Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: ADR in Asia Conference – HK-PRC Interim Measures Arrangement – 2 Years on

Suraj Sajnani, Hazel He (King & Wood Mallesons) · Thursday, October 28th, 2021 · HK45

Hong Kong Arbitration Week 2021 is upon us, with a number of exciting in-person, virtual and hybrid events. On 27 October 2021, the ADR in Asia Conference was held, focussing on "*Tomorrow's Disputes Today*". After opening remarks by The Honourable Secretary for Justice Teresa Cheng GBM, GBS, SC, JP, and an update on developments at the HKIAC by Ms Sarah Grimmer, Secretary-General of the HKIAC, four panel sessions were held:

- HK-PRC Interim Measures Arrangement: 2 Years On.
- Hong Kong Courts and Arbitration: Past, Present, Future, with a key-note speech by The Honourable Chief Justice Andrew K. N. Cheung GBM.
- Crypto: Tomorrow's Security, Currency, or Asset?
- "Tomorrow's" Arbitrator: Views from The Honourable Charles N. Brower.

Closing remarks were made by Mr David W. Rivkin, Co-chair, HKIAC and Partner, Debevoise & Plimpton.

This post focuses on the first panel session which examined how the HK-PRC Interim Measures Arrangement has worked in practice, two years after its launch (see an earlier blog post on the Arrangement here). This session was moderated by Mr Friven Yeoh of Sidley Austin, who was joined by the following panellists:

- Dr Yanli Si, Deputy Chief Judge of the Research Office of the Supreme People's Court of China;
- Ms Sarah Grimmer of HKIAC;
- Mr Paul Starr of King & Wood Mallesons;
- Ms Yanhua Lin of Fangda Partners; and
- Mr James Rogers of Norton Rose Fulbright.

Key features and figures of the Interim Measures Arrangement

Mr Yeoh kicked off the session by outlining the development of how parties to Hong Kong arbitrations have been able to seek interim measures to facilitate arbitration and safeguard enforcement: (1) originally, only from the Hong Kong courts and the arbitral tribunals; (2) more recently, through emergency arbitration procedures; and (3) now, through the new option to apply to the PRC courts directly, under the Arrangement.

Dr Si then delivered a keynote speech on the history of the implementation of the Arrangement from the perspective of a participant, promoter and witness. Dr Si highlighted the Arrangement as an important initiative for legal professionals in Mainland China and Hong Kong which demonstrates one country having benefits from two systems. Dr Si also provided key figures regarding the implementation of the Arrangement up to 22 October 2021:

- Number of applications made to the PRC courts: 54 (37 progressed, out of which 34 were granted);
- Types of preservation sought:
    - 51 for property preservation;
    - 2 for evidence preservation; and
    - 1 for conduct preservation;
- Administering arbitration institutions: HKIAC;
- Types of disputes: corporate, commercial, financial, maritime, sales and purchases of goods, and professional services;
- Applicants: 23% from Mainland China, 77% from outside Mainland China;
- Respondents: 58% from Mainland China, 42% from outside Mainland China;
- Stage of applications: all *ex parte* after commencement of the arbitrations;
- Securities: almost all the parties provided securities, mostly in the format of letter of guarantee; and
- Length of time for court's ruling: 19 days on average.

Practitioners' observations of the past two years of experience

Mr Yeoh opened the discussion by asking Ms Grimmer about the role HKIAC has played in the implementation process and her observation. Ms Grimmer described the HKIAC's essential role as confirming key details for the Court, such as the seat and administering institution of an arbitration. One observation was that all applications under the Arrangement so far were made after the commencement of arbitrations. Ms Grimmer explained the differences in procedure for a pre-arbitration application, which she noted would be more challenging than a post-commencement arbitration.

Mr Yeoh then turned to Mr Starr and Mr Rogers about practical tips as counsel seeking applications under the Arrangement. Mr Starr outlined several key differences between Hong Kong and PRC practices: (1) asset clues are required by the PRC courts, for which private investigators are normally engaged; (2) translation and notarisation for the PRC require extra time; (3) there is a need for security in the PRC, often by way of insurance; and (4) service of the preservation order is effected through the PRC courts. Mr Starr shared that these differences would affect the time it takes to successfully be granted measures, so parties should bear these in mind and plan accordingly. Mr Rogers noted the importance of engaging good local PRC counsel as the latter played an active role in liaising with the PRC court throughout the process.

Another key observation was that different standards are adopted by the PRC and Hong Kong courts in considering whether to grant interim measures. Ms Lin observed that the PRC courts would normally adopt a board-brush approach. In contrast, Mr Rogers shared the relatively higher standard adopted by Hong Kong courts, i.e. that there is a likelihood of success on the merits, a risk of dissipation, urgency, and a risk that the applicant cannot be compensated by damages.

Mr Yeoh asked whether parties would choose the PRC route over the Hong Kong route for interim measures, in light of the lower standard in considering whether to grant interim measures. Mr Rogers said it was possible, but there were other avenues that Hong Kong courts could provide, for example, emergency arbitration which had become a powerful tool in preserving evidence and assets and in obtaining an early decision on key issues. Mr Starr noted however that: (1) *ex parte* applications might not be allowed in emergency arbitration proceedings, which might cause risk of dissipation; and (2) emergency relief faced enforcement difficulties. He said the emphasis should be on where the assets were.

In light of the *ex parte* nature of applications, Mr Yeoh asked Ms Lin how the PRC courts protected parties' interest where an application was wrongfully made. Ms Lin answered that this was done by applicants providing security. She noted that in practice, it was quite difficult to challenge a PRC court's decision on assets preservation, so the risk of a security being called upon is not particularly high.

Conclusion

The panellists described that 2 years on, the Arrangement had been "*a game changer, no brainer and rainmaker*" for parties in Hong Kong arbitrations. Given Hong Kong's unique advantages under the Arrangement for resolving PRC-related disputes, the panellists agreed that Hong Kong had become a much more attractive arbitration seat, especially in light of the development prospects of the Belt & Road Initiative and the Greater Bay Area.

More coverage from Hong Kong Arbitration Week is available here.

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