

**For discussion on
29 April 2019**

**Legislative Council
Panel on Administration of Justice and Legal Services**

**Cooperation between the Hong Kong Special Administrative Region
and the Mainland on Arbitration-related matters**

INTRODUCTION

The Government of the Hong Kong Special Administrative Region (“HKSAR”) has been in discussion with the Mainland authorities to secure liberalisation measures in the Mainland in relation to the provision of arbitration services by the legal and dispute resolution services sector of the HKSAR. This paper provides an overview of latest development of co-operation between the HKSAR and the Mainland on arbitration-related matters.

MATTERS OF CO-OPERATION

I. Interim measures from Mainland Courts available to parties to institutional arbitrations seated in Hong Kong

2. The Department of Justice (“DoJ”) recently signed the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR* (“Arrangement”)¹ with the Supreme People’s Court, with which Hong Kong has concluded seven arrangements with the Mainland concerning various aspects of mutual legal assistance in civil and commercial matters.

3. Interim measures include property preservation, evidence preservation and conduct preservation in relation to arbitral proceedings.

¹ For details of the Arrangement, please refer to the information note CB(4)725/18-19(01) issued to the Panel on 3 April 2019.

Examples include order of security for claim, order to disclose and freeze assets.

4. Under Hong Kong law, a party to arbitral proceedings may seek interim measures from the arbitral tribunal or from the court; interim measures may also be granted by the Hong Kong court in aid of parties to arbitral proceedings in any place. Under section 61 of the Arbitration Ordinance (Cap. 609), any interim measure given by arbitral tribunals anywhere in the world can be enforced by Hong Kong court. Yet, the enforceability of the interim measure given by arbitral tribunals in Hong Kong will depend on the laws of the enforcing jurisdiction, for example, whether the 2006 amended version of the UNCITRAL Model Law on International Commercial Arbitration was adopted by such jurisdiction. On the other hand, only parties to arbitral proceedings administered by Mainland arbitral institutions may apply for interim measures from the Mainland courts in accordance with the relevant Mainland law. In other words, for parties to arbitral proceedings seated outside the Mainland, an application to the Mainland court for interim measures remains unavailable.

5. The DoJ and the Supreme People's Court had, under the principle of "One Country, Two Systems" and pursuant to Article 95 of the Basic Law², engaged in consultations for the purpose of providing a means for a party to arbitral proceedings in Hong Kong to seek the assistance of the relevant courts in the Mainland in granting an interim measure. The discussion, which involves the arbitration community in Hong Kong, commenced in late 2016 and concluded in 2019 which led to the signing of the Arrangement on 2 April 2019.

6. The Arrangement provides that a party to arbitral proceedings in the Mainland or the HKSAR may, before the arbitral award is made, apply to the courts of the other jurisdiction for an interim measure in relation to the arbitral proceedings.

7. The significance of the Arrangement can be seen in the

² Article 95 of the Basic Law states: "The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other."

following aspects:

- (a) Pursuant to the Arrangement, parties to arbitral proceedings seated in Hong Kong and administered by eligible arbitral institutions which have been designated would be able to apply to the relevant Mainland court for interim measures in aid of such arbitral proceedings.
- (b) The Arrangement will benefit Hong Kong's arbitration services, arbitral institutions and parties to arbitrations in the following ways:
 - (i) Parties to contracts may wish to provide for disputes to be resolved by arbitration in Hong Kong and be administered by a Hong Kong arbitral institution in order to enjoy the right provided under the Arrangement to apply to the Mainland courts for granting interim measures in aid of Hong Kong seated arbitration, irrespective of the nationality or domicile of the parties involved;
 - (ii) At the same time, by enabling parties to arbitration to apply to Mainland courts for interim measures, this is conducive to effective dispute resolution in Hong Kong, and thus further enhancing arbitration parties' access to justice and the protection of their legal rights;
 - (iii) Article 2 of the Arrangement sets out clear and practicable criteria in determining the eligible arbitral institutions for the purposes of making use of the Arrangement. We believe this will help attract reputable international arbitral institutions to set up dispute resolution centres or permanent offices in Hong Kong and administer arbitration cases here. In particular, since only Hong Kong seated arbitrations can make use of the Arrangement, practitioners and arbitral institutions will have greater incentive to promote the choice of Hong Kong as the seat of arbitration and place

for administering arbitration;

(iv) The Arrangement does not only benefit Hong Kong but can also benefit the international community and rule of law by providing easy and practicable access to justice and a fair level playing field, as well as setting an example for other communities to promote arbitration in a friendly environment.

(c) Hence, the Arrangement will further enhance Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia Pacific region.

8. Next steps to be done before the Arrangement is to come into effect on a date to be designated are:

- (i) compiling a list of eligible arbitral institutions to be provided to the Supreme People's Court for confirmation by both sides;
- (ii) issuance of the implementing judicial interpretation by the Supreme People's Court; and
- (iii) training for legal and dispute resolution professionals of Hong Kong and the Mainland to prepare them for the commencement of the Arrangement with a view to enabling users to capitalise on the Arrangement .

Commencement of the Arrangement expected in the 2nd or 3rd quarter of 2019, subject to the progress of the above.

9. Under the Arrangement, HKSAR is the first jurisdiction outside the Mainland where parties of arbitral proceedings seated in Hong Kong may apply to the Mainland courts for interim measures. See the quote from Matthew S. Erie, Associate Professor of Modern Chinese Studies and Fellow at St. Cross College, University of Oxford:

“This is a momentous development in the growth of international

commercial arbitration in both [the Mainland] and Hong Kong as it is the first time that such a mechanism has been put in place to allow [Mainland] courts to render interim relief to support arbitrations seated outside of the [Mainland].”³

II. Arbitration related initiatives in the Guangdong-Hong Kong-Macao Greater Bay Area

10. In the discussion paper submitted for the Panel meeting on 25 March 2019, we pointed out that, under Mainland laws, in the absence of any foreign-related elements, Mainland parties are not allowed to submit a dispute to an arbitral institution outside the Mainland (e.g. an arbitral institution in Hong Kong) for arbitration.⁴ This restriction affects wholly owned Hong Kong enterprises (“WOKE”) and joint ventures set up by Hong Kong investors in the Mainland, as they are treated as Mainland legal persons under Mainland laws.

11. In view of arbitration-related liberalisation measures taken by the Mainland for free trade zones in recent years to relax the aforesaid restriction⁵, we will continue to consult with Mainland authorities to explore the possibility of introducing an initiative to enable two Mainland

³ “Viewing 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’ as a Window onto the New Legal Hubs” Matthew S. Erie, Conflict of Laws . net – Views and News in Private International Law:
<http://conflictoflaws.net/2019/viewing-the-arrangement-concerning-mutual-assistance-in-court-order-ed-interim-measures-in-aid-of-arbitral-proceedings-by-the-courts-of-the-mainland-and-of-the-hong-kong-special-administrative/>

⁴ See paragraphs 13 to 16 of LC paper no. CB(4)665/18-19(04).

⁵ In January 2017, the Supreme People’s Court of the Mainland issued the “Opinion of the Supreme People’s Court on the Provision of Judicial Safeguards for the Development of the Pilot Free Trade Zones” (Fa Fa [2015] No.34) (“**FTZ Opinion**”). Article 9 of the FTZ Opinion provides that “*where the wholly foreign owned enterprises registered in the pilot free trade zones agree to submit a commercial dispute to arbitration outside the Mainland, the relevant arbitral agreement shall not be considered invalid solely because the dispute lacks any foreign-related elements.....*”. The FTZ Opinion suitably relaxes the arbitral agreement between wholly foreign owned enterprises to submit a dispute to arbitration outside the Mainland in the absence of any foreign-related elements.

In August 2018, the Supreme People’s Court of the Mainland issued the “Opinion of the Supreme People’s Court on the Provision of Judicial Service and Safeguards for Comprehensively Deepening Reform and Opening Up of Hainan” (Fa Fa [2018] No.16) (“**Hainan Opinion**”), which further relaxes the restriction on the parties who agree to submit a dispute to arbitration outside the Mainland, i.e. where the parties of civil and commercial cases in Hainan Pilot Free Trade Zone or Free Trade Port agree to submit a dispute to arbitration outside the Mainland, it would not be advisable to consider the agreement invalid due to the absence of any foreign-related elements.

parties in the Greater Bay Area to choose Hong Kong as the seat of arbitration. This initiative would be welcomed by the business executives of WOKE, many of whom would be familiar with the advantages of choosing Hong Kong as the forum for resolving cross-border disputes.

12. The above initiative is particularly conducive to the protection of intellectual property (“IP”) rights in the Greater Bay Area. In view of Hong Kong’s legislative amendments in 2017 clarifying the arbitrability of intellectual property (“IP”) rights and enforceability of IP arbitral awards, we will seek to promote IP arbitration in Hong Kong in the Mainland, especially in the Greater Bay Area where development in innovation and technology makes the use of arbitration to resolve IP disputes particularly important. There is always room for the use of arbitration for cross-jurisdictional issues in IP matters, such as in the facilitation of start-up entrepreneurs for research and development as well as commercialisation of IP matters in the Greater Bay Area. To this end, seminars could be arranged for the heads of technology transfer in universities and startups / incubation projects within the Greater Bay Area and beyond to explain to them the benefits of implementing IP arbitration mechanism as part of their commercialisation of IP rights.

III. Capacity Building

13. It is one of the new initiatives under the Policy Agenda attached to the Chief Executive’s 2018 Policy Address to promote Hong Kong as a regional capacity building centre for international law and dispute resolution through organising and co-organising international conferences and training programmes with international and local bodies.

(i) Existing capacity building programmes provided by local arbitration bodies and institutions

14. Whilst there are no specific requirements under the arbitration legislation for those who wish to act as arbitrators in Hong Kong to become qualified for appointment, there are two professional bodies in Hong Kong which provide education and training courses for those who wish to be accredited voluntarily. They are the Chartered Institute of Arbitrators (East Asia Branch) (“CIArb(EAB)”) and the Hong Kong

Institute of Arbitrators (“HKI Arb”). Local universities also provide courses which have been recognised by CI Arb and HKI Arb. Those who successfully completed these courses and passed the relevant examinations will be entitled to various grades of membership at CI Arb and HKI Arb.

15. Some arbitral institutions operating in Hong Kong, namely the Hong Kong International Arbitration Centre (“HKIAC”), the International Court of Arbitration of the International Chamber of Commerce (Asia Office) and China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, offered internship opportunities. In addition, the HKIAC also offers a Tribunal Secretary Training Programme.

(ii) *Inclusive Dispute Avoidance and Resolution Office (IDAR Office)*

16. To better cope with the challenges and to harness the additional opportunities offered by the Belt and Road Initiative and the Greater Bay Area plan, the IDAR Office was established in January this year within the DoJ. Amongst other things, the IDAR Office is tasked to organise or support a number of important international events and activities in Hong Kong, as well as raise the international profile of Hong Kong in deal making and dispute resolution through capacity building and promotional activities overseas.

17. In this regard, training courses organised or supported by the DoJ include:

- (a) co-organising the biennial UNCITRAL Asia-Pacific Judicial Summit with UNCITRAL and the HKIAC with the objective of enhancing international trade development through capacity-building with a focus on international law for judiciaries in the Asia-Pacific region; the next Asia-Pacific Judicial Summit will be held in the 3rd quarter of 2019; and
- (b) supporting AAIL to undertake part of the “China-Asian-African Legal Consultative Organization (“AALCO”) Exchange and Research Program on International Law” jointly established by

the Ministry of Foreign Affairs and the AALCO; the 5th training session will be held in the 3rd quarter in 2019 with a one-week session forming part of it being held in Hong Kong.

(iii) *Co-operation at the Greater Bay Area*

18. The legal and dispute resolution services sector of Guangdong, Hong Kong and Macao has in turn launched different forms of exchanges in order to leverage on their strengths. For example, the Guangdong, Hong Kong and Macao Arbitration Alliance was established in September 2019 as a joint non-governmental initiative of arbitral institutions in Guangdong, Hong Kong and Macao, with its first working meeting held in Guangzhou on 23 February 2019. In the working meeting, representatives of various arbitral institutions signed the Memorandum of Cooperation of the Guangdong, Hong Kong and Macao Arbitration Alliance to facilitate cooperation concerning international commercial arbitration in the Greater Bay Area.

19. The DoJ will continue to proactively liaise and consult with a view to establishing an exchange platform for the legal and business sectors in Hong Kong and the Mainland, which will facilitate commercial, trade, financial and other exchanges between Guangdong, Hong Kong and Macao.

20. The DoJ, the Higher People's Court of Guangdong Province and the Guangdong Justice Department are exploring the setting up of a platform for training of judges and lawyers and also conducting a comparative study of legal concepts in the Greater Bay Area.

(iv) *Sports Arbitration*

21. In particular, there are ample opportunities for Hong Kong to further develop its capacity building position in the specialised area of sports arbitration. In view of the growth in the sports industry, there is a growing need to resolve the disputes in the sports sector with its interwoven relationships between many different parties including athletes, sports bodies, sports clubs, federations, and the like.

22. The Court of Arbitration for Sport (CAS) is an institution independent of any sports organisation which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or

mediation by means of procedural rules adapted to the specific needs of the sports world. CAS was created in 1984. CAS has nearly 300 arbitrators from 87 countries, chosen for their specialist knowledge of arbitration and sports law. Around 300 cases are registered by CAS every year.⁶

23. In the Asian region, the Asian International Arbitration Centre (AIAC) in Kuala Lumpur has been promoting the wider use of arbitration for the resolution of disputes in the sports industry. The AIAC Certificate Programme in Sports Arbitration was organised to offer opportunities to those who are interested to understand the sports law and the practicalities in the resolution of sporting disputes. The AIAC has been recognised by CAS as an official alternative hearing centre. The AIAC is advocating the setting up of an Asian Sports Tribunal.

24. CAS has also established its first alternative hearing centre” in Shanghai in 2012 to resolve sports-related disputes involving parties from the Mainland and East Asia.⁷ Alternative hearing centres will ensure speedy resolution of disputes while reducing the travel costs of the parties.

25. Hong Kong has its unique strengths in respect of dispute resolution involving Mainland parties. Arbitration in Hong Kong has been widely recognised internationally. Since the experience and expertise of arbitrators contribute to the success of sports arbitration, there is a corresponding increase in the demand for specialised practitioners in the sports arbitration practice. Hong Kong should have the edge of providing sports arbitration training in Hong Kong and the Mainland etc. for international law and dispute resolution through organising and co-organising international conferences and training programmes with international and local bodies.

26. In view of the forthcoming Olympic Games in Japan in 2020, the Winter Olympics to be held in Beijing in 2022 and the growing need for resolution of disputes in the football industry in the Mainland and Hong Kong, DoJ will explore how it can contribute to this specialised area of dispute resolution in collaboration with the stakeholders.

⁶ <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last accessed on 16 April 2019)

⁷ http://www.china.org.cn/sports/2012-11/13/content_27096686.htm (last accessed on 16 April 2019)

ADVICE SOUGHT

27. We invite Members' comments and suggestions on how the Mainland market may be further opened up for the Hong Kong's arbitration services sector. Based on the comments and suggestions received through different channels, we will discuss with the relevant Mainland authorities with a view to formulating the way forward.

Department of Justice
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