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One Country, Two Systems: Availability of Interim Measures in China, a New Argument for Hong Kong on the Asia-Pacific Arbitration Stage?

Edern Coënt (Kim & Chang) and Eugene Thong · Friday, April 26th, 2019

Introduction

On 2 April 2019, the Supreme People's Court and the Government of the Hong Kong Special Administrative Region announced the signature of the "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" (**"Arrangement"**).

This announcement as well as the contents and importance of the Arrangement have immediately been the subject of much attention and coverage. Most of these contributions came from Hong Kong-based colleagues and pointed out the significance of the Arrangement for Hong Kong as an arbitral seat. This blogpost further assesses this significance, but more broadly, in the contexts of the Asia-Pacific region and competition amongst the region's preferred seats.

Interim Measures and the New Regime

Interim measures, meant to protect a party's interests or property during the pendency of proceedings, are usually available during arbitral proceedings in mature jurisdictions. They are available from either the arbitral tribunal or national court, and this is usually provided for in national legislation. In most of these jurisdictions, the relevant law, whether statute or case law, presumes that parties agree for tribunals to be empowered to grant interim measures, unless there is express indication otherwise.

With this context in mind, it is notable that mainland Chinese courts have no power to grant interim measures in support of foreign-seated arbitrations, and interim measures obtained from an emergency arbitrator or arbitral tribunal in a foreign-seated arbitration are not enforceable in mainland China either. Given this regime, a party entering into an arbitration agreement with a potential need for interim relief in mainland China may be forced to accept a clause providing for arbitration seated in mainland China and, given the relative uncertainty on that point,[1)] administered by a mainland Chinese institution as well.

Hong Kong has now become an exception to that regime and is likely to remain the only one in the

foreseeable future.[2] The Arrangement allows mainland Chinese courts to grant interim measures in support of arbitrations seated and administered in Hong Kong. This is subject to a number of formal requirements, which have led to some reservations as to its practical application,[3] but the overall sentiment is that this is a markedly positive development for Hong Kong as an arbitral seat.[4] The Arrangement follows in the steps of previous similar developments in the Hong Kong-mainland China relationship regarding the enforcement of arbitral awards and court judgements, which also crystallised in the form of bilateral agreements, and therefore reinforces the special status of Hong Kong within the "One Country, Two Systems" framework.

In the past few years, that infamous formula has often been referred to ironically. There was, and maybe still is, the view that Hong Kong and the mainland were more and more one country and less and less two systems, to the point that Hong Kong, as an arbitral seat and jurisdiction generally, was perceived to be too close to China and no longer neutral. The Arrangement turns the tables on that perception. It is interesting to note that both signatories to the Arrangement used the "One Country, Two Systems" formula in their inaugural speeches. Teresa Cheng, Secretary for Justice of Hong Kong, declared that "[w]*ith this Arrangement, we are confident that Hong Kong will continue to thrive as a leading international arbitration centre under the 'One Country, Two Systems' framework*". Yang Wanming, Vice-President of the Supreme People's Court, labelled it "*a practical measure taken by the Central Government to support the development of Hong Kong's legal services and its position as an international legal and dispute resolution services hub in Asia Pacific*" and also "*a reflection of closer regional judicial assistance under the 'One Country, Two Systems' principle, and another judicial wisdom in the implementation of the principle*".

There is indeed *wisdom* in the implementation of the Arrangement. First, given the type of disputes likely to arise out of China or out of transactions involving a Chinese party, availability of interim measures could go a long way. Issues commonly associated with such disputes, like violations of intellectual property rights, ongoing breaches of distribution or licensing agreements, frustration of joint ventures and dissipation of assets, typically call for urgent provisional relief. Second, by giving teeth to such relief as granted by tribunals seated in Hong Kong, as opposed to other tribunals seated outside of mainland China, the Arrangement reverses the growing perception that Hong Kong was getting too close to China and that this was bad news for it as an arbitral seat in Asia. In announcing the Arrangement while referring to the "One Country, Two Systems" mantra, the message seems to be: yes, it is still two systems (with all the attendant advantages that entails, including neutrality, especially given the objective quality and independence of the Hong Kong judiciary) but it is also one country and here is why that is actually useful.

Implications for other Asia-Pacific Arbitral Seats

That message, and the practical argument that it makes for Hong Kong, is likely to affect the comparative advantages of the two other preferred arbitral seats in the region, Singapore and Seoul. Both have invested heavily in their capabilities as arbitration-friendly venues, with Singapore having established the world's first integrated dispute resolution complex and emerged as the leading arbitral seat in the region,[5] and Seoul undertaking wide-ranging amendments to its laws to improve its legal infrastructure as an arbitral seat.

Both cities have also certainly profited from the neutrality concerns arising out of the relationship

between Hong Kong and mainland China, by being perceived as more neutral seats for China-related disputes. The Arrangement does not change that perception; it flips it on its head. Whereas parties may have been dismissing Hong Kong based on perception rather than fact, they now have a very specific and practical argument for choosing Hong Kong, considering the relief that will be available to them in potential disputes. That choice is already significant for the competition amongst the three arbitral seats, but in the context of the Belt and Road Initiative (**"BRI"**), with China as the main driver of potential future disputes in the region, this new development may indeed prove to be of great consequence. As it is, some US$ 1 trillion has already been committed to date to the BRI, which, at maturity, is expected to see a further investment of at least a few more trillions of US dollars. Moreover, its membership continues to expand, with European countries starting to join in: Italy became a member in March 2019, while Switzerland has expressed support this month. To say that the stakes are high may be considered an understatement.

For now, a very immediate and concrete effect of the Arrangement will be that parties and their counsel will have to pay more attention to the midnight clause that is the arbitration agreement. Parties dealing with mainland China and choosing arbitration as their dispute resolution mechanism will have to weigh more seriously the pros and cons of Hong Kong as an arbitral seat in comparison with its two regional competitors. Conversely, mainland Chinese parties may wish to consider whether Singapore or Seoul might turn out to be more favourable seats, despite their offshore status.

Meanwhile, Singapore and Seoul will have to come up with additional reasons to remain attractive in the region at a time when China's economic importance is still growing. Presently, Singapore seems to be continuing to seek new areas of potential innovation for arbitration, while further developing the full range of dispute resolution services on offer: for instance, it is finetuning the regimes for alternative or complementary solutions like mediation, which may also be important for the BRI, given the Asian centre of gravity. On the other hand, Seoul is vigorously fostering the growth of its arbitration community and market, in addition to emphasising its civil law roots as a factor distinguishing it from Hong Kong and Singapore.

Concluding Remarks

All in all, concrete and precise arguments based on fact, rather than vague sentiments or impressions, are very much welcome to spur competition between rivals, for, if Hong Kong withers, Singapore and Seoul's gain can only be one-off. Hong Kong should prosper through this new development, because this will push other seats in the region to greater heights, and all will be the better for it, for a long time to come.

References

?1 For example, in a survey involving 100 orders by mainland Chinese courts on applications to recognise and enforce arbitral awards rendered outside of mainland China spanning from 1994 to 2015, 83% of SIAC awards and 78% of HKIAC and ICC awards were found to be successfully enforced.

?2 Recent decisions by Chinese courts opened the door to change but only in relation to Hong Kong-seated, HKIAC administered arbitrations, which may have paved the way for the Arrangement rather than announce a sea change. See a Kluwer Arbitration Blog post on the subject from October 2018 here.

?3 The reservations mostly touch upon the fact that Chinese law remains applicable to the application, that the application has to go through the institution administering the case or that the supporting documents may be voluminous and would all have to be translated in Chinese. See, *e.g.*, law firm comments here and here.

?4 In a Statement published on the HKIAC website, Neil Kaplan calls it “a game changer”.

?5 See 2018 Queen Mary International Arbitration Survey, p 9.

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