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# Have PRC Courts Ordered Interim Relief Measures in Support of HKIAC Arbitrations without an Express Legal Basis: What Lies Ahead?

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Under the current Chinese legal framework, while PRC Courts are granted exclusive power to grant interim relief measures in support of arbitration [1)]

, there is lack of an express legal basis for Courts to do so in support of "off-shore" arbitrations.

However, two recently released Chinese court cases seem to have broken the mold by ordering interim relief in support of HKIAC arbitrations:

1) Civil Ruling on the Preservation Measures in relation to *Ocean Eleven Shipping Corporation v. Lao Kaiyuan Mining Sole Co., Ltd.*, decided by the Wuhan Maritime Court on 14 October 2016 (hereafter "**Wuhan Ruling**"); [2)] and

2) Civil Ruling relating to the Recognition and Enforcement of the Arbitral Award in *Guangdong Yuehua International Trade Group Co., Ltd. v. Sinotide Holdings Limited & Ke Junxiang* decided by the Guangzhou Intermediate People's Court on 22 March 2016 (hereafter "**Guangzhou Ruling**"). [3)]

In the first case, the court granted interim measures pre-award, during the course of the arbitral proceedings. In the second case, the court ordered injunctive relief post-award, during the recognition and enforcement stage. While encouraging, both rulings appear to have been decided without legal basis, we shall take a quick look below.

**The Wuhan Ruling**

After filing its claim at the HKIAC, the Claimant preemptively applied to the Wuhan Maritime Court to either freeze the Respondent's bank account in an amount of USD 300,000 or seal, seize or freeze Respondent's property of up to USD 300,000 in value to ensure that sufficient assets would be preserved for which a subsequent award in its favor could be satisfied.

Given the Dongwon F&B decision rendered by the Shanghai First Intermediate People's Court in

2014, [4] which refused an application for property preservation in support of an arbitration administered by the Korean Commercial Arbitration Board for the reason that there was no legal basis to grant the application as the arbitration was not initiated in China, one would have thought that the application in the Wuhan Ruling would be similarly dismissed.

However, the court granted the application pursuant to Article 28 of the Arbitration Law [5] and Article 103(1) of the CPL [6]

. While at first glance one may assume that there was a legal basis for the ruling, upon closer examination, the provisions that the court cited do not expressly endorse the granting of interim relief in support of "offshore" HKIAC arbitration.

Under Article 28 of the Arbitration Law, applications for interim measures (including preservative measures and injunctive relief) in support of arbitrations must be transferred by arbitration commissions to the Courts but the term "*arbitration commission*" here, is limited to Chinese arbitration commissions by virtue of Article 10 of the same.

Furthermore, Article 103(1) of the CPL does not directly address the court's authority to grant interim measures in support of arbitration, it merely addresses general procedural issues relating to property preservation measures.

As such, neither provision cited by the Court seems to expressly provide a legal basis to support its ruling.

**The Guangzhou Ruling**

The relevant HKIAC award in the case was issued in 2013. The successful Claimant thereafter applied to the Guangzhou Intermediate People's Court for recognition and enforcement of the arbitral award and during the proceedings, it made a further application for preservation of the Respondent's property. The court granted the application in 2014, ordering that the Respondent's accounts and shares be frozen. The award was recognized and enforced in 2016.

The court did not identify an express legal basis for its decision. Whereas Chinese courts are given the express power to grant interim measures before or after accepting an application for the recognition and enforcement of arbitral awards rendered in Macao [7] and Taiwan [8], the same cannot be said for arbitral awards made in Hong Kong. [9]

The Guangzhou Ruling is an interesting development as Chinese courts do not typically grant interim measures in support of "offshore" arbitrations during the recognition and enforcement stage because there is no legal basis for them to do so.

This principle was upheld in an application for asset preservation decided by the Haikou Maritime Court involving a LMAA award – *KoreaLine Corporation* v. *HNA Group* arbitration – in 2016.[10] The Claimant's application for preservation measures during the recognition and enforcement stage was refused. The court held that granting an interim measure under the circumstances would constitute international judicial assistance, which could only be granted upon a legal basis such as a treaty or a relationship of mutual reciprocity with the jurisdiction of the administering arbitration

commission.

However, the United Kingdom, where the LMAA is based, and China were not party to any relevant judicial assistance agreement and neither the New York Convention nor Chinese legislation provided any basis for the granting of the application. The application was dismissed accordingly.

**Potential Developments**

The fact that the Wuhan Ruling and the Guangzhou Ruling were rendered without legal basis seemingly reflects a shift in judicial practice and may be a sign that Chinese courts have moved ahead of the curve as compared to Chinese legislation.

As both rulings in support of HKIAC arbitration cases, it seems possible that PRC courts favor Hong Kong arbitrations and will provide assistance both during the arbitral proceedings and during the recognition and enforcement stage.

From the perspective of offering necessary judicial assistance to arbitration, this practice may in time be fully legitimized through:

1) appropriate amendments to the Arbitration Law and CPL defining “arbitration commission” under the Arbitration Law as including foreign arbitration institutions as well; or

2) amending the *HK Arrangements* to give the courts express power to order interim measures in support of Hong Kong arbitrations.

Importantly, the judicial sovereignty of PRC courts would remain intact as neither option would affect the PRC courts’ exclusive power to order interim measures.

With regards to legitimizing judicial assistance at the recognition and enforcement stage, it is very possible that the *HK Arrangements* will be updated and brought in line with the *Macau Arrangements* and *Taiwan Provisions* through the inclusion of provisions which grant PRC courts the power to order the interim measures after an application for recognition and enforcement of an arbitral award is accepted.

**Conclusion**

Regardless of whether the above changes take place, it seems like Chinese courts have already slightly opened the door to HKIAC. Hopefully with the SPC’s establishment of the China International Commercial Courts and their relevant guideline, Chinese Courts will be able to provide interim measures in support of not only Chinese arbitrations but also of international arbitrations without differential treatment.

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References

?1 Chinese courts are granted the exclusive power to grant interim relief measures pursuant to the following provisions under PRC law:
Article 28 of the PRC Arbitration Law (hereinafter "Arbitration Law") provides that: "[a] party may apply for property preservation if it may become impossible or difficult for the party to implement the award due to an act of the other party or other causes.
If a party applies for property preservation, the arbitration commission shall submit the party's application to the people's court in accordance with the relevant provisions of the Civil Procedure Law."
Article 272 of the PRC Civil Procedure Law (hereinafter "CPL") provides that: "[w]here a party applies for a preservation measure, the international arbitral institution of the People's Republic of China shall submit the party's application to the intermediate people's court at the place of domicile of the respondent or at the place where the respondent's property is located."
Article 100 of the CPL provides that: "[f]or a case where, for the conduct of a party or for other reasons, it may be difficult to execute a judgment or any other damage may be caused to a party, a people's court may, upon application of the opposing party, issue a ruling on preservation of the party's property, order certain conduct of the party or prohibit the party from certain conduct; and if no party applies, the people's court may, when necessary, issue a ruling to take a preservative measure."

?2 Civil Procedure Preservation Ruling regarding Ocean Eleven Shipping Corporation v. Lao Kaiyuan Mining Sole Co., Ltd., Wuhan Maritime Court, (2016) E 72 Cai Bao No.427 ("Wuhan Ruling").

?3 Civil Ruling regarding Guangdong Yuehua International Trade Group Co., Ltd. v. Sinotide Holdings Limited & Ke Junxiang, Guangzhou Intermediate People's Court, (2014) Sui Zhong Fa Min Si Chu Zi No.42 ("Guangzhou Ruling").

?4 Civil Procedure Preservation Ruling regarding the Dongwon F&B Arbitral Procedure, Shanghai First Intermediate People's Court, (2014) Hu Yi Zhong Shou Chu Zi No.2.

?5 See footnote 2.

?6 Article 103 of the CPL provides that: "[p]roperty shall be preserved by seizure, impoundment, freezing of account or any other means prescribed by law. After preserving any property, a people's court shall immediately notify the person whose property is preserved.
Property which has already been seized or frozen shall not be repeatedly seized or frozen."

?7 Article 11 of the Arrangement between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards (hereinafter "Macau Arrangement") provides that: "[b]efore or after a court accepts the application for recognition and enforcement of an arbitration award, it may take preservation measures against the respondent's property pursuant to the application by the party concerned and in accordance with lex fori."

?8 Article 10 of the Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region (hereinafter "Taiwan Provisions") provides that: "[b]efore or after accepting an application for the recognition of an arbitral award rendered in Taiwan region, the competent people's court may, in accordance with the Civil Procedure Law and relevant judicial interpretations, render a ruling to take preservation measures according to the application by the applicant concerned."

?9 Please see the Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR (hereinafter the "HK Arrangements").

?10 Civil Ruling on Asset Preservation in relation to KoreaLine Corporation v. HNA Group, Haikou Maritime Court, (2016) Qiong 72 Xie Wai Ren No.1-1.