

Implementation of the Interim Measure Arrangement between Hong Kong and Mainland China

Background

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 "Interim Measure Arrangement") was signed on 2 April 2019 and came into effect on 1 October 2019.

In the era before the Interim Measure Arrangement, except for maritime disputes, a Mainland court would not provide any assistance or grant any interim measures to parties to an arbitral proceeding in Hong Kong. As a result, parties to arbitral proceedings in Hong Kong were unable to apply for interim measures in Mainland China. There were risks that respondents would attempt to evade claims by a transfer of their Mainland assets before the commencement of arbitral proceedings in Hong Kong. The Interim Measure Arrangement rectified the loophole by enabling parties to recognised institutional arbitrations in Hong Kong to apply for interim relief in Mainland China.

One year has elapsed since the Interim Measure Arrangement came into effect and it is an appropriate time to review the implementation of the Interim Measure Arrangement. This article will (1) examine the recent statistics and successful cases, (2) explore how readily, in practice, a Mainland court would grant the preservation order, (3) discuss the latest developments amid the COVID-19 pandemic and (4) suggest some practical tips on applications for interim measures in Mainland courts during the COVID-19 pandemic.

Review of the implementation of the Interim Measure Arrangement

As of 27 August 2020, the HKIAC processed 25 applications made to different Mainland courts under the Interim Measure Arrangement. These applications concerned a preservation of assets or evidence that were worth a total of RMB 9.4 billion in Mainland China and the Mainland courts issued orders in respect of RMB 8.7 billion worth of assets. Among these applications, approximately 30% of them were made by parties from Mainland China and 70% by parties from Hong Kong, Switzerland, Samoa, Singapore and the British Virgin Islands. HKIAC is aware of 17 decisions issued by the Mainland Courts, all of which granted the applications for preservation of assets. The remaining applications are still awaiting decisions of the relevant courts and there are no cases of refusal.

On 8 October 2019, the Shanghai Maritime Court issued the first order granted under the Interim Measure Arrangement. In that case, a Hong Kong company commenced arbitration against a Shanghai-based company in connection with an alleged breach of a settlement agreement. The Hong Kong company applied to the HKIAC for an ex parte order to preserve, seize and freeze the respondent's bank accounts within Mainland China on 1 October 2019. The HKIAC issued a letter of acceptance in support of the Hong Kong company's application. Upon receipt of the HKIAC's letter and other application documents on 8 October 2019, the Shanghai Maritime Court granted the requested measures on the same day.

In another recent case, an individual claimant lodged an application for an order to preserve the bank accounts and stocks under the names of the three Mainland respondents worth over RMB 10 million on 23 December 2019. The HKIAC granted leave to the claimant by issuing the letter of acceptance. The claimant subsequently filed an application to Beijing No. 3 Intermediate People's Court on 3 March 2020 together with the counter-security, the HKIAC's letter of acceptance and other application documents, and the court granted the requested measures on the same day. The entire process took only one day.

The above cases demonstrate the HKIAC's willingness to assist, as well as the efficiency of the Mainland courts in processing applications under the Interim Measure Arrangement. Based on the information provided by HKIAC, the average time taken by the Mainland courts to issue a decision was 14 days from its receipt of the complete application, although applications that are made

during the COVID-19 pandemic may take longer. The efficiency of the Mainland courts and the fact that there have not been any cases of refusal illustrate the Mainland courts' endorsement of the Interim Measure Arrangement.

Among the 17 successful cases, only asset preservation orders were granted. A possible reason could be that the Mainland courts have imposed a relatively higher standard for conduct and evidence preservation applications. For instance, before granting an evidence preservation order, the Mainland courts normally require the applicants to prove that the evidence in question is at risk of being destroyed or that it may be difficult to obtain the evidence in the future. In contrast, asset preservation, as a more common measure, is more readily granted by the Mainland courts. Once a case has been filed and the security has been provided, the Mainland courts will generally grant leave to an application of asset preservation.



Latest developments amid the COVID-19 pandemic

Guiding opinions published by Supreme Court of People's Republic of China (the "SPC")

Due to the COVID-19 pandemic, the SPC has published two guiding opinions stipulating instructions in respect of the granting of interim measures in Mainland China, namely (1) the Guiding Opinions (I) on Several Issues concerning the Proper Trial of Civil Cases Related to the Novel Coronavirus Pneumonia (COVID-19) Epidemic According to the Law (關於依法妥善審理涉新冠肺炎疫情民事案件若干問題的指導意見(一)) (the "**First Opinions**") on 16 April 2020; and (2) the Guiding Opinions on Several Issues Concerning Lawful and Proper Handling of Enforcement Cases Related to the Novel Coronavirus Pneumonia Epidemic on 13 May 2020 (《最高人民法院關於依法妥善辦理涉新冠肺炎疫情執行案件若干問題的指導意見》) (the "**Second Opinions**").

Section 9 of the First Opinions provide that Mainland courts can now adopt flexible measures of property preservation in order to promote an early resumption of work and production and to alleviate the burden on companies that suffer as a result of the COVID-19 pandemic. For instance, while the property preservation order preserves machinery from being dissipated or transferred, it shall not prevent the respondents from producing goods with the machinery. Furthermore, as an exceptional measure, the First Opinions provide that an applicant of property preservation is now allowed to provide alternative securities such as a third-party guarantee and liability insurance of property preservation. This is to address the situation where some companies may be unable to provide sufficient counter-security due to low cash reserves or unstable cash flows.

Section 3 of the Second Opinions instruct the Mainland courts to intensify the examination of applications for property preservation in epidemic-related civil cases to protect companies experiencing difficulties in their businesses due to the COVID-19 pandemic. In order not to affect the normal operation of enterprises, the Second Opinions further provide that Mainland courts shall not support applications for preservation of property that obviously exceed the claim's scope. As a result of the guiding opinions, it is anticipated that the Mainland courts would need to spend more time scrutinising and processing the interim measure applications.



These guiding opinions aim to protect the stability of industrial supply chains, helping business entities to resume their operations and assisting the social economy to recover. Following the guiding opinions, Mainland courts will endeavour to safeguard the legitimate rights and interests of both the applicants and the respondents and, at the same time, protect people's livelihoods. Therefore, it is expected that the Mainland courts will exercise greater caution in granting the interim measure orders.

Increased use of online technology

The COVID-19 pandemic has prompted the modernisation of the case management information system of Mainland courts. Case registration, inquiries, interviews, court hearings and interim measure applications can now be completed online. This has not only improved the efficiency of case processing but also reduced the costs of the parties. Furthermore, the SPC has also established an online interim measures application system. Applicants can submit application documents through the internet for an application of property preservation, behaviour preservation and evidence preservation. The online interim measures application system also offers online security services, where the applicants can purchase liability insurance offered by a list of qualified Mainland insurance companies. The information used to apply for interim measures can also be used to apply for security, thereby halving the time normally taken to submit two applications.

The online interim measures application system is conducive to the implementation of the Interim Measure Arrangement, as it provides the HKIAC parties with a more efficient and low-cost solution to an application of interim measures in Mainland China.

Practical tips

Due to the two guiding opinions, it will now take longer for the Mainland courts to grant any interim measure orders, and therefore applicants should take every step they can to expedite the application process and avoid any mistakes that may delay the process. Any missing, incomplete or inaccurate information or any violation of other requirements would result in unnecessary requests for further information from the courts and cause delay to the interim relief orders. Here are four practical tips on applications for interim measures in Mainland courts during the COVID-19 pandemic:

Firstly, it is important to ascertain the whereabouts of a respondent's assets and addresses. It may be necessary for an applicant to conduct an asset search in order to prove that the respondent has available assets. One difficulty is that a respondent might have moved out of all of his or her known addresses, including the address on the public corporate record. The claimant may, therefore, be required to conduct asset searches on the respondent to obtain information about the location of the respondent's assets and bank accounts.

Secondly, it is worth noting that an applicant should check the application requirements of both the arbitration institution and the relevant Mainland court prior to his or her application for interim measures. There are very specific requirements on the application documents and the requirements may vary among different Mainland courts. In one instance, the Shenzhen Court requested that the HKIAC sent the application documents directly to the Shenzhen Court whereas other Mainland courts may accept that an application comes from the applicant's lawyers.

Thirdly, it is useful to obtain assistance from Mainland law firms that can help to communicate with the relevant Mainland court in advance to ascertain the list of documents needed, the documents that require notarisation and the procedures for submission of the application papers.

Fourthly, the forms of security recognised by the Mainland Courts include cash security, physical guarantee, credit guarantee and liability insurance. Applicants under the Interim Measure Arrangement should choose appropriate security methods according to their own circumstances and the characteristics of each case. Applicants are also advised to use the online interim measures application system so as to save time and cost.

KEY CONTACTS



Keith Brandt
Managing Partner, Hong Kong
D +852 2533 3622
keith.brandt@dentons.com



Raymond Zhu
Senior Partner, Beijing
D +86 10 58137229
yongrui.zhu@dentons.cn



Ninon Dong
Attorney at Law, Beijing
D +86 10 57590600
yining.dong@dentons.cn



Anson Tam
Trainee Solicitor, Hong Kong
D +852 2533 3635
anson.tam@dentons.com

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CSBrand-42197-Implementation of the Interim Measure Article — 16/11/2020