

DISPUTE RESOLUTION AND AIRCRAFT OPERATING LEASES TO PRC AIRLINES:

ONE YEAR ANNIVERSARY OF THE MAINLAND CHINA-HONG KONG INTERIM MEASURES ARRANGEMENT AND HOW IT IS WORKING IN PRACTICE

The Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region (the "**Arrangement**") has now been in force for just over a year. This briefing looks back at the experience of the past year and lessons learnt.

OVERVIEW

In our earlier briefings (see [here](#)¹ and [here](#)²), we noted that opting for Hong Kong seated arbitration offers various advantages, including the availability of interim relief and enforceability in the Mainland. In particular, the Arrangement allows, for the first time, parties to obtain interim measures from the PRC court in aid of offshore arbitration, specifically Hong Kong seated arbitration administered by qualified arbitration institutions. This is not available for arbitrations seated in other jurisdictions. We also explained how this could be of interest in contracts relating to aircraft transactions in Mainland China or involving counterparties based there. In turn we suggested that parties may in such situations favour Hong Kong as the seat for arbitration and dispute resolution, compared with courts or other arbitral seats.

For the past year, the practical operation of Arrangement has been closely watched by both the business and legal communities. We have also successfully helped our clients obtain interim measures granted under the Arrangement.

In relation to the use of the Arrangement, the only public figures published to date come from the HKIAC which has reported:

- 34 applications for interim relief filed before the PRC courts in support of HKIAC administered arbitrations. All but three of which have sought to preserve assets in Mainland China.

Key issues

- Most of the interim measures sought from the PRC courts under the Arrangement in this past year has been for asset preservation.
- For asset preservation, identifying the assets to be preserved beforehand and promptly providing security for the application are crucial.
- Practical issues such as the appropriate PRC court and such court's particular requirements should be carefully considered.
- Administrative and logistical issues such as translation should be factored in during preparation.

¹ Clifford Chance Client Briefing, "*Interim Measures in Aid of Arbitration: Arrangement Between Mainland China and Hong Kong to Take Effect on 1 October 2019*", September 2019

² Clifford Chance Client Briefing, "*Dispute Resolution and Aircraft Operating Leases to PRC Airlines: Simply Arbitrate?*", October 2019

- HKIAC is aware of 20 decisions issued by various PRC courts granting the applications for preservation of assets, totaling approximately USD 1.47 billion.
- The PRC courts involved are scattered across Mainland China but are mostly located in first or second-tier cities, such as Beijing, Shanghai, Shenzhen, Nanjing and Hangzhou, where economic activities are most active.
- Most of the applicants were parties outside Mainland China, including parties from Hong Kong, Cayman Islands, BVI, Singapore, Taiwan, Switzerland, Samoa and Japan.

Our understanding is that there have been no applications under the ICC 2017 Arbitration Rules or CIETAC 2015 Arbitration Rules. However, in summary, it has obviously proven to be a popular tool for parties in disputes given the 34 applications and approximately USD 1.47 billion worth of assets involved so far.

On a related note, the PRC courts have shown further support for the recognition and enforcement of awards rendered in arbitrations seated in Hong Kong. On 27 November 2020, the Hong Kong Government and the Supreme People's Court of China (**the SPC**) signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (**the Supplemental Arrangement**) to improve the 20-year old Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong. The Supplemental Arrangement clarifies, among other things, that the party seeking recognition and enforcement of a Hong Kong award may apply to the competent PRC court for interim relief before or after applying for recognition and enforcement. This would address the applicant's concern that the respondent may dissipate its assets while the award is going through recognition and enforcement procedures.

PRACTICAL TIPS

Based on our observations and experience in seeking interim relief under the Arrangement, here are some practical tips and factors to consider:

- **Pre-screening for eligible arbitral institution:** The Arrangement provides that an interim relief application may only be filed in support of an arbitration seated in Hong Kong and administered by a qualified arbitral institution.³ As an initial step, the parties may review their arbitration agreement to check whether their chosen route of arbitration falls within the purview of the Arrangement. The administering arbitral institution will be responsible for transferring the interim relief application to the competent PRC court, along with a letter certifying acceptance of the arbitration. The HKIAC has gained extensive experience in handling applications under the Arrangement and therefore has established protocols in place.

³ The six qualified arbitral institutions are:

- Hong Kong International Arbitration Centre;
- China International Economic and Trade Arbitration Commissions Hong Kong Arbitration Center;
- International Court of Arbitration of the International Chamber of Commerce – Asia Office (ICC)
- Hong Kong Maritime Arbitration Group;
- South China International Arbitration Center (HK); and
- eBRAM International Online Dispute Resolution Centre.

- **Form of relief:** The form of relief sought can be an early indicator for the time needed by the relevant PRC court to review the application. This is because most applications filed under the Arrangement are for preservation of assets as opposed to evidence or conduct, which means PRC courts are generally more familiar with asset preservation.
- **Identification of assets:** For asset preservation applications, identifying and providing particulars of the assets to be preserved will help the applicant in determining the appropriate forum and expedite the PRC court's review process and subsequent enforcement.
- **Forum:** The relevant forum for seeking interim relief is the Intermediate People's Court of the place of domicile of the respondent or the place where relevant property or evidence is situated. There may thus be more than one court having jurisdiction over the application and it often requires balancing various interests in order to select the most appropriate forum. To make such assessment, the relevant factors to consider include the risk of potential local protectionism, any alternative place where assets or evidence are located and can be effectively preserved, and the relevant PRC court's experience with handling interim relief applications under the Arrangement. Like arbitral institutions, PRC courts with prior experience often have more established protocols which can streamline the process.
- **Security:** In the PRC, the applicant is required to provide security for preservation measures. The amount and form of such security may vary in different courts. It is crucial for the applicant to understand beforehand the particular requirements of the PRC court where it intends to file the application. Most PRC courts now accept guarantees or insurance policies from qualified banks and insurance companies in Mainland China. Once aware of the relevant court's requirements, the applicant can prepare the appropriate form of security before submitting their applications. As a rule of thumb, parties should obtain full security in the equivalent amount of the assets to be preserved if the application is filed prior to commencing the arbitration proceedings. The requirement for security is more relaxed if the application is filed after commencing the arbitration proceedings and is subject to the discretion of the particular PRC court handling the application.
- **Timetable:** Due to the PRC courts' heavy caseload, and sometimes unfamiliarity with the interim relief application process under the Arrangement, it may take weeks to review the application, make a decision and enforce the preservation measures if granted. Given the nature of the relief sought, delay undoubtedly would be a major concern for applicants. While careful and advance planning could help streamline the process, the applicants should also factor in potential delays when mapping out the estimated timetable.
- **Translation:** Translation and other logistical issues such as notarisation and authentication of supporting documents are often ranked low in a party's list of priorities in preparing for an interim relief application. However, this can be no small task and even more so when time is of the essence. Therefore, it is important to ascertain as early as possible which documents in the underlying arbitration must accompany the application as required by the reviewing court and start planning for translation, notarisation, and authentication.

CONCLUSION

With only one year in effect, the Arrangement has already proven to be a welcome development for businesses and a popular tool for parties to arbitration seated in Hong Kong. We also expect the Arrangement to become more widely used, and the application process to be further streamlined as the arbitration institutions and the PRC courts grow more familiar with it. Lessors transacting with Mainland counterparties should consider these potential advantages when choosing a dispute resolution option for their contracts, in light of the specific PRC counterparty and relationship.

CONTACTS

Hong Kong

Cameron Hassall
Partner

T +852 2825 8902
E cameron.hassall
@cliffordchance.com

Thomas Walsh
Partner

T +852 2825 8052
E thomas.walsh
@cliffordchance.com

Paul Greenwell
Registered Foreign
Consultant

T +852 2825 8857
E paul.greenwell
@cliffordchance.com

Yvonne Shek
Consultant

T +852 2826 3439
E yvonne.shek
@cliffordchance.com

Jeffrey Ip
Senior Associate

T +852 2826 3536
E jeffrey.ip
@cliffordchance.com

Feifei Yu
Registered Foreign
Lawyer

T +852 2825 8052
E feifei.yu
@cliffordchance.com

Haoyang Zhang
Registered Foreign
Lawyer

T +852 2826 3445
E haoyang.zhang
@cliffordchance.com

Michelle Sum
Associate
T +852 2826 2489
E michelle.sum
@cliffordchance.com

Shanghai/Beijing

Lei Shi
Partner

T +86 21 2320 7377
E lei.shi
@cliffordchance.com

Nathan Zhou
Associate

T +86 21 2320 7327
E nathan.zhou
@cliffordchance.com

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Clifford Chance, 27th Floor, Jardine House,
One Connaught Place, Hong Kong

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