

Mainland-Hong Kong Interim Measures Arrangement Now in Effect

October 2019

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* (the **Arrangement**), which was signed on 2 April 2019, came into effect in Mainland China and HKSAR on 1 October 2019. The Supreme People's Court of the People's Republic of China (the **SPC**) published a guidance note recently, providing clarification on the interpretation and application of the Arrangement (the **Clarification**).

As mentioned in an earlier A&O bulletin, under the Arrangement, for the first time, a party to “arbitral proceedings in Hong Kong” may apply for interim measures at the relevant Mainland courts in accordance with the relevant PRC laws and regulations, an option which was previously only available for arbitrations seated in Mainland China. The Arrangement applies to ongoing arbitral proceedings commenced before 1 October 2019 as well as those commenced after 1 October 2019.

This bulletin explains some practical points in relation to the seeking of interim measures from the Mainland courts under the Arrangement.

1. What does “arbitral proceedings in Hong Kong” include?

A party to “arbitral proceedings in Hong Kong” may apply for interim measures from the Mainland courts under the Arrangement. According to Article 2 of the Arrangement, “arbitral proceedings in Hong Kong” refers to proceedings which satisfy the following conditions:

- the arbitration is seated in Hong Kong; and
- the arbitration is administered by a qualified institution or permanent office. As of the date of this bulletin, the HKSAR Government and the SPC have confirmed that the following are qualified: (i) Hong Kong International Arbitration Centre; (ii) China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center; (iii) International Court of Arbitration of the International Chamber of Commerce - Asia Office; (iv) Hong Kong Maritime Arbitration Group; (v) South China International Arbitration Center (HK); and (vi) eBRAM International Online Dispute Resolution Centre.

However, the Clarification explains that “arbitral proceedings in Hong Kong” does not include investment arbitrations between an investor and a State.

2. What types of interim measures can parties obtain from a mainland court?

The “interim measure” referred to in the Arrangement includes, in the case of the Mainland: (i) property preservation; (ii) evidence preservation; and (iii) conduct preservation.

“Conduct preservation”, the PRC equivalent of “interim injunction” or “specific performance”, was not introduced into PRC Civil Procedure Law (the **CPL**) until its amendment in 2012. According to Article 100 of the CPL, a court may “order a party to undertake certain acts or prohibit a party from undertaking certain acts”.

Despite the reference to conduct preservation in Article 100 of the CPL, there was still some debate as to whether conduct preservation is available in Mainland arbitral proceedings since PRC Arbitration Law only refers to property preservation and evidence preservation without mentioning the availability of conduct preservation, and Article 100 of the CPL does not contain any express reference to arbitral proceedings. As the concept of conduct preservation is relatively new to the Mainland judges and due to the lack of implementation guidelines, the level of acceptance by Mainland judges of conduct preservations in aid of arbitral proceedings has been fairly low in practice in Mainland China, particularly in less developed areas. The Arrangement and the Clarification have now clarified that the parties to an arbitral proceeding in Hong Kong may apply for conduct preservation from the Mainland courts. This is considered a breakthrough by the market as it is a clear endorsement by the SPC of the applicability of conduct preservation in an arbitration context. However, it remains to be seen how a conduct preservation order will be implemented.

3. When and to whom can the application be made?

A party to arbitral proceedings in Hong Kong may make an application for preservation measures any time before the arbitral award is made. According to the Clarification, a party cannot rely on the Arrangement in seeking any preservation measures *after* an award is made for the purpose of protecting enforcement.

If the application is made *after* the arbitral institution has accepted the case, the application should be made to the arbitral institution for transmission to the relevant Mainland court. The Clarification also notes that, in light of the urgent nature of the request for preservation measures, a party should also be allowed to submit its application to the Mainland court directly, together with a letter from the institution directing its transmission (which the court will separately verify with the institution).

If the application is made *before* an arbitral institution has accepted the case, the application should be made directly to the relevant Mainland court, although the arbitral institution will need to subsequently issue a letter certifying its acceptance of the case. If the relevant court does not receive the letter within 30 days of the granting of the preservation order, the court will discharge such order.

4. Which mainland court has jurisdiction? 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 is the relevant Mainland court with jurisdiction.

Article 3 of the Arrangement sets out a “One Court Restriction”, that is, if the place of residence of the respondent and the place where the property or evidence is situated fall within the jurisdiction of different Mainland courts, the applicant may only make an application to **one** of those courts. The Clarification notes that if a court is faced with an application for preservation measures against property or evidence outside its own jurisdiction, it may nevertheless ask for assistance from the court of the place of the relevant property or evidence if necessary. However, as the above guidance does not, for example, confer the relevant court a legal right to request for cooperation from the other courts or set out a timeline for such cooperation, it remains to be seen how such guidance would be followed in practice. Careful consideration therefore should be given in selecting which Mainland court to apply to for interim measures.

5. What test would the mainland court apply in assessing the application?

Under Article 100 of the CPL, preservation measures may be granted if the applicant can show that the judgment/award would otherwise be very difficult to enforce, or the applicant’s rights and interests would suffer other forms of harm. Under Article 101 of the CPL, a party may apply for preservation measures *before* applying for arbitration where, without the relevant preservation measures, its legitimate rights and interests would be subject to irreparable harm.

Under Article 81 of the CPL, a party may apply for evidence preservation during the course of an arbitration or before applying for arbitration if the evidence may be lost or difficult to obtain in the future.

The Clarification also states that in order to allow the court to assess whether it is necessary to grant the preservation measures, an application for preservation measures should include, among other things, the facts, reasons and evidential basis of its application, including an explanation as to the urgency of the situation (for example, explanation as to how the party’s legitimate interests will suffer irreparable harm, or how the enforcement of award will become very difficult unless the preservation measures are granted immediately). Where the application is made before a party has applied for arbitration, provision of security by the applicant is mandatory.

6. How long would the process take?

In more urgent circumstances, a ruling on an application for preservation measures could be made within 48 hours and enforced immediately. Under usual circumstances, a court should rule on an application for preservation measures within five days of the acceptance of the application, or if it is ruled that security is required, within five days from the provision of the security. If the court grants the application, the enforcement should commence within five days of the ruling.

7. How can a party contest a decision on preservation measures?

The assessment of the applications for preservation orders may be conducted on an ex parte basis in Mainland, but if the respondent disagrees with the order granting the preservation measures, it may apply for reconsideration within five days but the enforcement of the ruling would not be suspended during the reconsideration period. “Reconsideration” is a judicial process whereby the ruling court would re-consider its own decision. In practice, the courts rarely revoke their own preservation ruling unless a third party’s proprietary interest is affected.

For more details on the content of the Arrangement, please refer to A&O’s bulletin on the topic available at

<http://www.allenoverly.com/publications/en-gb/Pages/Groundbreaking-Arrangement-Allowing-Interim-Measures-in-Mainland-China-for-Hong-Kong-Arbitrations.aspx>

Key contacts



Matthew Gearing QC
Partner
Tel +852 2974 7177
matthew.gearing@allenovery.com



Matthew Hodgson
Partner
Tel +852 2974 7135
matthew.hodgson@allenovery.com



Jane Jiang
Partner
Tel +86 21 2036 7018
jane.jiang@allenovery.com



Joanne Lau
Senior Associate
Tel +852 2974 7159
joanne.lau@allenovery.com

Allen & Overy as a firm is not qualified to advise on PRC law. Any discussion of PRC law in this bulletin is based on our reading of the relevant legislation and/or discussions with PRC lawyers and does not constitute formal legal advice.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462670. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales. The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

© Allen & Overy LLP 2021. This document is for general guidance only and does not constitute advice.