

For information

Panel on Administration of Justice and Legal Services

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

INTRODUCTION

On 2 April 2019, the Government of the Hong Kong Special Administrative Region (“HKSAR”) and the Supreme People’s Court (“SPC”) 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”) (a copy of the courtesy English translation of the Arrangement is at **Annex**). This note informs Members on the above matter.

BACKGROUND

The Current Situation and the Need for an Arrangement

2. A party to a cross-boundary dispute, may, in the course of resolving it through arbitral proceedings, need to seek the assistance from the courts of a jurisdiction other than the place of arbitration to grant interim measures, including evidence and asset preservation measures, against the other party to the arbitration. The purpose of granting such measures is to prevent one of the parties to the arbitration from deliberately destroying the evidence or dissipating the assets, or to maintain the status quo, so as to ensure that the arbitral proceedings can be effectively conducted or that the award made by the arbitral tribunal can be effectively enforced.

3. As far as arbitral award is concerned, the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR* was signed in 1999. However, that arrangement does not address the issue of granting interim measures (known as “preservation

measures” in the Mainland) for the preservation of assets and evidence or maintenance of the status quo in relation to arbitral proceedings.

4. Under existing Hong Kong legislation¹, parties to arbitral proceedings in any place may apply to the Court of First Instance of the High Court of the HKSAR for interim measures and for enforcement of the interim measures granted by the arbitral tribunal. In the Mainland, on the other hand, although the parties to an arbitration may apply for interim measures from the Mainland courts in relation to the arbitration², the relevant provisions currently apply only to parties to arbitral proceedings administered by Mainland arbitral institutions. As such, parties to arbitral proceedings in the HKSAR or other places are currently unable to apply to the relevant courts in the Mainland for interim measures in aid of such arbitral proceedings to preserve the assets and evidence of the respondent or to maintain the status quo³.

Main Provisions of the Arrangement

5. In view of the above unsatisfactory situation, the Department of Justice (“DoJ”) and the SPC had, pursuant to Article 95 of the Basic Law⁴, 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 and signed the Arrangement.

6. The purpose of the Arrangement is to provide 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. The main provisions in the Arrangement are set out as follows:

¹ This includes sections 21L(1) and 21M(1) of the High Court Ordinance (Cap. 4) and sections 45(2) and 60(1) of the Arbitration Ordinance (Cap. 609).

² This includes Articles 100, 101 and 272 of the *Civil Procedure Law of the People’s Republic of China* (amended on 27 June 2017) and Article 68 of the *Arbitration Law of the People’s Republic of China* which came into operation on 1 September 1995.

³ It is, however, understood that there is one exception in the case of maritime arbitration. Parties to maritime arbitration seated outside the Mainland may currently apply for interim measures under the relevant Mainland laws and regulations.

⁴ 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.”

- (a) specification of the scope of an “interim measure” in the context of the Mainland and the HKSAR respectively (Article 1);
- (b) specification that a party to “arbitral proceedings in Hong Kong” (see paragraph 7 below) may, in accordance with the relevant Mainland laws and regulations, apply for interim measures from the relevant Mainland courts, and a brief description of the relevant procedures and documents to be submitted (Articles 2 to 5);
- (c) specification that a party to arbitral proceedings administered by Mainland arbitral institutions may, in accordance with the relevant legislation of the HKSAR, apply to the HKSAR courts for interim measures, and a brief description of the relevant procedures and documents to be submitted (Articles 6 to 7);
- (d) stipulation of matters relating to the handling of applications for interim measures at the courts of the two jurisdictions (Articles 8 to 10); and
- (e) stipulation that the Arrangement does not prejudice any rights enjoyed by the arbitral institutions, arbitral tribunals or parties of the Mainland and the HKSAR under the laws of the other place (Article 11).

7. “Arbitral proceedings in Hong Kong” referred to in the Arrangement shall be seated in the HKSAR and administered by the following institutions or permanent offices:

- “(1) arbitral institutions established in the HKSAR or having their headquarters established in the HKSAR, and with their principal place of management located in the HKSAR;
- (2) dispute resolution institutions or permanent offices set up in the HKSAR by international intergovernmental organisations of which the People’s Republic of China is a member; or

- (3) dispute resolution institutions or permanent offices set up in the HKSAR by other arbitral institutions and which satisfy the criteria prescribed by the HKSAR Government (such as the number of arbitration cases and the amount in dispute, etc.).”⁵

The list of such institutions or permanent offices referred to above is to be provided by the HKSAR Government to the SPC and be subject to confirmation by both sides.⁶

8. Arbitral and dispute resolution institutions or permanent offices wishing to qualify under Article 2 of the Arrangement may apply to DoJ in writing with supporting documents showing that they meet the relevant requirements. The DoJ will soon begin to accept applications from arbitral and dispute resolution institutions for designation as the HKSAR arbitral institutions.

9. It is not necessary to formulate new legislation or amend existing legislation in the HKSAR, as the Arrangement can be implemented in the HKSAR through the existing legislation.⁷ In the Mainland, the Arrangement will be implemented by the SPC's promulgation of a judicial interpretation.

Benefits of the Arrangement for the HKSAR's International Arbitration Services

10. Currently Mainland laws do not allow parties to arbitral proceedings in other jurisdictions to apply to a people's court in the Mainland for interim measures⁸. After the signing of the Arrangement, parties to arbitral proceedings which are seated in the HKSAR and administered by designated HKSAR arbitral institutions would be able to seek assistance from the relevant people's courts in the Mainland. The implementation of the Arrangement will enhance the competitiveness of the HKSAR's international arbitration services.

⁵ Article 2(1) of the Arrangement

⁶ Article 2(2) of the Arrangement

⁷ Article 6 of the Arrangement reflects the current position whereby a party to arbitral proceedings administered by a Mainland arbitral institution may make an application for interim measures pursuant to the laws of Hong Kong.

⁸ For one exception, please see footnote 3 above.

Implementation of the Arrangement

11. The HKSAR and the Mainland will announce a date on which the Arrangement shall come into effect after completion of the relevant procedures of both places.

Department of Justice
April 2019

(Courtesy English translation)

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

In accordance with the provisions of Article 95 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, the Supreme People's Court and the Government of the Hong Kong Special Administrative Region (hereinafter referred to as "HKSAR"), after consultation, hereby make the following arrangement concerning mutual assistance in court-ordered interim measures in aid of arbitral proceedings by the courts of the Mainland and of the HKSAR:

Article 1 "Interim measure" referred to in this Arrangement includes, in the case of the Mainland, property preservation, evidence preservation and conduct preservation; and, in the case of the HKSAR, 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.

Article 2 "Arbitral proceedings in Hong Kong" referred to in this Arrangement shall be seated in the HKSAR and be administered by the following institutions or permanent offices:

- (1) arbitral institutions established in the HKSAR or having their headquarters established in the HKSAR, and with their principal place of management located in the HKSAR;
- (2) dispute resolution institutions or permanent offices set up in the HKSAR by international intergovernmental organisations of which the People's Republic of China is a member; or

- (3) dispute resolution institutions or permanent offices set up in the HKSAR by other arbitral institutions and which satisfy the criteria prescribed by the HKSAR Government (such as the number of arbitration cases and the amount in dispute, etc.).

The list of such institutions or permanent offices referred to above is to be provided by the HKSAR Government to the Supreme People's Court and be subject to confirmation by both sides.

Article 3 Before the arbitral award is made, a party to arbitral proceedings in Hong Kong may, by reference to the provisions of the *Civil Procedure Law of the People's Republic of China*, the *Arbitration Law of the People's Republic of China* and relevant judicial interpretations, make an application for interim measure to the Intermediate People's Court of the place of residence of the party against whom the application is made ("respondent") or the place where the property or evidence is situated. If the place of residence of the respondent or the place where the property or evidence is situated fall within the jurisdiction of different people's courts, the applicant shall make an application to any one of those people's courts but shall not make separate applications to two or more people's courts.

Where an application for interim measure is made after the relevant institution or permanent office has accepted the arbitration case, the party's application shall be passed on by the said institution or permanent office.

Where a party makes an application for interim measure before the relevant institution or permanent office has accepted the arbitration case, but the people's court of the Mainland has not received a letter from the said institution or permanent office certifying its acceptance of the arbitration case within 30 days after the interim measure is taken, the people's court of the Mainland shall discharge the interim measure.

Article 4 An applicant applying to a people's court of the Mainland for interim measure shall submit the following materials:

- (1) the application for interim measure;

- (2) the arbitration agreement;
- (3) documents of identity: where the applicant is a natural person, a copy of his/her identity card is to be submitted; where the applicant is a legal person or an organisation which is not a legal person, copies of its certificate of incorporation or registration and the identity card(s) of its legal representative(s) or responsible person(s) are to be submitted;
- (4) where a party makes an application for interim measure after the relevant institution or permanent office has accepted the arbitration case, the request for arbitration setting out the main claim of the arbitration and the facts and justifications on which the claim is based, together with the relevant evidential materials, as well as a letter from the relevant institution or permanent office certifying its acceptance of the relevant arbitration case;
- (5) any other materials required by the people's court of the Mainland.

Where a document of identity is issued outside the Mainland, such document of identity shall be certified in accordance with the provisions of the relevant laws of the Mainland.

Where a document submitted to a people's court of the Mainland is not in the Chinese language, the applicant shall submit an accurate Chinese translation.

Article 5 The application for interim measure shall specify the following:

- (1) particulars of the parties: where the party is a natural person, his/her name, address, particulars of identity document(s), means of contact, etc.; where the party is a legal person or an organisation which is not a legal person, its name, address as well as the name, position, address, particulars of identity

document(s), means of contact, etc. of its legal representative(s) or principal responsible person(s);

- (2) details of the application, including the amount applied to be preserved, the particulars of the conduct applied to be preserved and the time period, etc.;
- (3) the facts and justifications on which the application is based, together with the relevant evidence, including an explanation of the urgency of the circumstances so that if interim measure is not taken immediately, the legitimate rights and interests of the applicant may suffer irreparable damage or the enforcement of the arbitral award may become difficult, etc.;
- (4) clear particulars of the property and evidence to be preserved or concrete threads which may lead to a train of inquiry;
- (5) information about the property in the Mainland to be used as security or certification of financial standing;
- (6) whether any application under this Arrangement has been made in any other court, relevant institution or permanent office, and the status of such application;
- (7) any other matters as may be required to be specified.

Article 6 Before the arbitral award is made, a party to arbitral proceedings administered by a Mainland arbitral institution may, pursuant to the *Arbitration Ordinance* and the *High Court Ordinance*, apply to the High Court of the HKSAR for interim measure.

Article 7 A party applying to the court of the HKSAR for interim measure shall submit the application, an affidavit supporting the application, exhibit(s) thereto, a skeleton argument and a draft court order in accordance with the requirements of the relevant laws of the HKSAR, and shall specify the following:

- (1) particulars of the parties: where the party is a natural person, his or her name and address; where the party is a legal person or an organisation which is not a legal person, its name and address as well as the name, position, means of contact, etc. of its legal representative or principal responsible person;
- (2) details of the request and justifications for the application;
- (3) the location and status of the subject matter of the application;
- (4) the answer asserted or likely to be asserted by the party against whom the application is made;
- (5) any facts which might lead the court not to grant the interim measure being sought or not to grant such interim measure *ex parte*;
- (6) the applicant's undertaking to the court of the HKSAR;
- (7) any other matters as may be required to be specified.

Article 8 A requested court shall examine a party's application for interim measure expeditiously. A people's court of the Mainland may require the applicant to provide security, etc., while a court of the HKSAR may require the applicant to give an undertaking and provide security for costs, etc.

After examination and being satisfied that the party's application for interim measure is in accordance with the law of the requested place, the court of the requested place shall make a decision, order etc. for interim measure.

Article 9 Where a party is aggrieved by a decision, order etc. of the requested court, the matter shall be dealt with in accordance with the provisions of the relevant laws of the requested place.

Article 10 A party who makes an application for interim measure shall pay the fees in accordance with the laws and regulations on litigation fees of the requested place.

Article 11 This Arrangement does not prejudice any rights enjoyed by the arbitral institutions, arbitral tribunals or parties of the Mainland and the HKSAR under the laws of the other place.

Article 12 Any problem arising from the implementation of this Arrangement or any amendment to be made to this Arrangement shall be resolved through consultation between the Supreme People's Court and the HKSAR Government.

Article 13 Following the promulgation of a judicial interpretation by the Supreme People's Court and the completion of the relevant procedures in the HKSAR, both sides shall announce a date on which this Arrangement shall come into effect.

This Arrangement is signed in duplicate in Hong Kong on this 2nd day of April 2019.