

Hong Kong Enters Mutual Interim Relief Arrangement With Mainland China

Hong Kong becomes the first and only jurisdiction outside mainland China where mainland China courts may grant interim measures in aid of arbitral proceedings.

Key Points:

- Pursuant to the new mutual arrangement between Hong Kong and mainland China, any party to “arbitral proceedings in Hong Kong” may, before or after commencing arbitration, apply to the competent mainland Chinese courts to obtain interim measures.
- For the purposes of the new mutual arrangement, “arbitral proceedings in Hong Kong” means arbitral proceedings that are seated in Hong Kong and administered by three categories of institutions or permanent offices; however, the list of these institutions and offices is still subject to the joint confirmation of the Hong Kong government and China’s Supreme People’s Court.
- The new mutual arrangement has significant implications for the implementation of key policy initiatives such as the Greater Bay Area Initiative and the “One Belt, One Road” Initiative. As a result, participants of arbitrations seated in Hong Kong can not only benefit from the well-established legal framework in Hong Kong, but will also be able to obtain protection from the mainland China courts when needed.
- Although introducing the new mutual arrangement demonstrates that China is taking positive steps to amend and to bring its arbitration and related laws, judiciary system, and legal framework into the modern age, parties face a few uncertainties and practice difficulties regarding additional costs and the issue of the security. In addition, the Supreme People’s Court has yet to announce any guidance in respect of the test that the mainland Chin courts will use in granting interim measures for a Hong Kong seated arbitration.

On 2 April 2019, the Government of Hong Kong Special Administrative Region (the Hong Kong government) and the Supreme People’s Court of the People’s Republic of China (the Supreme People’s Court) entered into a landmark agreement, 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). Pursuant to the Arrangement, any party to “arbitral proceedings in Hong Kong” may, before or after commencing arbitration, apply to the competent mainland Chinese courts to obtain interim measures. At the same time, any party to arbitral proceedings in mainland China may apply to the Hong Kong courts to obtain interim measures pursuant to Section 45 of the Hong Kong Arbitration Ordinance (the Arbitration Ordinance).

Development of the Mutual Arrangement

Although mainland China courts have traditionally been extremely reluctant to accept applications for interim measures from parties commencing arbitration outside mainland China, mainland China courts have indicated they may be receptive to granting interim measures in aid of Hong Kong-seated arbitrations in the last few years.

In *Talpa v. Shanghai Caixing* (2016), the Beijing Intellectual Property Court (the Beijing IP Court) granted interim measures for a Hong Kong-seated arbitration. The plaintiff Talpa sought injunctive relief from the Beijing IP Court, even though the license agreement provided for Hong Kong law and Hong Kong arbitration. The Beijing IP Court accepted the case and granted injunctive relief, despite the fact that the Hong Kong arbitration was still pending at the time. The Beijing IP Court held that the claim was for “trademark infringement,” and not “breach of contract,” and the court therefore had jurisdiction to issue injunctive relief.

In *Ocean Eleven Shipping Corporation v. Lao Kai Yuan Mining Sole Co., Ltd* (2016), the plaintiff applied for the property preservation against the defendant’s bank accounts in China to the Wuhan Maritime Court, through the Hong Kong International Arbitration Centre. In accordance with the civil award issued by the Beijing IP Court, the plaintiff’s application for property preservation was granted pursuant to Article 28 of the China Arbitration Law and the Civil Procedure Law of the People’s Republic of China.

In *Guangdong Yuehua International Trade Holdings Limited v. Sino-Tide Holdings Limited & Ke Junxiang* (2016), the plaintiff, after the final arbitration award was issued, also applied for the property preservation against the defendant’s bank accounts and other assets in China to the Guangzhou Intermediate People’s Court, through the Hong Kong International Arbitration Centre. According to the judgment, the court granted the application pursuant to Article 283 of the Civil Procedure Law of the People’s Republic of China.

What Type of Arbitral Proceedings Does the Arrangement Cover?

For the purpose of the Arrangement, arbitral proceedings in Hong Kong means arbitral proceedings that are seated in Hong Kong and administered by any of the following institutions or permanent offices in accordance with Article 2 of the Arrangement:

- 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.)

The HKSAR government and the Supreme People’s Court are still negotiating which institutions or permanent offices will be included in the scope of the Arrangement, and the list is subject to their agreement. The list will include the Hong Kong International Arbitration Centre and possibly the China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong and/or the International Chamber of Commerce Hong Kong.

At the same time, although foreign (including HKSAR) ad hoc awards are now enforceable in China, ad hoc arbitrations seated in HKSAR will not benefit from the Arrangement pursuant to Article 2 of the Arrangement.

What Type of Interim Relief Does the Arrangement Cover?

In accordance with Article 1 of the Arrangement, interim measures in the context of mainland China laws refers to property preservation, evidence preservation, and conduct preservation. However, interim measures available under Hong Kong law include injunctions and other interim measures that:

- Maintain or restore the status quo pending determination of the dispute
- Prevent or refrain the defendant from taking action that is likely to cause current or imminent harm or that would cause prejudice to the arbitral proceedings
- Preserve assets
- Preserve evidence that may be relevant and material to the resolution of the dispute

Under section 45(5)(b) of the Arbitration Ordinance, a Hong Kong court is empowered to grant interim measures in aid of an arbitration seated outside Hong Kong if the interim measure sought belongs to a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by a Hong Kong court. The Supreme People's Court has not announced any guidance in respect of the test that the mainland China courts will use in granting interim measures for a Hong Kong seated arbitration.

Requirements of the Application for Assistance in Interim Measures

According to the Arrangement, 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 to an arbitral proceeding in Hong Kong applies for interim measures from a competent court in mainland China before the arbitration institution accepts a Notice of Arbitration and such court grants the application for interim measures, the party must submit documentary proof to the competent court, through the arbitral institutions or permeants office, confirming that the institution has subsequently accepted the arbitration within 30 days from the date of the court's decision. If the party fails to submit this proof, the competent court shall terminate the previously granted interim measure.

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.

Implications for Participants of Hong Kong Seated Arbitrations

The Arrangement will, for the first time, allow parties to opt for Hong Kong arbitration while allowing them simultaneously to obtain interim measures from competent mainland China courts. The Arrangement also demonstrates the positive steps that China has taken to amend and to bring its arbitration and related laws, judiciary system, and legal framework into the modern age. Further, the Arrangement has significant implications for the implementation of key policy initiatives such as the Greater Bay Area Initiative and the "One Belt, One Road" Initiative. As a result, parties are not only able to opt for Hong Kong-seated

institutional arbitration and benefit from the well-established legal framework, but will also be able to obtain protection from the mainland China courts when needed.

However, parties may face some practical uncertainties and difficulties. First, parties may incur additional time and cost in meeting the requirements of the Arrangement. Pursuant to Article 4 of the Arrangement, an identity document issued outside mainland China should be certified in accordance with the provisions of the relevant laws of mainland China, and all non-Chinese documents submitted to a mainland China court will require accurate Chinese translations. The aforementioned requirements may require certification by a China-appointed attesting officer in Hong Kong or may be subject to Chinese consulate/embassy notarization and authentication procedures. In addition, after the competent court has accepted the application for interim measures, mainland China qualified lawyers must conduct the interim hearing.

Second, parties seeking interim measures in a cross-border transfer of funds may need to take into account the time and logistical difficulties posed if mainland China and Hong Kong courts — at their discretion — require parties to provide security to support their application. Pursuant to the Hong Kong Arbitration Ordinance, courts may require applicants for interim measures to provide security reflecting the amount of potential damage to the restrained party if the court determines the interim measure was wrongfully granted. However, parties may be able to provide an undertaking to pay damages, rather than actually having to deposit funds in court. A similar standard applies in mainland China, but parties must deposit the funds representing the security to a court-designated account.

Click [here](#) for an English version of the Arrangement and [here](#) for a Chinese version of the Arrangement.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

[Ing Loong Yang](#)

Ingloong.Yang@lw.com
+852.2912.2790
Hong Kong

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