

International Arbitration: Focus on Chinese Counter-Parties

Given recent developments, parties with cross-border agreements and arbitration with Chinese counter-parties should look to Hong Kong as a seat of arbitration.

On 2 April 2019, the Hong Kong SAR Government and the PRC Supreme People's Court signed an arrangement whereby the Hong Kong and Mainland Chinese courts are to provide mutual assistance in interim measures in support of arbitral proceedings. The arrangement came into force on 1 October 2019, and will apply to proceedings commenced prior to but still ongoing as of 1 October 2019.

Pursuant to the arrangement, any party to arbitral proceedings in Hong Kong conducted under the auspices of any of six qualified arbitral institutions, including HKIAC, CIETAC (HK Arbitration Center), ICC (Asia Office), Hong Kong Maritime Arbitration Group, South China International Arbitration Center (HK), and eBRAM International Online Dispute Resolution Centre, may, before an award is issued, apply to the relevant Mainland Chinese courts for interim measures in relation to the arbitral proceedings in accordance with the relevant laws and regulations of Mainland China. Such interim measures include preservation of assets, evidence, and conduct.

Equally, any party to arbitral proceedings in Mainland China may apply to the Hong Kong courts for interim measures pursuant to Hong Kong law — a remedy that is already available to parties to foreign-seated arbitral proceedings.

This critical development renders arbitration in Hong Kong, particularly under the HKIAC, CIETAC, and ICC rules, much more attractive for those entering into contracts with Chinese counter-parties. Chinese courts will not otherwise enforce interim measures granted by a foreign-seated tribunal, nor grant measures to support a foreign-seated arbitration.

Other Considerations:

Formal Requirements

A number of arbitration laws impose stricter formal requirements on an arbitration agreement than a regular contract (including arbitration clauses contained in a broader agreement). Moreover, parties should be particularly cautious when considering the authority and capacity of governmental, or government-owned, counterparties. To be valid in China, arbitration clauses should refer disputes to a specific arbitral institution, rather than including a general statement that disputes should be resolved by the rules of a specific institution.

Valid in China

Parties should ensure their choices of arbitral institution or type of arbitration are valid in China, and there are no express statutory provisions allowing foreign arbitral institutions to administer China-seated arbitrations. However, the PRC has recently announced that reputable foreign arbitral institutions will be permitted to set up operations in the Shanghai Pilot Free Trade Zone. Moreover, when all parties are PRC-nationals, arbitration must take place in China, and the agreement must be governed by PRC law.

Confidentiality

Confidentiality is often a key consideration for parties in an arbitration proceeding. While the arbitration proceeding itself is confidential in most cases, if the losing party eventually decides to file a petition to a competent court to set aside the arbitral award, such court proceedings might be open to the public and details of the case might be disclosed. Parties are strongly advised to consider arbitration in Hong Kong because it is one of the few jurisdictions that expressly guarantees confidentiality regarding court proceedings on the application of any parties to the arbitration proceedings.

Local Courts

Parties should consider the quality, efficiency, and accessibility of the courts in the proposed seat of arbitration, as they have a key role in reviewing the arbitration award and supporting the arbitral process. Furthermore, parties should be mindful of the degree of finality accorded to arbitral awards in the seat of arbitration. For disputes involving Chinese parties or for disputes in which enforcement in China is a possibility, parties should seriously consider arbitration in Hong Kong.

Danger

Choosing an unconventional seat/place of arbitration or governing law can result in unintended consequences. A seat's unique requirements may render an arbitration clause void, and/or seriously hinder the arbitral process and enforceability of any award. Choosing an unconventional governing law can, in some circumstances, also affect the validity of the arbitration clause.

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