

Interim Relief In Support Of Hong Kong-Seated Arbitrations Now Available In Mainland Chinese Courts

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On 2 April 2019, the Hong Kong government and the Supreme People's Court of the People's Republic of China 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 Hong Kong Special Administrative Region (the "Arrangement"). This is a significant development which makes Hong Kong more attractive as a seat for China-related international arbitrations. The Arrangement will enable parties to certain

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Hong Kong arbitral proceedings to apply to Mainland Chinese courts for interim measures in support of their arbitral claims. Historically, this has been fraught with difficulties. This development thus allows parties to arbitrate outside of Mainland China while retaining the option of seeking interim relief in Mainland China.

Which Hong Kong arbitral proceedings? The Arrangement applies to "institutional arbitrations" seated in Hong Kong. While the list of covered institutions is subject to confirmation by both sides to the Arrangement, it is likely to include the Hong Kong International Arbitration Centre ("HKIAC"), the China International Economic and Trade Commission ("CIETAC") and the International Chamber of Commerce ("ICC"). However, ad hoc arbitrations or arbitrations administered by institutions not on the confirmed list will not be covered, even if they are seated in Hong Kong.

Which interim measures? Interim measures are intended to preserve evidence or assets pending a final decision on the merits of a dispute. These are important tools in the conduct of international dispute resolution. Chinese law has historically been silent on the power of courts to grant interim measures in support of arbitrations seated outside of Mainland China. In the absence of an express legal basis, Mainland Chinese courts have, with rare exceptions, been reluctant to grant interim relief in support of foreign-seated arbitrations.

Under the Arrangement, Mainland Chinese courts may be able to grant three types of interim measures in aid of arbitration: preservation of property, preservation of evidence, and preservation of conduct (preservation of conduct orders compel or prohibit parties from performing certain actions and are a new form of relief, mostly limited to

intellectual property cases)¹. These interim measures may cover a wide range of court orders, such as freezing of bank accounts, seizure of assets and evidence, and a variety of injunctions, depending on the nature of the applicant's requests and the court's discretion. Orders on preservation of property and evidence are granted by Mainland Chinese courts in a wide variety of cases.

Interim measures not falling within these three categories are not covered by the Arrangement in the case of the Mainland and will likely not be granted by Mainland Chinese courts in support of Hong Kong arbitrations. In contrast to the common law system in Hong Kong, an applicant will generally need to show only that it faces a substantial threat of irreparable damage if the interim measure is not granted, rather than the likelihood of success on the merits and other prerequisites.

Interim relief in support of arbitration is available only when an eligible arbitration has been commenced or will shortly be commenced, and before the arbitral award has been made. The interim relief will be discharged if the Mainland Chinese court does not receive a letter from the administering institution certifying its acceptance of the arbitration case within 30 days of the interim relief order.

What is the significance of the Arrangement? The Arrangement extends the reciprocity between Mainland China and Hong Kong in the arbitration landscape and furthers the trend of mutual recognition between the two systems in commercial disputes. For example, in January 2019, the channels of mutual enforcement of arbitration awards and court judgments were greatly widened following the adoption of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region. This agreement significantly expanded, beyond monetary judgments, the types of judgments which the courts of each jurisdiction could enforce from the other jurisdiction's courts. The mutual availability of interim measures deepens the enforceability channels available in disputes with a connection to both the Mainland and Hong Kong.

When will the Arrangement come into force? The Arrangement has not yet come into force. Both sides to the Arrangement will announce a date on which the Arrangement will take effect, after the Supreme People's Court has promulgated a judicial interpretation and the Hong Kong government has completed the relevant procedures on its side. The signing ceremony has taken place so there is an expectation that a date for the coming into effect of the Arrangement will be announced in the near future.

¹ 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, Article.1.

In the meantime, parties entering into arbitration agreements should take this development into account when contemplating Hong Kong as a seat of arbitration. This consideration is particularly relevant for parties that are likely to need interim measures against Chinese assets, or who may wish to avoid such measures being granted against their own Chinese assets.

Similarly, parties to existing contracts providing for arbitration in Hong Kong should take note of the availability of interim measures from Mainland Chinese courts if a dispute arises.

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Please do not hesitate to contact us with any questions.

HONG KONG



Tony Dymond
tdymond@debevoise.com



Gareth Hughes
ghughes@debevoise.com



Mark Johnson
mdjohnson@debevoise.com



Z.J. Jennifer Lim
jlim@debevoise.com



Cameron Sim
csim@debevoise.com

LONDON



Lord Goldsmith QC
phgoldsmith@debevoise.com

NEW YORK



Christopher K. Tahbaz
cktahbaz@debevoise.com

SHANGHAI



Philip Rohlik
prohlik@debevoise.com