

Insights

IMPLEMENTATION OF THE INTERIM MEASURES ARRANGEMENT BETWEEN HONG KONG AND THE PRC IN THE FIRST QUARTER – A LOOK BACK AT THOSE WHO HAVE CROSSED THE LONG-AWAITED BRIDGE ACROSS THE MOAT

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SUMMARY

The Hong Kong International Arbitration Centre, HKIAC, recently published information on its practice of processing applications under the interim measures Arrangement between Hong Kong and the PRC that came into operation on 1 October 2019 (the “*Hong Kong-Mainland arrangement concerning mutual assistance in court-ordered interim measures in aid of arbitral proceedings*”). This Arrangement provides a long-awaited bridge for parties to cross the previously almost inaccessible moat and obtain interim relief orders against the relevant PRC parties. The recent applications clearly demonstrate that the Arrangement is a valuable pathway to safeguard an applicant’s position in a PRC-related arbitration seated in Hong Kong; and help to alleviate concerns that significant time and cost would be expended before an interim measure is secured in the PRC.

Introduction

Under the groundbreaking Arrangement between the Hong Kong Government and the PRC Supreme People’s Court, parties to arbitral proceedings seated in Hong Kong and administered by a recognised arbitral institution in Hong Kong may apply to the relevant PRC court to issue court orders for interim measures, which include:

- property preservation;
- evidence preservation; and
- conduct preservation.

While this is certainly an exciting development for those who have been looking for a way to obtain orders for interim measures against PRC parties, it is also natural that one would want to hear the experience of those who have already crossed the newly constructed bridge – how has the Arrangement played out in the real world?

Application procedures with HKIAC

The HKIAC has recently published [information](#) about its practice of processing applications under the Arrangement.

Parties can seek an interim measure both before and after commencement of an arbitration. For ongoing institutional arbitral proceedings seated in Hong Kong that were commenced before 1 October 2019 (i.e. before the Arrangement came into operation), parties are allowed to apply for interim measures under Article 8 of the interpretation and the application note on the Arrangement published by the PRC Supreme People’s Court on 26 September 2019 (available in Chinese only).

Where an arbitration has commenced, a letter of acceptance issued by HKIAC is required to supplement an application to the PRC court under the Arrangement. The letter of acceptance certifies HKIAC’s acceptance of the arbitration. In order to obtain a letter of acceptance, HKIAC requires the applicant to provide:

- a request for a letter of acceptance;
- a copy of the application to the Intermediate People’s Court including any supporting materials;
- an indication as to whether any other party to the arbitration should be copied on communications in relation to the request; and
- any other documents or information required by HKIAC.

Where an arbitration has not yet commenced, parties seeking interim measures may apply directly to the relevant PRC court. If the interim measure is granted, the applicant is obliged to commence the arbitration and submit to the PRC court, within thirty days, a letter of acceptance by HKIAC. In order to obtain such a letter, the requesting party must provide the information listed above and a copy of the PRC Court’s decision.

Summary of latest applications submitted TO HKIAC

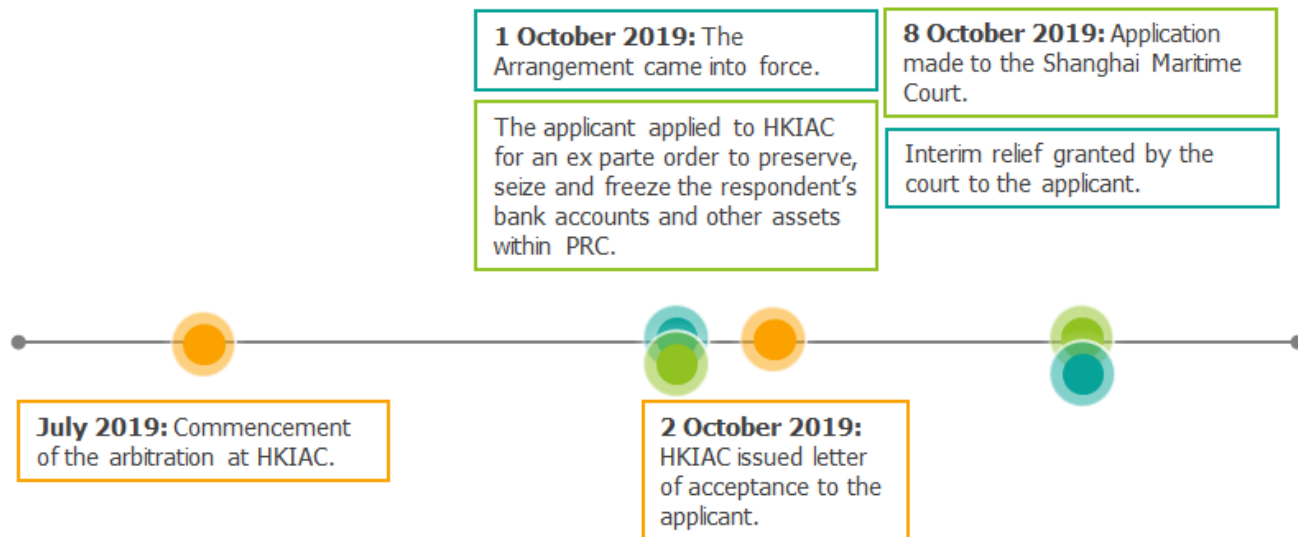
As of 16 December 2019, HKIAC had received a total of eleven applications, all made on *ex parte* basis, from parties to ongoing HKIAC arbitrations under the Arrangement. In each application, HKIAC issued a letter of acceptance to the applicant, or, in some cases, to the relevant PRC court upon the court’s request. These applications were submitted to seven different PRC courts. Ten of the eleven applications requested asset preservation orders and one requested an evidence

preservation order. The HKIAC reports that asset preservation orders totaling approximately RMB 1.7 billion (USD 243 million) have been granted in at least four of the applications.

A case study

The first application under the Arrangement was considered by the Shanghai Maritime Court (papers available in Chinese only). In that case, a Hong Kong shipping company commenced an HKIAC administered arbitration against a Shanghai-based company in July 2019. The dispute arose because the Shanghai-based respondent cancelled a voyage charter for a coal shipment from Indonesia to Shanghai. The parties later settled the dispute on the basis that the respondent would pay US\$180,000 to the applicant. However, the respondent failed to pay the agreed sum.

On 1 October 2019, as soon as the Arrangement came into force, the Hong-Kong-based applicant made an application to HKIAC for an *ex parte* order to preserve, seize and freeze (“查封、扣押、冻结”) the respondent’s bank accounts and other assets within PRC. The very next day, HKIAC issued the letter of acceptance in support of the applicant’s application that would be made at the Shanghai Maritime Court. The applicant submitted the application to the Shanghai Maritime Court through the HKIAC on 8 October 2019. The court granted the requested order to the applicant on the same day. As the timeline below shows, the applicant obtained the interim relief order against the respondent within eight days of making the application.



Timeline: The first application considered by the Shanghai Maritime Court on 8 October 2019

When the Arrangement was announced, it was welcomed with open arms by parties to institutional arbitral proceedings in Hong Kong. However, there was uncertainty around the processing times of the PRC courts and, consequently, whether the Arrangement would be a useful and effective tool in appropriate cases. As the above example shows, the timescales associated with a successful application under the Arrangement are encouraging to say the least.

BCLP Perspective

Before this Arrangement was entered into, the availability of interim measures to non-PRC seated arbitral proceedings was unclear. Further, the PRC courts have in the past shown a tendency to dismiss interim measure applications that were made by parties to non-domestic arbitrations. It is still early days, but the HKIAC's report demonstrates that the Arrangement provides a useful safeguard of an applicant's position in a PRC-related arbitration seated in Hong Kong. In such arbitrations, the efficiency of both the HKIAC, in issuing the letter of acceptance, and the PRC courts, in granting the requested interim relief, has helped to alleviate concerns that the two-stage application process might involve significant time and cost before an interim measure is secured in the PRC. It is fair to say that this newly constructed bridge across the moat has so far been proven to be convenient and robust.

Under this Arrangement, choosing Hong Kong as the seat of arbitration will provide parties with the benefits of a common law jurisdiction and a heightened chance of successful enforcement against PRC parties. It is therefore expected that commercial parties involved in PRC-related transactions will be even more willing to choose Hong Kong as the seat of arbitration. This will serve to enhance further Hong Kong's position as the primary arbitration centre in the Asia-Pacific region.

This article was co-written with Trainee Solicitor Vivica Fu.

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MEET THE TEAM



Glenn Haley

Co-Author, Hong Kong SAR

glenn.haley@bclplaw.com

[+852 3143 8450](tel:+85231438450)

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