Mainland China-Hong Kong Interim Measures Arrangement One Year On: Crossing the River by Feeling the Stones

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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 of the Hong Kong Special Administrative Region (the "**Arrangement**") came into force. It was previously reported on the blog here and here. On 8 October 2019, the first interim measure under the Arrangement was granted by the Shanghai Maritime Court. We can expect to see more applications under the Arrangement. Inevitably, challenges will follow, creating a situation of "crossing the river by feeling the stones" (*摸着石头过河*) for parties and practitioners.

Background

Before the Arrangement, parties looked to local legislation for local courts to (1) recognise and enforce interim measures granted by tribunals in a foreign jurisdiction, and/or (2) itself issue interim measures over an arbitration commenced in a foreign jurisdiction.

In Hong Kong, where the arbitration law has largely adopted the UNCITRAL Model Law, both above-mentioned mechanisms are available (sections 35 and 45 of the Hong Kong Arbitration Ordinance). Such mechanisms were not available in Mainland China (see previous commentary on the Blog from the Mainland China perspective: Part I and Part II).

As a starting point, in Mainland China, arbitral tribunals are not empowered to grant interim measures. For arbitrations seated in Mainland China, a party making an interim measure application (usually called a preservation application) should first submit it to the arbitration commission administering the arbitration, which then passes the application on to the relevant court (see Articles 28 and 68 of the PRC Arbitration Law). Prior to the Arrangement, the domestic laws of the PRC provided no mechanism for a court to provide the same assistance to a foreign arbitration, nor was there a ready mechanism to enforce an interim measure made by a tribunal in a foreign arbitration or by a foreign court.

Given the rise in arbitrations involving or concerning parties from Mainland China as shown by HKIAC's 2019 statistics, this lacuna and its consequences have become more evident in recent years. The risk is apparent: if the subject matter of the interim measures is in Mainland China, the power of any order made largely depended on the voluntary cooperation of the party against whom the order was made. On the whole, the effectiveness of such orders would be undermined.

While the introduction of the Arrangement does not (and does not claim to) fill the entire gap, it opened the first door in in allowing interim measures to cross borders in respect of Mainland China.

Key Points of the Arrangement

Who

Two issues fall under the question of "who". The first is who the parties to the arbitration are: the Arrangement applies only to commercial arbitrations between parties of equal status. This excludes Investor-State arbitrations (see Section II(II)2 of the Interpretation and Application by the Supreme People's Court of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland of the Hong Kong Special

Administrative Region, published in the People's Court Daily on 26 September 2019, with courtesy English translation available here) (the "**SPC Interpretation**").

The second is which arbitration institutions can take advantage of the Arrangement. The answer to this question is in Articles 2 and 6 of the Arrangement.

For Hong Kong-seated arbitrations (Article 2), only those administered by institutions confirmed by both jurisdictions are eligible. The premise of this is that *ad hoc* arbitrations cannot take advantage of the Arrangement. Conversely, Article 6 of the Arrangement does not require confirmation of a list of eligible Mainland arbitral institutions. Under Article 10 of the PRC Arbitration Law, a Mainland arbitral institution is one "*registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government*" (see the relevant list here).

What

Article 1 of the Arrangement states what the term "*interim measures*" means in the Mainland and in Hong Kong respectively, the specific types of which are defined by domestic laws of Mainland China and Hong Kong.

In Mainland China, interim measures are called "preservation orders" which are, as the name suggests, for preserving the status quo. They are broadly divided into three categories: the preservation of property, evidence, and conduct. In Hong Kong, the types of interim measures are less rigidly categorised.

When

In both jurisdictions, Arrangement applications are made before the arbitral award is made (Articles 3 and 6 of the Arrangement), and even before an arbitration has been commenced. An extra caveat should be noted that if an application is made to a Mainland court before the commencement of an arbitration: the applicant should request the Hong Kong arbitral institution to communicate with the Mainland court regarding its acceptance of the case no later than 30 days after the preservation measure is taken (paragraph 3, Article 3 of the Arrangement).

Where

The question of "where" also encompasses two issues: (1) where the arbitration in question is seated; and (2) which court to turn to for the application.

On the first issue, many have already noted that an "*arbitration in Hong Kong*" must mean an arbitration that is seated in Hong Kong (Article 2 of the Arrangement). The same requirement does not apply to Mainland arbitrations, which only needs to be an arbitral proceeding administered by a Mainland arbitral institution. The seat of the arbitration in this case could be outside of Mainland China (see SPC Interpretation, Section II(III)).

On the second issue, Article 6 of the Arrangement states that the application in Hong Kong should be made to the Hong Kong High Court. For parties making applications to Mainland Chinese courts, Article 3, Paragraph 1 of the Arrangement sets out the rule which helps to pinpoint the appropriate court. The applicant should apply to the court of either (1) the respondent's place of residence, or (2) the place of the subject matter of the application (e.g. where the property or the evidence is located). This physical location needs to be identified to a municipal level; in terms of court level, the applicant should seek a court at the intermediate level: this is usually straightforward, as such courts would include the word "intermediate" in their names. Some specialised courts are also deemed intermediate level courts, such as maritime courts and the Shanghai Financial Court.

How

Articles 4, 5, and 7 outline the documents and information needed to make the application to a Mainland Chinese court and to the Hong Kong High Court respectively. These articles are, however, outlines. The application should be made having full regard to the practical meaning of relevant provisions in the context of domestic law.

Practical Notes

The reader should keep in mind that while the language of the Arrangement appears to be straightforward, it should be considered only as a starting point for applications. The specific types of interim measures and the procedure for their application remain the subject of local laws. There are many factors to consider

when making actual applications, which if overlooked, could lead to delay or even failure in obtaining the interim measure.

1. ***Mainland Chinese court-compliant documents***: Courts in Mainland China place great importance on the authenticity of documents submitted. Depending on the documents, authenticity may be proven by a number of means, individually or combined. Given the likely international nature of applications made under the Arrangement, the notarisation / legalisation / certification / authentication of documents is particularly significant. The specific steps (and their names) may vary from jurisdiction to jurisdiction, but will often involve notaries public, the ministry of foreign affairs of the place where the documents are created, and the PR China embassy or appropriate authority at the particular jurisdiction. Furthermore, documents not in Chinese need to be translated (Article 4 of the Arrangement) by a court-approved translation agency. It is important that these time and costs factors be considered well in advance of the application to avoid delay as this process often takes a number of weeks.
2. ***Security or undertaking***: Whether in Mainland China or in Hong Kong, the applicant should be ready to provide court-compliant security or undertaking (Article 8 of the Arrangement). Courts in Mainland China often calculate security based on a percentage of the claimed amount, and require it to be provided in the form of a guarantee by a bank or by an insurance company. The specific requirements will vary from court to court and from dispute to dispute. Applicants should therefore factor in the costs of such security when charting out the costs of an application.
3. ***Making an application before commencement of arbitration***: In a straightforward arbitration, 30 days may look like ample time for communication between the Hong Kong arbitral institution and the Mainland court (Article 3 of the Arrangement). However, for example, the HKIAC receives arbitrations commenced under potentially problematic arbitration clauses almost daily.[fn]This was discussed during a Webinar hosted by the HKIAC on 6 May 2020 titled "*Dos and Don'ts of Drafting Arbitration Clauses*".[/fn] There is therefore a risk that there might be unexpected time lag or non-acceptance of the arbitration, causing the applicant to run afoul of this requirement and to potentially lose the security put up for the application.
4. ***Choosing amongst multiple possible Mainland Chinese courts***: If

there are multiple possible courts to choose from (whether it is because different assets are in different locations, or the respondent and assets are in different locations), the applicant may only make one application. Some factors that may help the parties decide where to make the application include: (1) the familiarity and experience a court has with cases involving a foreign element; (2) the ease and convenience with which execution of the preservation order may be carried out; (3) the need for further enforcement against the final arbitral award. The applicant does not have to confine the application to preservation measures that can only be taken out at the court of application, as choosing one court does not necessarily deprive the applicant of assistance by another relevant court (though this matter is subject to discussion between and implementation through the courts) (SPC Interpretation, Section II(IV)1).

5. ***Role of the Hong Kong arbitral institution***: The Hong Kong arbitral institution plays an important role in an application to a Mainland Chinese court, though this role has manifested itself differently in the small number of applications seen to date, depending on the Mainland Chinese court to which applications are made. Paragraph 2, Article 3 of the Arrangement requires the application to be passed from the arbitral institution to the relevant court. This is in line with the practice of Mainland Chinese arbitral institutions passing on applications to the relevant Mainland Chinese court. However, the SPC has also commented that a party should be allowed to submit its application together with a transfer letter issued by the Hong Kong arbitral institution (SPC Interpretation, II(V)1, 2). Communication with the relevant Mainland court before application to determine its practice would be helpful in avoiding confusion and delay.
6. ***Provision of "asset clues"***: the application for preservation of assets or evidence in Mainland China needs to include "*clear particulars of the property and evidence to be preserved or concrete threads which may lead to a train of inquiry*" (Article 5(4) of the Arrangement). This is sometimes colloquially referred to as "asset clues". The key point to note here is that the Mainland Chinese courts do not take on an investigative function, and such "asset clues" (or the lack thereof) may well be determinative the outcome of the application.