Kluwer Arbitration Blog

Paris Arbitration Week: Protecting Your Interest Through Interim Relief From Mainland Chinese Courts

Yiqiu Wang (Freshfields Bruckhaus Deringer LLP) · Saturday, September 25th, 2021

During the Paris Arbitration Week, HKIAC held a webinar on "Protecting your interest through interim relief from Mainland Chinese courts", two years after the unprecedented Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region (the ***Arrangement***) came into effect.

Dr Ling Yang (Deputy Secretary-General and Chief Representative of the Shanghai Office at HKIAC) delivered welcoming remarks and Anton Ware (Partner, Arnold & Porter) moderated the discussion. The panellists were Chungang Dong (Partner at Jingtian & Gongcheng), Dr Nils Eliasson (Partner at Shearman & Sterling; HKIAC Vice Chairperson), Sarah Grimmer (Secretary-General at HKIAC) and Karl Hennessee (Senior Vice-President of Litigation, Investigations & Regulatory Affairs at Airbus; HKIAC Council Member).

The Arrangement

The event kicked off with a presentation by Dr Yang on the Arrangement.

The instrument was signed on 2 April 2019 and came into effect on 1 October 2019. On 25 September 2019, six arbitral institutions in Hong Kong were approved as the eligible institutions under the Arrangement. The Arrangement allowed Hong Kong to become the first and only arbitral seat outside of Mainland China, where parties can apply for interim measures in Mainland Chinese courts to preserve assets, evidence or conduct.

HKIAC's experience with the Arrangement

Ms Grimmer addressed the role of HKIAC in applications for interim measures to Mainland Chinese courts, which is to certify that HKIAC is administering the case. Within 24 hours upon receipt of complete applications from the parties, HKIAC will issue a letter to Mainland Chinese courts confirming that the arbitration is administered by HKIAC.

She then provided a statistical analysis of the implementation of the Arrangement. HKIAC has so

far processed 50 applications under the Arrangement. The Mainland Chinese courts have issued 32 decisions, 30 of which granted interim measures upon the applicants' provision of security. The total value of assets preserved amounted to RMB 10.9 billion (approximately USD 1.7 billion), which, according to Ms Grimmer, showcases the significant commercial advantage of choosing Hong Kong as an arbitral seat.

To date, applications have been made to 23 different courts across China. In terms of nationalities, the Arrangement has an impact on both Chinese and foreign entities – applicants comprise around 25% Mainland Chinese parties and 75% foreign parties, while respondents are split between 53% Mainland Chinese entities and 47% foreign parties. The median time taken by Mainland Chinese courts to issue a decision was 8 days.

In practice, around 2/3 of the cases were submitted by the applicants to the courts, whereas 1/3 of the applications were transferred to the courts by HKIAC.

Benefits of the Arrangement

The panellists then discussed the impact of the Arrangement on parties' business dealing, negotiation and choice of dispute resolution clause in a China-related contract. Mr Hennessee considered the benefits to be two-fold: first, the Arrangement helps to preserve the relationship between the parties and minimise the disruption of supply chain when a dispute arises; second, the existence of the instrument also provides assurance to both parties and encourages the parties to act in good faith. In a nutshell, the Arrangement balances the playing field between parties and decreases the possibility of one party leveraging a supply or payment situation.

Dr Eliasson commented that the Arrangement has proven to be a game-changer for several reasons: first, Hong Kong is the only jurisdiction outside of Mainland China where parties can obtain interim measures from Mainland Chinese courts; second, interim relief obtained from an arbitral tribunal is unenforceable in Mainland China, rendering an application under the Arrangement the only viable solution; third, interim measures can also be ordered *ex parte*; lastly, the Arrangement has a broad scope that also captures foreign parties that are not based but have assets in Mainland China. In addition, Dr Eliasson also observed a shifting choice?of?seat landscape after the adoption of the Arrangement – foreign companies either are more committed to Hong Kong as an arbitral seat, or have chosen to switch to Hong Kong to come within the ambit of the Arrangement.

Practical issues in seeking interim relief from a PRC court

Mr Dong then shared his previous experience with successfully obtaining a freezing order from an intermediate court in Guangdong province in aid of a HKIAC arbitration. He noted that the application was off to a rocky start – the initial request for a pre?arbitration freezing order was rejected. Although a pre-arbitration freezing order is allowed under Article 3 of the Arrangement, in practice it is common for Mainland Chinese courts to dismiss such applications, even for domestic arbitration cases. The applicant subsequently commenced arbitration and filed the HKIAC confirmation letter with the court. The application for a freezing order was then approved and the security requirement was satisfied by a litigation preservation insurance policy.

Mr Dong commended HKIAC's experience in handling such applications. From a procedural perspective, he noted that there was barely any practical difference from seeking interim relief for domestic arbitration cases.

Preservation of conduct

The panel then turned to a unique concept under Chinese law – "preservation of conduct". Mr Dong explained that this is analogous to preliminary injunction under common law. Introduced in Articles 100 and 101 of the Civil Procedure Law of the People's Republic of China in 2013, preservation of conduct refers to interim measures requiring or prohibiting a party from acting in a certain manner. The legal threshold is high – the applicant must show urgency, irreparable harm and furnish security.

Mr Hennessee added that the legal standard of preservation of conduct may be higher than that of a preliminary injunction in common law courts. He noted it is similar to an *ex parte* injunction, which also requires proof of urgency and irreparable harm, as well as provision of security. He then illustrated the high threshold of urgency with an example – in practice, parties often invoke a clause in the contract that requires both parties to continue to perform in the event of a dispute. In his experience, the existence of similar clauses can be an important piece of evidence to show urgency.

Mr Eliasson encouraged parties to consider preservation of conduct despite the stringent legal criteria. In this regard, it is helpful that the power of the courts to grant such preservation is formulated broadly under Article 100 of the Chinese Civil Procedure Law. Mr Eliasson found this particularly helpful in private equity investment and other types of investment disputes, which are prevalent in Hong Kong. For instance, in 2020, a court in Shenzhen issued an order prohibiting shareholders who allegedly obtained shares in an invalid manner from registering the purchase with the relevant authorities in China. In this context, interim relief granted under the Arrangement can be a very important supplement to the measures that parties typically seek in Hong Kong or other offshore jurisdictions in these types of cases.

Ms Grimmer described HKIAC's experience with one unusual conduct preservation case that arose out of a professional services contract, under which the claimant claimed unpaid fees from the respondent for services rendered in respect of a third-party Mainland Chinese entity. The claimant applied for an order restraining the third party from allocating any assets to the respondent. Interestingly, instead of a conduct preservation order, the Mainland Chinese court issued an order preserving the assets of the respondent for the arbitration.

Proposed amendments to Chinese arbitration law

The last topic of discussion concerned the recent publication of the Revised Draft of Arbitration Law of the People's Republic of China (the ***Revised Draft***) in July 2021, and whether the reform would boost Mainland Chinese cities to become the "future centres of international arbitration".

Mr Eliasson recognised the importance of the ongoing reforms to Chinese arbitration law, as well as the increasing popularity of Mainland China as an arbitral seat. He found that these changes,

however, will not undermine the competitiveness of Hong Kong as an arbitral seat, considering that Hong Kong has developed its arbitration-friendly regime over decades.

Mr Dong agreed that the Revised Draft is progressive and inspiring, but also pointed out that there is still a long way ahead before it can be adopted. He raised concerns about the amendment in the Revised Draft that empowers arbitral tribunals to grant interim measures (a power that currently rests with the courts), stating that this may lead to an influx of applications from over 200 arbitration institutions in China. Hence, the reform would also require corresponding amendments to the Chinese Civil Procedure Law and robust support from the Mainland Chinese court system.

Conclusion

Drawing upon their own experiences as well as the implementation of the Arrangement, the panellists agreed that Hong Kong continues to have a significant competitive edge over other arbitration hubs for Mainland China-related arbitrations, and will remain an attractive arbitral seat in the future.

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