accordingly parties should be allowed to apply for court-ordered interim measures to courts in the Mainland in accordance with the *Arrangement* even if the arbitral proceedings commenced before the *Arrangement* comes into force.

Conclusion

As the first legal document on assistance in court-ordered interim measures in arbitral proceedings signed by the Mainland with another jurisdiction, the *Arrangement* signifies the close collaboration between the Mainland and Hong Kong, which will further strengthen the competitive edge of Hong Kong to render services in international arbitration and will support Hong Kong on its construction of the Asia Pacific International Dispute Resolution Service Center.