Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering comparative analysis from top-ranked lawyers

International Arbitration

China: Trends & Developments

Yifeng Gao, Jingye Jiang and Jack Law
Global Law Office

chambers.com

2020

Trends and Developments

Contributed by:
Yifeng Gao, Jingye Jiang and Jack Law
***Global Law Office** see p.6*

Interim Measures in Mainland China in Aid of Hong Kong Arbitrations

Background

Many foreign companies choose Hong Kong arbitration to resolve disputes with their Chinese counterparts. However, interim measures ordered by Hong Kong Courts or arbitration tribunals are not enforceable in Mainland China. Subsequently, enforcement of an award could be a tough issue when the winning party finds that its opponent has transferred its assets in the Mainland to associated companies.

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland & of the Hong Kong Special Administrative Region ("the Arrangement") came into force on 1 October 2019. The Arrangement gives parties to a Hong Kong-seated arbitration rights to seek interim measures (including but not limited to property preservation) before Mainland courts.

Through property preservation, Mainland courts may order to seal up (eg, real properties), seize (eg, facilities and equipment), or freeze (eg, bank accounts); such that an arbitral award could be effectively enforced in mainland China. The property preservation can diminish the risk of dissipation of assets and place more pressure on the opponent in achieving settlements.

Different types and functions of interim measures ordered by Mainland courts

Interim measures ordered by the Mainland courts include property preservation, evidence preservation, and conduct preservation. The most significant and common measure among the three is property preservation.

Property preservation usually is ordered by a Mainland court upon a party's application when the judgment would be rendered unenforceable or other damages would be caused by the conduct or other reasons of the other party. Property Preservation is similar to a Mareva injunction in common law jurisdictions.

Pre-requisites for an application for interim measures before Mainland courts

To apply for property preservation, a Hong Kong Arbitration must be seated in Hong Kong (by parties' agreement or otherwise decided by the arbitral tribunal in accordance with relevant arbitration rules); and administered by an arbitral institution or its permanent offices, which includes Hong Kong International Arbitration Centre, 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.

It is noteworthy that ad hoc arbitrations and investment arbitrations are excluded for the purpose of the Arrangement.

Materials for an application to Mainland courts for interim measures

General requirements

Pursuant to the Arrangement and relevant PRC laws, a party applying for interim measures shall submit the following to a Mainland court:

- the application for interim measure;
- the arbitration agreement;
- documents of identity;
- letter from relevant institution or permanent office certifying its acceptance of the case;
- particulars of assets; and
- guarantee.

In practice, the most important materials are the application, the particulars of assets, and the guarantee.

An Application for Property Preservation

In Hong Kong, an applicant for a Mareva injunction must first prove a good arguable case and real risk of dissipation. The court then may consider the balance of convenience before granting an injunction.

In comparison, the threshold is much lower in applying for property preservation before Mainland courts. There is no need to satisfy the requirements of a Mareva injunction. In practice, the Mainland courts would not consider the possibility of the applicant's chances of winning in the case nor would it investigate into whether the other party is dissipating assets. As a result, the chance of Mainland courts granting a property preservation is considerably high.

Particulars of assets
Contrary to the common law system, there is no order for disclosure per se under PRC laws. The applicant for property preservation must provide clear evidence of the other parties' assets. Mainland Courts would only preserve the assets identified by the applicant.

Identifying the assets for preservation is usually the toughest practical barrier for an applicant.

In practice, a party normally would engage lawyers to carry out an investigation, and conduct company search or other types of due diligence in order to obtain particulars of assets.

Guarantee provided by the applicant
Unlike requirement for a Mareva injunction in Hong Kong, an applicant's undertaking of compensating the other opposing party's losses is not sufficient before a Mainland court. In practice, the applicant for property preservation are usually required to provide guarantees in the following ways:

- assets security by the applicant or a third party;
- third party guarantee;
- letters of guarantee issued by financial institutions; or
- letter of indemnification provided by insurance companies.

Applicants usually follow PRC lawyer's advice and submit a letter of guarantee or indemnification by a financial institution or an insurance company so that the financial burden placed upon the applicant itself could be relieved.

Application procedures
When to apply
Article 3 of the Arrangement requires an application be submitted "before the arbitral award is made," which means that a party may file an application to Mainland courts before the commencement of an arbitration or during the arbitration proceedings. However, no application can be made once an arbitral award is issued.

Currently, these is no provision allowing a party to apply for preservation measures after an arbitral award is rendered. Therefore, it is advisable for parties to a Hong Kong-seated arbitration to apply for preservation measures before an arbitral award is issued. In addition, because the recognition and enforcement of a Hong Kong award can be time-consuming in the Mainland, while the losing party might have opportunities to transfer assets which can further obstruct the actual enforcement, applying for and utilising the interim measures, thus, can offer significant advantages to the winning party in the subsequent enforcement.

How to apply
If an application is made prior to the commencement of an arbitration, it should be submitted to the relevant Mainland courts directly. Upon the interim measure being taken, it is required the letter of acceptance be submitted to the court within 30 days by the arbitral institution.

If an application is made during the arbitral proceedings, the applicant should submit it to the arbitral institution, and the latter will pass on the application together with a letter of acceptance to relevant Mainland courts. In practice, the Mainland courts would accept that the party submits the application, together with the letter issued by the arbitral institution, directly to the court.

In practice, it is advantageous for a party to instruct lawyers to file the application directly to the Mainland courts so as to save time for transmission and to reduce the risk of assets dissipation.

Jurisdiction
Article 3 of the Arrangement provides that 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 has jurisdiction in granting interim measures.

An applicant is free to choose to apply to the court of the place of residence or the court where the property is situated. But the application can be made only to one court. In practice, an applicant usually seeks assistance from experienced lawyers in choosing a proper court to prevent local protectionism and smooth the procedure.

Hearing, time and costs
In an application for a Mareva injunction in Hong Kong, the court will conduct an oral hearing, and the opposing party has a chance to object. In a case of emergency, the court will have an ex parte hearing to scrutinise the case of the applicant. On the contrary, Mainland courts in general do not hold hearings to consider applications for property preservation.

Instead, they only review written applications submitted by applicants. Hence, it is more likely that Mainland courts would grant applications for property preservation.

For applications submitted before the commencement of arbitration, Mainland courts are required to make their decisions within 48 hours upon receiving applications. For applications submitted during arbitral proceedings, the time period is five days upon receiving applications. In cases where guarantees are required, courts must decide within five days after guarantees

are provided. The preservation measures shall be taken within five days upon courts granting orders.

Costs of the court in granting interim measures are relatively low, which are charged based on the amount of assets involved. In any case, the cost shall not be more than RMB5,000.

Conclusion

Overall, with the Arrangement coming into force, parties to a Hong Kong-seated arbitration now are able to apply for property preservation in the Mainland, which highlights prominently the advantages of Hong Kong-seated arbitrations. It is advantageous for parties to make use of such more likely granted and costs effective property preservation measure in the Mainland courts.

Since the legal regimes in the Mainland are noticeably different from those in Hong Kong, especially regarding assets disclosure and guarantee requirements, parties to Hong Kong-seated arbitrations and their lawyers should make themselves familiar with the Arrangements and seek necessary assistance from Mainland lawyers in order to obtain fully the protections and benefits offered by the Arrangement.

A Hong Kong-seated Arbitral Award Probably Should be Recognised Before it is Enforced

Background

Article 283 of the Civil Procedural Law of PRC provides that foreign arbitral award should be applied for recognition prior to the enforcement procedure. Whether a Hong Kong-seated arbitration awards should be recognised first, however, is not so clear. The bilateral arrangement between Mainland China and Hong Kong only provides that the applicant may make an enforcement application of the Hong Kong-seated arbitral award to the relevant court.

Views of Mainland courts

Different Mainland courts adopted different views towards this issue.

In 2017, an application for enforcing a Hong-Kong seated arbitral award in Shenzhen Intermediate People's Court was denied because the applicant did not apply for recognition first. However, in 2019, the application, filed by the same applicant, for enforcing the same award, was granted by Wuhan Intermediate People's Court, even though the respondent raised a defence on the ground that the award had not yet been recognised.

Recent decisions from Supreme People's Court (SPC) tend to require the recognition process before enforcing Hong Kong-seated arbitral award. In a case (case number: (2013) Zhi Jian Zi No 202) ruled by SPC, SPC stated the internal review for recognition of a Hong Kong seated arbitral award was indispensable, even though the applicant only applied for enforcement. In a Reply Letter (number: (2016) Zui Gao Fa Min Ta No 63) sent by SPC to Beijing Higher People's Court, SPC also reiterated that the necessity of reviewing whether a Hong Kong-seated arbitral award has been recognised or not before the enforcement stage.

In 2017, SPC issued a judicial interpretation named Provisions of the SPC on Several Issues relating to the Hearing of Cases Involving Judicial Review of Arbitration, and an internal notice called Notice of the SPC on Issues Concerning the Centralized Handling of Cases of Arbitration-related Judicial Review, both of which listed the recognition equally to enforcement of Hong Kong-seated arbitral award.

Foreign Arbitration Institutions are Allowed to Establish Offices and Conduct Arbitrations in the Lin-Gang Special Area of Shanghai

Background

On 27 July 2019, PRC State Counsel issued the Framework Plan for the Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone, which specifically allows foreign arbitration institutions to conduct arbitration business in the Lin-Gang Special Area. On 12 October 2019, the Shanghai Municipal Government issued the Administrative Measures for Foreign Arbitration Institutions to Establish Business Offices in Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone ("Administrative Measures"), which refines the qualifications and the scopes of business as required for foreign arbitration institutions to manage arbitration cases in the Lin-Gang Special Area.

Current business offices and the scope of business

Specifically, foreign arbitration institutions may register and establish business offices in the Lin-Gang Special Area to conduct foreign-related arbitration business in respect of civil and commercial disputes arising in the fields of international commerce, maritime affairs and investment, including acceptance, trial, hearing, awarding of cases, case management and services, consultancy, guidance, training and seminars.

After the issuance of the Administrative Measures, four world-renowned international arbitration institutions have set up their business offices in the Lin-Gang Special Area, including the International Chamber of Commerce International Court of Arbitration, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre and the Korean Commercial Arbitration Board.

Conclusion

Allowing foreign arbitration institutions to set up business offices in Mainland China means that the parties have more choices of diversified and specialized international commercial

arbitration services within the border of China. The improvement in the level of arbitration services would probably attract more domestic and foreign parties to choose Shanghai as the seat of arbitration, particularly in the context of the Belt and Road Initiative.

Allowing foreign arbitration institutions to set up business offices in Mainland China also signals that China is still committed to opening-up, which is conducive to optimising the business environment and attracting foreign investment.

Virtual Arbitration Services to Cope with the COVID-19 Outbreak

Background

The outbreak of COVID-19 has caused disruptions over the daily life and work exacerbated as travel and quarantine restrictions and other prevention measures adopted globally. Domestic and international arbitration in China is not immune to the influence of COVID-19 pandemic, and the demands for online or virtual arbitration services are visibly increasing.

The practice adopted by different arbitration institutions in China

HKIAC

Hong Kong International Arbitration Center (HKIAC) is the linchpin in promoting virtual hearing services among varied arbitration institutions in China. According to several official statistics published on the HKIAC website, the percentage for virtual hearing services that parties adopted fully or partly accounted for 85% in April and May 2020. Specifically, there are six technical tools which can be chosen by parties to smoothly facilitate the arbitration process instead of simply postponing them, including video conferencing, audio conferencing, electronic bundle services, electronic presentation of evidence, transcription services and interpretation services.

To ensure parties' rights of participation in arbitration hearings, HKIAC allows parties to incorporate virtual services partially or fully. For example, the parties can be physically present before the Tribunal, and witnesses and interpreters may participate remotely through cloud-based platforms (ie, Zoom, WebEx) which offers more flexibility. All of these methods can robustly advance the arbitration proceedings by technical supplemental.

CIETAC and SCIA

The arbitration institutions in Mainland China are also proactive to embrace the trend of virtual arbitration services. Compared to international arbitration, Chinese domestic arbitration usually adopts a relatively traditional way in case management. For example, documents and evidence materials in relation to the arbitration are generally delivered in person or by courier, instead of communicating by e-mail. But facing severe pandemic impacts, Chinese domestic arbitration institutions quickly adopted virtual arbitration services to facilitate case management.

Shenzhen Court of International Arbitration (SCIA) upgraded its three online service platforms, including online case fling platform, online hearing platform and online exchange and examination of evidence platform, for parties to take advantage. To encourage parties to choose online platforms, SCIA issued a decision on reduction of arbitration fees in February 2020.

For mitigating the influence of epidemic, China International Economic and Trade Arbitration Commission (CIETAC) also released the Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic on 28 April 2020, which was effective as of 1 May 2020. With respect to filling cases, it promotes several non-contact measures for submitting arbitration applications, documents and evidence, and conducting oral hearing via CIETAC oral hearing platform. Besides, arbitral tribunals are advised to ask for the parties' permissions for hearing cases on a documents-only basis, which could accelerate the proceedings and the issuance of the arbitral awards.

There is no doubt that the virtual arbitration measures can help parties to resolve disputes in the difficult environment of COVID-19. As domestic arbitration institutions and parties are getting used to online platform and technology, they may soon embrace a more technology-based and modern way of case management system in arbitration proceedings.

Contributed by: Yifeng Gao, Jingye Jiang and Jack Law, ***Global Law Office***

Global Law Office was one of the first law firms in China to take its perspective international, embracing the outside world. More than 500 lawyers' practise from offices in Beijing, Shanghai, Shenzhen and Chengdu. The firm's arbitration legal team has long been engaged in legal consulting and dispute resolution in the fields of international trade, international investment and international finance, including dispute resolution methods such as negotiation, mediation, expert review, arbitration and litigation. The areas involved are international cargo trading, maritime business laws in the fields of maritime affairs, foreign investment in China, Sino-foreign joint ventures, international syndicated loans, project financing, construction engineering contracts, insurance, logistics, international technology transfer, patent and know-how licensing, trade mark licensing, processing and distribution agreements, etc.

Authors

Yifeng Gao is a partner of Global Law Office based in Beijing. Yifeng's practice areas include international trade, commercial contracts, shipping, transportation and logistics, insurance, real estate, FDI and corporate, litigation and arbitration, etc. He has handled and supervised over 15,000 arbitration and litigation cases. Clients include major international commercial groups, shipping companies, trading companies, insurance companies, P&I Clubs, product manufacturers and investment entities, etc. Yifeng is regularly recognised by legal publications for his expertise.

Jingye Jiang is a partner of Global Law Office based in Beijing. Jingye is well experienced in dispute resolution, with a particular focus on arbitration and litigation. He has handled more than 500 cases regarding, among others, bills of lading, charterparties, marine oil pollution, salvage, shipbuilding and ship purchase, insurance claims, international trade, contracts disputes, corporate disputes, financial claims, real estates and construction. He has appeared before arbitration tribunals in the major arbitration institutes and in front of courts at every level. Jingye also served as the presiding arbitrator, co-arbitrator and sole arbitrator in hundreds of arbitration cases at CIETAC, CMAC and BAC, etc.

Jack Law is a partner of Global Law Office and specialises in international dispute resolution. He worked in the Chinese judiciary and a US court for several years and is admitted to practice in China and New York. As an experienced arbitration and litigation attorney, Jack has acted in many complex and high-profile litigations and arbitrations in China. The subject matter of the disputes relates to international trade, foreign investments and shareholders' disputes, etc. Jack helps clients to obtain interim measures and enforce international arbitration awards before PRC courts. Jack also appears in foreign proceedings as a PRC law expert.

Global Law Office

15&20/F Tower 1
China Central Place
No.81 Jianguo Road
Chaoyang District
Beijing 100025
China

Tel: +86 10 6584 6688
Fax: +86 10 6584 6666
Email: global@glo.com.cn
Web: www.glo.com.cn