

JULY 2019

## Interim measures in aid of arbitration: Mutual assistance between the PRC and Hong Kong



On 2 April 2019, the Supreme People's Court of the People's Republic of China ("**SPC**", "**PRC**") and the Secretary for Justice of the Hong Kong SAR signed an "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitration Proceedings" ("**Arrangement**").

When effective, the Arrangement will allow parties to seek interim Court assistance in Mainland PRC in aid of Hong Kong arbitration, and *vice versa*. It applies only to institutional arbitration in Mainland PRC and to institutional arbitration in listed Hong Kong arbitral institutions. The list is yet to be released, but is expected to include CIETAC (Hong Kong), ICC (Hong Kong), and HKIAC.

The Arrangement is additional to, and does not override, existing avenues for relief: Article 11.

Further guidance on the operation of the Arrangement is anticipated in a future judicial interpretation by the SPC. In the meantime:

### What interim measures?

The interim measures available in Mainland PRC and Hong Kong under the Arrangement appear similar in substance. Article 1 refers to:

- In the PRC, "*property preservation, evidence preservation and conduct preservation*".

- In Hong Kong, "*injunction and other interim measure for the purpose of maintaining or restoring the status quo pending determination of the dispute; taking action that would prevent, or refraining 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 and material to the resolution of the dispute*".

### Which Court?

Applications may be made to:

- The PRC Intermediate People's Court having jurisdiction over (a) the respondent's place of residence, or (b) the place where the property or evidence is situated: Article 3. If (a) and (b) are different, one must be selected; separate applications to multiple Courts are not allowed.
- The Hong Kong High Court: Article 6.

### When can I apply?

Applications pursuant to the Arrangement may be made by "*a party to arbitral proceedings*" before the arbitration award is issued: Articles 3 and 6.

For applications in Mainland PRC, if the application is made after the Hong Kong arbitration institution has "accepted" the arbitration case, the institution should transmit the application. If it is made before "acceptance", certification by the institution that it has "accepted" the arbitration needs to be filed within 30 days of the interim measure, failing which the interim measure will be discharged. See Article 3.

### Requirements

Articles 4-5 and 7 state the requirements for applications under the Arrangement in Mainland PRC and Hong Kong respectively. Of note:

- In Mainland PRC:
  - The applicant's documents of identity are required: Article 4(3). We expect the usual requirements for documents of authority will also apply.
  - There needs to be an explanation as to why the relief sought is urgently required: Article 5(3).
- In Hong Kong, it appears a requirement for full and frank disclosure will apply: Article 7(4)-(5) requires the applicant to specify:
  - "*the answer asserted or likely to be asserted by the party against whom the application is made*".
  - "*any facts which might lead the court not to grant the interim measure being sought or not to grant such interim measure ex parte*".

### Counter-security?

In Mainland PRC, security (presumably for loss arising if the interim measure is unjustified): Articles 5(5) and 8. It is as yet unknown if an insurance product similar to that used in recent years as counter-security in the PRC Courts will be made widely available for this purpose.

In Hong Kong, an undertaking (presumably as to damages if the interim measure is unjustified) and security for costs: Articles 7(6) and 8. We expect the Courts will consider if fortification of the undertaking by other security is required.

### Closing comments

The Arrangement is potentially of significant assistance to parties arbitrating in Hong Kong, who require interim relief in Mainland PRC. The Arrangement is therefore anticipated to provide a boost to institutional arbitration in Hong Kong involving a PRC party, assets, or evidence, for the institutions that are ultimately listed. Listed institutions will have to ensure appropriate assistance to parties, especially with respect to the transmission and certification referred to in Articles 3 and 4. It remains to be seen whether the Arrangement will be extended to *ad hoc* arbitrations in the future, which form the majority of dispute resolution procedures within certain industry sectors.

## Get in touch

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