Legal Commentary

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Practice Guide: Applying to Mainland Courts for Interim Measures during Hong Kong Arbitral Proceedings

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In 2019, one of the most important events in the field of China-related international commercial arbitration was the signing on April 2 and entry into force on October 1 of the *Arrangement of the Supreme People's Court of the People's Republic of China 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**"). Supplementary to the Arrangement, the Research Office of the Supreme People's Court promulgated the *Understanding and Application of the Arrangement of the Supreme People's Court 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 "**Understanding and Application**").

For your reference, we have summarized based upon our practice experience the key issues regarding applying to Beijing courts for interim measures by parties to Hong Kong arbitral proceedings under the Arrangement.

Which intermediate people's court should receive the application for interim measures submitted during a Hong Kong arbitral proceeding?

According to Article 3 of the Arrangement, applications for interim measures should be submitted to a single Mainland court having jurisdiction. Specifically, a party to a Hong Kong arbitral proceeding should submit the application to the "**Intermediate People's Court of the place of residence of the party against whom the application is made or the place where the property or evidence is situated**… If the place of residence of the [party] 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**" (emphasis added).

The above provisions are relatively straightforward. However, in practice, uncertainty remains whether the provisions on centralized jurisdiction applicable in Beijing municipality also apply to applications for interim measures made in overseas arbitral proceedings.

According to the *Provisions of the Beijing High People's Court on the Jurisdiction of Cases of the Fourth Intermediate People's Court of Beijing* (the "**Provisions**") promulgated in 2018 by the Beijing High People's Court, foreign-related arbitration judicial review cases in Beijing are subject to the centralized jurisdiction of the Beijing Fourth Intermediate People's Court. See Article 1, items 2, 3, and 4 of the Provisions:

"The Beijing Fourth Intermediate People's Court (Beijing Railway Transport Intermediate Court) has jurisdiction over the following cases: ... (2) commercial cases of the first instance where the subject matter under the jurisdiction of this municipal people's court is no more than 200 million RMB which are foreign-related or involve the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region; (3) cases under the jurisdiction of this municipal people's court which apply to confirm the validity of arbitration agreements, or to revoke arbitral awards (excluding cases applying for revocation of labor dispute-related arbitral awards); (4) review cases under the jurisdiction of this municipal people's court for applications to recognize and enforce foreign arbitral awards, or to recognize and enforce arbitral awards made by arbitral institutions in the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region; review cases under the jurisdiction of this municipal people's court for applications to recognize and enforce judgments made by foreign courts, courts of the Hong Kong Special Administrative Region, the Macao Special Administrative Region, and the Taiwan Region; ..."

According to our consultations with the Beijing Fourth Intermediate Court, the court's centralized jurisdiction in connection with foreign-related arbitration is limited to case types as described above, including cases applications to revoke arbitral awards, applications to recognize and enforce arbitral awards made by foreign arbitral institutions, and applications to recognize and enforce arbitral awards made by arbitral institutions in Hong Kong, Macao, and Taiwan. Applications for interim measures made in overseas arbitral proceedings do not fall into the scope of centralized jurisdiction of the Beijing Fourth Intermediate Court, but are governed by the competent court designated according to the methods stipulated in the Arrangement.

Are applications for interim measures to be submitted directly to a Mainland court or forwarded by the overseas arbitral institution?

According to Article 3, paragraphs 2 and 3 of the Arrangement, applications for interim measures are divided into two types.

Type one – the application is made to the Mainland court before the arbitral proceeding commences in Hong Kong. In this case, the application may be submitted directly to the Mainland court, provided that a letter certifying acceptance of the case by the Hong Kong arbitral institution is submitted to the court within 30 days.

Type two – the application is made to the Mainland court during an ongoing arbitral proceeding in Hong Kong. In this case, the party should first submit the application for interim measures to the arbitral institution or its permanent office, which will in turn forward the application to the Mainland court.

However, the Understanding and Application points out that the forwarding of an application through the arbitral institution or its permanent office will prolong the application process, considering the relevant

arbitral institution or its permanent office is located in Hong Kong. Therefore, it would appear strict application of Article 3, paragraph 2 of the Arrangement prevents the full effectiveness of interim measures. Thus, the Understanding and Application further stipulates that "the parties to an arbitral proceeding in Hong Kong shall be permitted to submit an application for interim measures together with a transmittal letter from the arbitral institution or its office to the people's court of the Mainland; the people's court of the Mainland may confirm the circumstances by contacting the relevant arbitral institution or its office according to the contact information provided by the Department of Justice of the Hong Kong Special Administrative Region."

Based on our practical experience, Beijing courts recognize the methods described above in the Understanding and Application. That is, applications for interim measures can be filed directly with the Beijing courts without first submitting them to the arbitral institution or its permanent office in Hong Kong for forwarding, even if arbitral proceedings have been initiated in Hong Kong.

What serves as proof that the Hong Kong arbitral institution has accepted an arbitration case once the case is instituted and underway?

Based upon our practical experience, the arbitral institution needs to issue a separate certification letter to certify acceptance of the case. Requirements will differ among arbitral institutions in terms of information required to be submitted, how long it will take the arbitral institution to issue the letter, and the specific contents of the letter issued by the arbitral institution. In practice, parties should directly confirm with the arbitral institution when handling the application.

The arbitral institution will issue a letter certifying formal acceptance of the case after it receives a notice of arbitration and the registration fee. The certification letter can be submitted to the Mainland court as supporting evidence together with the application to prove that the arbitral institution has accepted the case.

According to our experience, the above-mentioned certification letter and supporting materials need not be notarized and authenticated. However, it is necessary to obtain overseas notarization and authentication where a Mainland lawyer submits the application to the Mainland court on behalf of a party. In addition, the certification letter issued by the arbitral institution must be written in Chinese.

What support will arbitral institutions provide to facilitate applications?

According to information disclosed in the Understanding and Application, as confirmed by the Supreme People's Court and the Government of Hong Kong Special Administrative Region, the following Hong Kong arbitral institutions may apply for interim measures with Mainland courts under the Arrangement: the Hong Kong International Arbitration Centre ("**HKIAC**"), the China International Economic and Trade Arbitration Commission, Hong Kong Arbitration Center, International Court of Arbitration of the International Chamber of Commerce – Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Center (HK), and eBRAM International Online Dispute Resolution Centre.

Based upon our practical experience, arbitral institutions all proactively assist parties to apply for interim measures, including assisting in the issuance of letters certifying acceptance of the case, and maintaining

confidentiality of the applicant's application. For example, we have been deeply impressed by HKIAC for its responsiveness in cases where we have applied for interim measures with Mainland courts.

Once the Mainland court has accepted the application for interim measures, are there any procedural differences with ordinary interim measures?

After the Beijing courts have accepted an application for interim measures, the basic procedures for handling the interim measures are the same as those for Mainland courts in litigation and arbitration. These include requiring the relevant parties to provide a guarantee (the most commonly used method is to provide a property security guarantee letter issued by a qualified insurance company) and requiring information about the property to be preserved, etc.

Based upon our practical experience, one slight difference is that, according to Article 5, paragraph 3 of the Arrangement, the court may require the relevant parties to submit "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." We do not ordinarily encounter this requirement when applying for interim measures in Mainland litigation and arbitral proceedings.

The court's practices and requirements may change as more experience is accumulated with the implementation of the Arrangement. Our analysis above is merely intended to serve as a reference and we will continue monitor issues that may arise during implementation of the Arrangement.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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