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How Far to Reach an International Standard? The Applicable Standards for Granting Interim Relief in Mainland China and Hong Kong

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In 2019, Mainland China and Hong Kong entered into a groundbreaking bilateral arrangement regarding interim measures for arbitration, i.e., *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* (the "**Arrangement**").[1)] The arrangement allowed parties to an institutional arbitration seated in Hong Kong to seek interim measures in courts in Mainland China. (*See* previous posts here, here, and here.)

HKIAC has witnessed 47 applications made under the Arrangement as of 30 June 2021. The Arrangement has become "the bridge" for seeking interim measures between Mainland China and Hong Kong. This post examines the applicable standards for granting emergency interim reliefs in these two jurisdictions.

Mainland China Approach

Under the current Chinese legal framework, courts in Mainland China ("Mainland Courts") have the exclusive power to grant interim relief for arbitration both before and during arbitral proceedings. In other words, interim relief in support of arbitration in Mainland China is not available from the arbitral tribunal. Interim measures in Mainland China are broadly divided into three categories: the preservation of assets, evidence, and conduct. The PRC Civil Procedure Law ("**CPL**") provides the applicable standard for Mainland Courts to grant interim measures.

To obtain pre-arbitration interim measures to preserve assets or conduct, the applicant shall prove that "the interested party's lawful rights and interests will be irreparably damaged if an application for preservation is not filed immediately under urgent circumstances." (Article 101, CPL.) In addition, the applicant shall provide security. The standard to preserve evidence is whether "there is an emergency that the evidence is likely to extinguish or difficult to obtain in the future." (Article 81.2, CPL.)

To obtain interim measures to preserve assets or conduct during the arbitral proceedings, the applicant shall prove that "it may be difficult to execute a judgment, or any other damage may be caused to a party." (Article 100, CPL.) Mainland Courts may order the applicant to provide

security upon the application at this stage. The standard to preserve evidence is whether "the evidence is likely to extinguish or [become] difficult to obtain in the future." (Article 81.1, CPL.)

It is hard to draw a clear applicable standard from the above-mentioned CPL clauses because the wording is vague. On top of that, Mainland Courts have great discretion in deciding whether to grant emergency interim reliefs: the application for interim measures is made *ex parte*, and Mainland Courts adopt the doctrine of *ex officio*.

In practice, from my observations, it is more difficult to obtain pre-arbitration interim relief and, among the three types of measures, conduct preservation. On the other hand, asset preservation has been widely granted.

However, it is still hard to draw a "national standard" on interim reliefs from reviewing Mainland Courts' decisions. Different courts adopt different interpretations of the CPL's requirements and even have different requirements on documents and evidence to be provided with the application for asset preservation. Arbitration practitioners in Mainland China have raised concerns for such lack of a clear standard because applicants may fail to meet the "internal standard" set by the competent court, which is not disclosed to the public, and miss the opportune time to freeze assets.

Generally, the conclusive factor for Mainland Courts in deciding asset preservation is whether the applicant can provide security. All successful applications made under the Arrangement have provided security to Mainland Courts. (As of 30 June 2021, around USD 1.6 billion worth of assets have been ordered to be preserved by Mainland Courts under the Arrangement.)

There is also no clear applicable standard for emergency arbitrators in Mainland China to grant emergency interim relief. Emergency arbitrator is not recognized by PRC Arbitration Law ("**Arbitration Law**"). Still several major arbitration institutions in Mainland China have introduced the concept of emergency arbitrator into their arbitration rules. Since 2017, we have seen at least two emergency arbitrators appointed in arbitrations administered by arbitration institutions in Mainland China with a seat in Mainland China. *See* Beijing Arbitration Commission case and Shanghai Arbitration Commission case. Similarly, the arbitration rules of arbitration institutions in Mainland China only provide general guidelines or grant emergency arbitrator great discretion, rather than a clear standard. *See, e.g.*, Article 63(6), Beijing Arbitration Commission Arbitration Rules (2019); Article 5.1, CIETAC Emergency Arbitrator Procedures (2015).

Therefore, the approaches adopted by the judiciary and arbitration institutions in Mainland China do not seem to provide a clear and practical standard for judges and emergency arbitrators to apply in deciding whether to grant interim relief.

Hong Kong Approach

Hong Kong Arbitration Ordinance ("**Arbitration Ordinance**") has largely adopted the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"). For an arbitration seated in Hong Kong, both the Hong Kong court and the tribunal/emergency arbitrator have the power to grant interim measures before or during arbitral proceedings. According to Section 35 of the Arbitration Ordinance, the types of interim measures are less strictly categorized than those in Mainland China.

Section 36 of the Arbitration Ordinance (adopting Article 17A of UNCITRAL Model Law) provides that "The party requesting an interim measure . . . shall satisfy the arbitral tribunal that: (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim."

Article 23.4 of HKIAC Administered Arbitration Rules (2018) ("**HKIAC Rules**") adopts the same applicable standard as Section 36 of the Arbitration Ordinance. It is noteworthy that Article 23.4 of HKIAC Rules expressly gives tribunal/emergency arbitrators discretion to consider other factors when deciding whether to grant interim measures by stating, "relevant factors may include, but not limited to . . . [the same factors adopted by Section 36 of the Arbitration Ordinance]."

The Hong Kong approach seems to be more like the "international standard" adopted by the Model Law. And in practice, Hong Kong courts have developed the substantive multi-factor test. Compared to the approach in Mainland China, which seems to pay more attention to the procedural requirement, i.e., whether the applicant provides the security or not, the Hong Kong approach gives weight to the substantive analysis of the case.

One possible reason for such differences between the two approaches is that the two jurisdictions reflect different legal traditions. Hong Kong is a common law jurisdiction that adopts the party-centered principle, where the parties take more responsibilities than the judges in producing substantive analysis for the decision. Meanwhile, the Mainland Courts adopt the adjudicator-centered principle where the judges take more responsibilities for the decision-making. Under such principle, Mainland Courts tend to rely on the clear procedural requirement set by CPL. This is also a reflection of Mainland China as a civil law jurisdiction.

Comments

An amendment to the Arbitration Law is in process. It is unclear whether emergency arbitrators will be introduced to the upcoming version of the Arbitration Law. However, with the Arrangement in place and at least two successful emergency arbitrator precedents in Mainland China, we will likely see more applications for interim measures in support of Hong Kong seated-arbitration in Mainland Courts and more emergency arbitrators appointed in arbitrations seated in Mainland China. Thus, it is important to develop the applicable standards for granting emergency interim relief in Mainland China, which will provide clear and practical guidance for Mainland Courts and emergency arbitrators and more certainty for parties.

As discussed above, Mainland Courts have the exclusive power to order interim relief. In most cases, the judge assigned for cases regarding interim relief in support of litigation should also be assigned to decide interim relief in support of arbitration. Even if the amendment of Arbitration Law revises the standards for granting emergency interim reliefs, the experience from deciding interim relief in litigation cases will still be relevant in deciding interim relief in arbitration-related cases.

Emergency arbitrators are less influenced by litigation case law in Mainland Courts. For example, Mr. Sun Wei has shared his experiences of acting as the first emergency arbitrator in Mainland China. He applied the "international standard" drawn from general practice in international

commercial arbitration and arbitration rules from major international arbitration institutions like the ICC and HKIAC. With more emergency arbitrators to be appointed in Mainland China, we cannot expect every emergency arbitrator to be familiar with international arbitration practice like Mr. Sun. Thus, if arbitration institutions in Mainland China can take the lead and incorporate the "international standard" into arbitration rules, I believe this will provide practical guidance for emergency arbitrators and more certainty for parties in such cases in Mainland China.

References

?1 Thanks to Lingming Xu for his contribution to this blog post. The views expressed herein are personal and do not reflect the views or the position of the Hong Kong International Arbitration Centre. The author reserves the right to amend her position if appropriate.

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