

# Practice Guide: Applying to Mainland Courts for Interim Measures during Hong Kong Arbitral Proceedings

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## Abstract

This article, based upon the practice experience of Han Kun Law Offices, summarizes several key issues regarding how to apply to Beijing courts for interim measures by parties to Hong Kong arbitral proceedings under the *Arrangement of the Supreme People's Court of the People's Republic of China 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*.

## Practice Guide: Applying to Mainland Courts for Interim Measures during Hong Kong Arbitral Proceedings

Hong Kong is one of the jurisdictions that are most closely connected with the arbitral practice in Mainland China. However, parties of arbitral proceedings in Hong Kong had always faced great difficulties when dealing with interim measures in China due to the absence of any formal mechanism by which Mainland courts could grant preservation orders supporting arbitrations seated outside of Mainland China<sup>1</sup>. The situation has changed since 1 October 2019, when the *Arrangement of the Supreme People's Court of the People's Republic of China 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**”) came into force. The Arrangement fills the gap in legislation and is widely

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<sup>1</sup> Interim measures in Mainland China include preservation of property, evidence and conducts. Preservation of conducts is a type of interim measures having an effect of compelling or prohibiting a party to perform certain actions. For preservation of property and evidence, see Article 28 and Article 46 of *Arbitration Law of People's Republic of China* (2017 Amendment) (the “PRC Arbitration Law”). Available at: [http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content\\_4624.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4624.htm) (Accessed: 27 December 2020)

For preservation of conduct, despite the absence of relevant provision in PRC Arbitration Law, there is a judicial interpretation which entitles the parties to an arbitration concerning intellectual property dispute to apply for preservation of conduct. See *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Reviewing the Injunction Cases involving Intellectual Property Disputes*, Fa Shi [2018] No. 21. Available at: <http://www.court.gov.cn/fabu-xiangqing-135341.html> (Accessed: 27 December 2020)

In addition, there is a precedent in which the First Intermediate People's Court of Hainan Province granted an order of conduct preservation to a party to a CIETAC arbitration on non-intellectual property dispute, based upon Article 100 of Civil Procedure Law of People's Republic of China (2017 Amendment). See (2019) Qiong 96 Xing bao No.1. Available at: <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=8486dc72a1a548189801ab330185ac50> (Accessed: 27 December 2020)

deemed as a landmark in the development of judicial cooperation between the two jurisdictions.

Supplementary to the Arrangement, the Research Office of the Supreme People's Court promulgated the *Understanding and Application of the Arrangement of the Supreme People's Court 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 “**Understanding and Application**”). Based upon the Understanding and Application as well as the practice experience gained by Han Kun Law Offices in the more than one year of the Arrangement's implementation, this article summarizes the key issues regarding applying to Beijing courts for interim measures by parties to Hong Kong arbitral proceedings under the Arrangement.

### **1. To which intermediate people's court should an application for interim measures be submitted during a Hong Kong arbitral proceeding?**

According to Article 3 of the Arrangement, applications for interim measures should be submitted to a single Mainland court having jurisdiction. Specifically, a party to a Hong Kong arbitral proceeding should submit the application to the “[i]ntermediate people's court of the place of residence of the party against whom the application is made (“respondent”) or the place where the property or evidence is situated... If the place of residence of the respondent or the place where the property or evidence is situated fall within the jurisdiction of different people's courts, the applicant shall make an application to **any one of those people's courts but shall not make separate applications to two or more people's courts**”<sup>2</sup> (emphasis added).

Despite the above stipulations, uncertainty remains in practice whether applications for interim measures made in overseas arbitral proceedings are subject to the provisions on centralized jurisdiction applicable in Beijing municipality.

According to the *Provisions of the Beijing High People's Court on the Jurisdiction of Cases of the Fourth Intermediate People's Court of Beijing* (the “**Provisions**”) promulgated in 2018 by the Beijing High People's Court, foreign-related arbitration judicial review cases in Beijing are subject to the centralized jurisdiction of the Beijing Fourth Intermediate People's Court. Items 2, 3 and 4 of Article 1 of the Provisions provide that:

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<sup>2</sup> *Arrangement of the Supreme People's Court of the People's Republic of China 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”), Fashi [2019] NO.14. Available at: <http://gongbao.court.gov.cn/Details/512d83a54880609e30b96321df3899.html> (Accessed: 27 December 2020).

“The Beijing Fourth Intermediate People’s Court (Beijing Railway Transport Intermediate Court) has jurisdiction over the following cases: ... (2) commercial cases of the first instance where the subject matter under the jurisdiction of this municipal people’s court is no more than 200 million RMB which are foreign-related or involve the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region; (3) cases under the jurisdiction of this municipal people’s court which apply to confirm the validity of arbitration agreements, or to revoke arbitral awards (excluding cases applying for revocation of labour dispute-related arbitral awards); (4) review cases under the jurisdiction of this municipal people’s court for applications to recognize and enforce foreign arbitral awards, or to recognize and enforce arbitral awards made by arbitral institutions in the Hong Kong Special Administrative Region, the Macao Special Administrative Region, or the Taiwan Region; review cases under the jurisdiction of this municipal people’s court for applications to recognize and enforce judgments made by foreign courts, courts of the Hong Kong Special Administrative Region, the Macao Special Administrative Region, and the Taiwan Region; ...”<sup>3</sup>

According to the Beijing Fourth Intermediate Court, its centralized jurisdiction in connection with foreign-related arbitration is limited to the types of cases listed above, i.e., cases on (i) validity of arbitration agreements, (ii) revocation of arbitral awards, (iii) recognition and enforcement of arbitral awards made by foreign arbitral institutions, and (iv) recognition and enforcement of arbitral awards made by arbitral institutions in Hong Kong, Macao, and Taiwan. Therefore, applications for interim measures made in overseas arbitral proceedings are not subject to the centralized jurisdiction of the Beijing Fourth Intermediate Court, and shall be submitted to a competent court designated according to the Arrangement.

## **2. Should an application for interim measures be submitted directly to a Mainland court or be forwarded by the overseas arbitral institution?**

According to paragraphs 2 and 3 of Article 3 of the Arrangement, applications for interim measures fall into two categories and are handled differently.

**Category A** – the application is made before the arbitral proceeding commences in Hong Kong. In this case, the application may be submitted directly to the Mainland court, provided that a letter certifying acceptance of the case by the Hong Kong arbitral institution is submitted to the court within 30 days.

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<sup>3</sup> *Provisions of the Beijing High People’s Court on the Jurisdiction of Cases of the Fourth Intermediate People’s Court of Beijing.* Available at: <http://bjgy.chinacourt.gov.cn/article/detail/2018/02/id/3199003.shtml> (Accessed: 27 December 2020).

**Category B** – the application is made during an ongoing arbitral proceeding in Hong Kong. In this case, the party should first submit the application for interim measures to the arbitral institution or its permanent office, which will in turn forward the application to the Mainland court.

However, the Understanding and Application points out that submission of an application through the arbitral institution or its permanent office will cause delay in the process, which means rigid implementation of paragraph 2 of Article 3 of the Arrangement could weaken the effectiveness of interim measures. Thus, the Understanding and Application further stipulates that “the parties to an arbitral proceeding in Hong Kong shall be permitted to submit an application for interim measures together with a transmittal letter from the arbitral institution or its office to the people’s court of the Mainland; the people’s court of the Mainland may confirm the circumstances by contacting the relevant arbitral institution or its office according to the contact information provided by the Department of Justice of the Hong Kong Special Administrative Region.”<sup>4</sup>

Based on our practical experience, Beijing courts have accepted the methods described above in the Understanding and Application. That is, applications for interim measures can be filed directly with the Beijing courts without being forwarded by the arbitral institution or its permanent office in Hong Kong for forwarding, even if arbitral proceedings have been initiated in Hong Kong.

### **3. What serves as proof that the Hong Kong arbitral institution has accepted an arbitration case?**

According to what we have learned in practice, the arbitral institution needs to issue a special letter certifying the acceptance of the case. Requirements differ among arbitral institutions on information required to be provided, how long it will take the arbitral institution to issue the letter, and specific contents of the letter. In practice, parties should directly confirm with the arbitral institution regarding its specific requirements before making the application.

In general, an arbitral institution will issue a letter certifying formal acceptance of the case after it receives a notice of arbitration and the registration fee. The certification letter can be submitted to the Mainland court as supporting evidence together with the application for interim measures.

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<sup>4</sup> Qibo JIANG, Haijia ZHOU, Yanli SI, Kun LIU, “*Understanding and Application of the Arrangement of the Supreme People’s Court 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 “Understanding and Application”) People’s Court Daily 2019-09-26 (003)

As far as we know, the certification letter and supporting materials need not be notarized and authenticated. However, it is necessary to obtain overseas notarization and authentication of authorization documents where a Mainland lawyer submits the application to the Mainland court on behalf of a party. In addition, the certification letter, if not in Chinese, should be accompanied by a translation.

#### **4. How will arbitral institutions support the parties when they make applications for interim measures?**

According to the Understanding and Application, as confirmed by the Supreme People's Court and the Government of Hong Kong Special Administrative Region, the following Hong Kong arbitral institutions may apply for interim measures with Mainland courts under the Arrangement: “the Hong Kong International Arbitration Centre (“**HKIAC**”), the China International Economic and Trade Arbitration Commission (“**CIETAC**”) Hong Kong Arbitration Centre, International Court of Arbitration of the International Chamber of Commerce – Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Centre (HK), and eBRAM International Online Dispute Resolution Centre”<sup>5</sup>.

According to our experience, all of the arbitral institutions proactively assist parties to apply for interim measures, including assisting in the issuance of letters certifying acceptance of the case, and maintaining confidentiality of the parties' application. For example, we have been deeply impressed by HKIAC for its responsiveness in cases where we have applied for interim measures with Mainland courts.

#### **5. Once the Mainland court has accepted the application for interim measures, is the subsequent procedure different from ordinary interim measures in domestic cases?**

After the Beijing courts accept an application for interim measures, generally the basic procedures for handling the interim measures are the same as those for Mainland courts in domestic litigations and arbitrations. These procedures include the provision of a guarantee by the applicant (generally it is necessary to provide a property security guarantee letter issued by a qualified insurance company) and provision of information about the assets to be preserved.

In practice, we have noted one slight difference that, according to paragraph 3 of Article 5 of the Arrangement, the court may require the relevant parties to submit “an explanation of the urgency of the circumstances so that if interim measure is not taken

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<sup>5</sup> Qibo JIANG, et al., “*Understanding and Application*” People's Court Daily 2019-09-26 (003)

immediately, the legitimate rights and interests of the applicant may suffer irreparable damage or the enforcement of the arbitral award may become difficult, etc.”<sup>6</sup> By comparison, there is no such requirement in the application for interim measures in domestic litigation and arbitral proceedings.

Considering that the court’s practices and requirements may change as experience is accumulated with the implementation of the Arrangement, our analysis above is merely intended to serve as a reference.

## **Conclusion**

After one year of its operation, relevant data shows that the Arrangement has significantly facilitate the process of granting preservation orders by Mainland courts in support of arbitration in Hong Kong.<sup>7</sup> As precedents accumulate, more parties and practitioners will benefit from the mechanism provided by the Arrangement.

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<sup>6</sup> Arrangement, Fashi [2019] NO.14. Available at: <http://gongbao.court.gov.cn/Details/512d83a54880609e30b96321df3899.html> (Accessed: 27 December 2020)

<sup>7</sup> See *Hong Kong-Mainland China Arrangement on Interim Measures: HKIAC Update*. Available at: <https://www.hkiac.org/news/hk-prc-interim-measures-arrangement-hkiac-update> (Accessed: 27 December 2020)