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Applications for Interim Measures in Mainland China: Advantages of Arbitrating in Hong Kong

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Before October 1, 2019, parties to any arbitration seated outside Mainland China could not apply to Mainland China courts for interim measures. Exploiting this vulnerability, recalcitrant parties may have attempted to frustrate the award by simply hiding, dissipating, or destroying significant assets and incriminating evidence within Mainland China. This defeats the purpose of an efficient and effective resolution of commercial disputes by way of international arbitration.

This vulnerability was eventually addressed in favor of Hong Kong-seated arbitrations. 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 (the “**Arrangement**”) came into effect on October 1, 2019. It allows, among other things, parties to administered arbitrations seated in Hong Kong to seek preliminary and interim relief before the Mainland China courts. This makes Hong Kong the only seat of arbitration where arbitrating parties can seek such relief before the Mainland China courts.¹ The Hong Kong International Arbitration Centre recently published a few statistics under, and frequently asked questions relating to, the Arrangement. In the following, we briefly revisit the provisions of the Arrangement and review the implementation of the Arrangement in light of these statistics. We also discuss certain practical remarks.

The Arrangement

The Arrangement gives rise to two mechanisms. On the one hand, parties to arbitrations which are seated in Hong Kong and administered by a recognized arbitral institution can apply to the Mainland China courts for interim measures before the arbitral awards are made (“**Mainland China Assistance**”).² On the other hand, parties to arbitrations administered by a Mainland arbitral institution can apply to the Hong Kong Court of First Instance (“**CFI**”) for interim measures before the arbitral awards are made (“**Hong Kong Assistance**”).³ We set out these two mechanisms below:

	Mainland China Assistance	Hong Kong Assistance
<i>Types of arbitrations</i>	Arbitrations seated in Hong Kong and administered by one of these six arbitral institutions: ⁴ Hong Kong International Arbitration Centre (“ HKIAC ”), China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, the Asia office of International Court of Arbitration of the International	Arbitrations administered by a Mainland arbitral institution

	Mainland China Assistance	Hong Kong Assistance
	Chamber of Commerce (ICC), Hong Kong Maritime Arbitration Group, South China International Arbitration Center, and eBRAM International Online Dispute Resolution Centre	
<i>Types of interim measures courts may grant</i>	Strictly categorized into three types: (a) assets preservation; (b) evidence preservation; and (c) conduct preservation ⁵	Generally includes: ⁶ (a) injunctions restraining the removal or otherwise dealing of assets; (b) other injunctions; ⁷ (c) inspection, detention, custody, or preservation of property; (d) entry of land or building; (e) deposit of disputed funds into court; (f) taking of samples for the purpose of obtaining evidence; (g) sale of perishable property; (h) disclosure of documents; (i) security for costs and interim payments; (j) appointment of receivers
<i>Timing of the application</i>	Before a Hong Kong arbitral award is made, ⁸ meaning that both preliminary and interim measures are available	After either the commencement of arbitration or an arbitration is considered " <i>to be commenced</i> ", ⁹ and before a Mainland China arbitral award is made, also meaning that both preliminary and interim measures are available
<i>Applicable law</i>	PRC Civil Procedure Law, PRC Arbitration Law, and the relevant judicial interpretations	Arbitration Ordinance and High Court Ordinance
<i>First instance courts with jurisdiction</i>	PRC Intermediate People's Court where the respondent is domiciled or where the assets or the evidence is located	Hong Kong CFI
<i>Need for security</i>	Generally needed, in the form of guarantee letters and cash guarantees	Generally needed, in the form of an undertaking and security for costs
<i>Standards</i>	Pre-arbitration interim measures:	The requesting party shall satisfy that (a) the arbitration is capable of giving

	Mainland China Assistance	Hong Kong Assistance
	<ul style="list-style-type: none"> ▪ <u>Asset or conduct preservation</u>: 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.¹⁰ ▪ <u>Evidence preservation</u>: the applicant shall prove that there is an emergency that the evidence is likely to extinguish or difficult to obtain in the future.¹¹ <p>Interim measures during the arbitral proceedings:</p> <ul style="list-style-type: none"> ▪ <u>Assets or conduct preservation</u>: the applicant shall prove that it may be difficult to execute a judgement, or any other damage may be caused to a party.¹² ▪ <u>Evidence preservation</u>: whether the evidence is likely to extinguish or become difficult to obtain in the future.¹³ 	<p>rise to an arbitral award that is enforceable in Hong Kong; (b) the requesting party has a good arguable case; (c) an arbitral award of damages is an inadequate remedy; and (d) granting the interim measure requested is less harmful than not granting it.¹⁴</p>

As of July 5, 2021,¹⁵ the HKIAC saw 47 applications for Mainland China interim measures in aid of Hong Kong-seated HKIAC arbitrations. Out of these, 44 were made for asset preservation, two for evidence preservation, and one for conduct preservation. HKIAC was aware of 30 decisions issued by the Mainland China courts pursuant to the Arrangement. Out of these, 28 granted the applications for asset preservation. The total value of assets preserved amounted to RMB10.8 billion (approximately USD1.7 billion). On average, it only took the Mainland China courts 19 days from receiving an interim measure application to making a decision.

Practical Remarks

The Arrangement has the force of supporting cross-border economic developments involving Mainland China and Hong Kong. Specifically, the Arrangement made Hong Kong an even more attractive jurisdiction as an arbitration seat. In order to fully embrace the protections made available under the Arrangement, arbitrating parties are encouraged to proactively discern any attempt of the opposing parties to dispose of or dissipate their assets or evidence. Arbitrating parties are encouraged to do so even before arbitration is contemplated or threatened. In this regard, our investigative attitude and global outreach have fit squarely with clients' and in-house teams' interests in both applying for interim measures and defending such applications.

To secure interim measures expeditiously, arbitrating parties are encouraged to accurately identify the subject matters (e.g., assets or evidence to be preserved) of the applications. In addition, while the provision of security is optional¹⁶ in embarking upon the Mainland China Assistance, the requesting party must provide, in the application papers, information about the property in Mainland

China to be used as security or certification of financial standing.¹⁷ Likewise, for the Hong Kong Assistance, the requesting party must include his/her/its undertaking for the CFI's consideration,¹⁸ therefore, good and sufficient security should be provided.

The following practical remarks should also form part of arbitrating parties' consideration:

I. Mainland China Assistance

The Mainland China courts demonstrated their willingness to provide Hong Kong-seated institutional arbitrations with all necessary assistance to protect commercial parties' rights and interests and preserve the integrity of arbitral proceedings.¹⁹ The figures above also align with our experience that asset preservation is generally permitted in Mainland China. We expect and welcome an even stronger incentive for commercial parties to agree in their arbitration agreements to refer disputes to institutional arbitration seated in Hong Kong. We also anticipate a higher demand for conduct preservation in Mainland China, as conduct preservation is more powerful than asset and evidence preservations in terms of freezing the status quo.

If the place of residence of the respondent or the place where the assets, evidence, or conduct to be preserved falls within the jurisdiction of different Mainland China courts, the requesting party can only make one application with one Mainland China court.²⁰ In this regard, we suggest opting for the court (a) which is most sophisticated in supporting international arbitrations, (b) whose jurisdiction is most closely connected with the assets, evidence, or conduct to be preserved, and (c) where the arbitral award on the merits of the claims is to be enforced. As of July 5, 2021, 23 Mainland China courts handled applications made under the Arrangement. These include applications from Beijing, Shanghai, and Shenzhen.²¹

While we await greater certainty in the application of the substantive standards under the PRC Civil Procedure Law, arbitrating parties applying to the Mainland China courts for interim measures should always provide security. The Mainland China courts have been seen to treat the provision of security as a key factor in considering whether to order interim measures.

Finally, in light of the global pandemic, as well as the continued efforts on improving efficiency and reducing costs, the Mainland China courts have been developing technology to process certain matters online, which includes an online preservation application system.²²

II. Hong Kong Assistance

In principle, arbitrating parties should be treated with equality and given a reasonable opportunity to be heard. Uniquely, however, the Arbitration Ordinance adopts most provisions in the UNCITRAL Model Law on International Commercial Arbitration, but not article 17I of it.²³ This means that, in deciding an application for interim measures, arbitrating parties may not be given the opportunity to present their cases.²⁴ An effect of carving out of article 17I is that arbitrating parties can pursue court-ordered interim measures *ex parte*. An *ex parte* application allows the requesting party to seek interim measures in the absence of the opposing parties' knowledge. This enables the interim measures to be executed most effectively.

When making an application, the requesting parties should not, however, forget about explaining any facts that may lead the CFI not to grant the interim measures being sought or not to grant such interim measures *ex parte*.²⁵ The *ex parte* nature of an interim measure application requires the requesting party to be open and frank to the CFI. The strong and wide power of the CFI to grant interim measures, albeit discretionary, also warrants open and frank disclosure. It should be noted that the CFI can even order interim measures against an appropriate third party,²⁶ although the threshold is understandably high.

Concluding Remarks

The fast-changing nature of the commercial world fuels the pressing needs for preliminary and interim measures. It is of paramount importance that commercial parties safeguard their interests by pre-planning and strategizing with their legal advisers well in advance of arbitration. Obvious as it may be, the sense of urgency maximizes strategic options in the ensuing arbitration as much as it maximizes the likelihood of successfully enforcing the resulting arbitral awards.



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¹ While parties to arbitrations seated in non-Mainland China jurisdictions other than Hong Kong are entitled to enforce arbitral awards in Mainland China, they generally cannot pursue interim measures in Mainland during the pendency of such arbitrations.

² Articles 2 and 3, Arrangement.

³ Article 6, Arrangement.

⁴ Press release of the Hong Kong government on September 26, 2019, accessible at <https://www.info.gov.hk/gia/general/201909/26/P2019092600393.htm>.

⁵ A conduct preservation order operates in essence as an injunction, as it stops someone from doing something or forces someone to do something.

⁶ The Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administration Region (the "**Evidence Arrangement**") went into effect on March 1, 2017. It allows Mainland China and Hong Kong courts to assist one another in the taking of evidence in civil and commercial matters. It may resemble the Arrangement (e.g., the CFI may request a Mainland China court to help with examining sites located in Mainland China. Such requests carry an injunctive element, like how the Arrangement governs interim measures). Nevertheless, the two arrangements serve different purposes. While the Evidence Arrangement operates to ease the taking of evidence, the Arrangement is concerned with preserving the status quo by means of interim measures. We focus on the Arrangement in this article.

⁷ Other types of injunctions include, but are not limited to, Mareva injunctions to enjoin a party from disposing of or dissipating assets, Anton Piller orders to search premises and seize evidence without prior warning, *quia timet* injunctions designed to prevent the occurrence of wrongful acts before those acts are carried out, and anti-suit injunctions to disallow any legal proceedings.

⁸ According to Article 3 of the Arrangement, where an application is made after an arbitral institution accepts the arbitration, the application should be addressed to the institution, which is to refer the application to the appropriate PRC court. Where the application is made before the institution accepts the arbitration, but the relevant PRC court has not received a letter from the institution certifying its acceptance within 30 days after the interim measure is taken, the application should be addressed directly to the appropriate PRC court.

⁹ *P Co and Q Co v R LLC and S Bank* [2021] HKCFI 691 at [20]-[24] (An issue arises as to whether a party could seek court-ordered interim measures in the circumstance that an arbitration was "*to be commenced*" soon, if the parties

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may be required to first engage in a pre-arbitration resolution process which was yet to occur. The CFI opined in orbiter that the phrase “to be commenced” should be construed liberally).

¹⁰ Article 101, PRC Civil Procedure Law.

¹¹ Article 81.2, PRC Civil Procedure Law.

¹² Article 100, PRC Civil Procedure Law.

¹³ Article 81.1, PRC Civil Procedure Law.

¹⁴ Section 45(5), Arbitration Ordinance; section 21M(1) of the High Court Ordinance; *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* (2016) 19 HKCFAR 586 at [47]-[49].

¹⁵ PRC-HK Interim Measures Arrangement: Frequently Asked Questions prepared by the HKIAC: <https://www.hkiac.org/Arbitration/interim-measures-arrangement-faqs>, questions 5 and 9.

¹⁶ Article 8, Arrangement.

¹⁷ Article 5(5), Arrangement.

¹⁸ Article 7(6), Arrangement.

¹⁹ Hong Kong-seated *ad hoc* arbitrations do not fall under the ambit of the Arrangement. While parties to such arbitrations cannot apply for interim measures in Mainland China, they are entitled to enforce the arbitral awards in Mainland China under the recent Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region. We analyze this recent arrangement in our next article.

²⁰ Article 3, Arrangement.

²¹ PRC-HK Interim Measures Arrangement: Frequently Asked Questions prepared by the HKIAC: <https://www.hkiac.org/Arbitration/interim-measures-arrangement-faqs>, question 6.

²² See, baoquan.court.gov.cn

²³ Section 44, Arbitration Ordinance.

²⁴ Articles 17I(1)(a)(i) and 36(1)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration.

²⁵ Article 7(5), Arrangement.

²⁶ *Company A and others v Company D and others* [2018] HKCFI 2240 at [29]-[41].