



Arrangement on the Mutual Assistance and Protection of the Arbitration Procedures by the Mainland and Hong Kong Special Administrative Region Courts

Executive Summary

Earlier this year, the Hong Kong Special Administrative Region (hereafter "Hong Kong") and the Supreme People's Court of the People's Republic of China announced the pending introduction of the "groundbreaking" *"Arrangement on the Mutual Assistance and Protection of the Arbitration Procedures by the Mainland and Hong Kong Special Administrative Region Courts"* 《关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排》 (*"Arrangement"*). Concisely, it allows parties to Hong Kong arbitrations to apply directly to an Intermediate People's Court in the Mainland for the preservation of property, assets or conduct and also preservation orders. Furthermore, it enables parties to Mainland arbitrations to apply directly to the Hong Kong High Court for injunctions and other interim measures.

On 1st October 2019, Hong Kong became the first jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral proceedings administered by its arbitral institutions would be able to apply to the Mainland courts for interim measures. A formal mechanism has not previously existed. Once enacted, parties are no longer bound to arbitrate in Mainland China if they wish to have recourse to such measures. They will also enjoy the alternative option of a Hong Kong seat. This benefits parties who seek to enforce arbitration awards in the Mainland.

Naturally, this will facilitate and increase cross border applications for urgent preservation measures. In light of the Greater Bay Development Plan and the Belt and Road Initiative, Hong Kong is uniquely placed to benefit from the Arrangement. As the only jurisdiction to have such an agreement with the Mainland, Hong Kong is poised to be the "neutral seat" for Sino-international disputes.

Background

Mainland China has historically been hesitant to accept applications for interim measures from parties commencing arbitration outside of the region. However, Courts have indicated they may be receptive to granting interim measures in aid of Hong Kong-seated arbitrations in the last few years.

Most notably, *Talpa v. Shanghai Caixing* (2016), where a Beijing Court granted interim measures to a Hong Kong seated arbitration. The plaintiff sought injunctive relief from the Beijing IP court, even though the license agreement provided for Hong Kong law and arbitration. It held that the claim was for "trademark infringement" and not "breach of contract" thus, the Beijing IP court has jurisdiction to issue injunctive relief.

In *Ocean Eleven Shipping Corporation v. Lao Kai Yuan Mining Sole Co., Ltd* (2016) and *Guangdong Yuehua International Trade Holdings Limited v. Sino-Tide Holdings Limited & Ke Junxiang* (2016), Mainland courts were allowed to grant relief without specifying a legal basis. These specific cases further emphasized the need for formal arrangements.

In the context of Mainland China, the term "interim measure" refers to property preservation, evidence preservation, and conduct preservation. In the context of Hong Kong, the concept refers to injunctions and other interim measures for maintaining or restoring the status quo, pending determination of the dispute; taking action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings; preserving assets; or preserving evidence that may be relevant.

Under section 45 (5) 9b) of the Arbitration Ordinance, Hong Kong courts may grant interim measures in aid of an arbitration seated outside Hong Kong, as long as the interim measure sought abides by legislation. The Supreme People's Court is yet to announce the applicable test or guidance.

In the Arrangement, "arbitral proceedings" refer to proceedings seated in Hong Kong and administered by any of the following institutions or permanent offices under Article 2:

- Arbitral institutions established in the Hong Kong Special Administrative Region (the HKSAR) or those with headquarters established in the HKSAR, and with their principal place of management located in the HKSAR,
- Dispute resolution institutions or permanent offices set up in the HKSAR by international intergovernmental organizations of which the People's Republic of China is a member,
- Dispute resolution institutions or permanent offices set up in the HKSAR by other arbitral institutions and that satisfy the HKSAR government's criteria (such as the number of arbitration cases and the amount in dispute, etc.).

Although parties first submit the interim relief application to an approved Hong Kong arbitration institution, PRC law applies. After approval, the interim relief hearing must be conducted by lawyers qualified in the Mainland. A party to arbitral proceedings in Hong Kong may apply for interim measures from the mainland Chinese courts before or after the competent arbitral institution accepts the Notice of Arbitration.

If a party applies for interim measures after such party submit its Notice of Arbitration, the party must submit its application to the institution, which will then forward the application to the competent mainland Chinese court for determination.

In terms of practicality, the requirement in Article 4 for documents issued outside the PRC to be certified may elongate the process. This could potentially require certification by a China-approved attesting officer or embassy notarization. The requirement for all documents to provide "accurate Chinese translation" should also be considered in the timeframe.

Article 5 lists items necessary for the application to a Mainland Court. Again, these items must refer to the P.R.C Civil procedure law, amongst other regulations. Article 5 lists the following:

1. Basic information of the parties: the parties are natural persons, including name, domicile, identity document information, communication methods, etc.; the parties are legal or unincorporated, including the name, domicile and legal representative of the legal or unincorporated organization or The name, position, address, identity document information, communication method, etc. of the principal person in charge;
2. Requests, including the amount of application for preservation of property, the content and duration of application for preservation;
3. The facts, reasons and relevant evidence on which the request is based, including the urgency of the situation, if it is not immediately preserved, the applicant's lawful rights and interests will be irreparably damaged, or the arbitral award will be difficult to enforce;
4. Clear information or specific clues of the property or evidence applying for preservation;
5. Mainland property information or credit certificates used to provide guarantees;
6. Whether the applications and applications stipulated in this arrangement have been submitted in other courts, relevant institutions or permanent offices;
7. Other matters that need to be stated.

The *Arrangement* offers parties choice and protection. Parties can benefit from an international, well established legal system and can gain protection if necessary.

ASIALLIANS has extensive experience in arbitration proceedings in China, Hong Kong and Taiwan, both as counsel and arbitrators. Teams from China, Hong Kong and Taiwan regularly intervene in commercial, investment or maritime arbitrations, as well as in procedures for the recognition and enforcement of foreign decisions.

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"Have PRC Courts Ordered Interim Relief Measures in Support of HKIAC Arbitrations without an Express Legal Basis: What Lies Ahead?" – Helen H. Shi (Fangda Partners), Kluwer Arbitration Blog, 26 August 2018

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