Journal of Korea Trade Vol. 24, No. 6, October 2020, 101-114
https://doi.org/10.35611/jkt.2020.24.6.101
ISSN 1229-828X

The 2019 Hong Kong-Mainland China Arrangement on Mutual Assistance in Court-ordered Interim Measures: A Major Breakthrough for Hong Kong-seated International Arbitral Proceedings

JKT 24(6)

Received 12 May 2020
Revised 12 July 2020
Accepted 28 September 2020

Jung Won Jun†
College of Law, Kookmin University, Seoul, Korea

Abstract

Purpose – This paper examines 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 Arrangement), which became effective on October 1, 2019, calling on courts of mainland China and Hong Kong for reciprocal commitment in support of court-ordered interim measures in aid of arbitral proceedings. Because the Hong Kong courts have granted interim measures in aid of arbitral proceedings seated in and outside of Hong Kong even prior to the Arrangement becoming effective, this paper focuses on the significance of the Arrangement making Hong Kong the first and only seat outside of mainland China from which parties to arbitral proceedings may successfully obtain interim measures to preserve of assets, properties, and/or evidence from Chinese courts to be enforced in China.

Design/methodology – The significance of interim measures in international arbitration and the existing circumstances of interim measures in support of international arbitral proceedings in mainland China and Hong Kong are discussed first in this paper. Due to the confidential nature of arbitral proceedings, while the details of applications for interim measures pursuant to the Arrangement cannot be discussed, in examining the implications of the Arrangement, the relevant and necessary information was made available from the Hong Kong International Arbitration Centre, as it is one of the six qualified arbitral institutions under the Arrangement.

Findings – This groundbreaking Arrangement provides a mechanism for parties with China-related matters to more effectively resolve their disputes, the opportunity for Hong Kong to become an unparalleled seat of arbitration, and for mainland China to overcome some of its negative perceptions in international arbitration. Because the Arrangement also allows parties to directly apply for interim measures from mainland Chinese courts, parties with China-related matters should take note of this potential bypassing of the procedural hurdle, which usually requires an arbitral institution to submit such applications in China, and make strategic decisions accordingly as may be appropriate.

Originality/value – Because the Arrangement is a recent yet a significant agreement calling on courts of mainland China and Hong Kong for reciprocal commitment in support of court-ordered interim measures in aid of arbitral proceedings, this study will provide useful guidance for parties with China-related matters all over the world, especially in light of China's rapid economic growth and extensive and prominent trade relationships in today's world. Parties who foresee the need for interim measures from mainland Chinese courts should designate Hong Kong as their seat of arbitration and select one of the six qualified arbitral institutions under the Arrangement to administer their arbitral proceedings in order to benefit from the Arrangement.

Keywords: Hong Kong, Interim Measures, International Arbitration, Mainland China, Seat of Arbitration

JEL Classifications: F10, F51, K40

† **First and Corresponding author:** jungwonjun@gmail.com

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1. Introduction

On April 2, 2019, Hong Kong Special Administrative Region and mainland China signed an agreement known as 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 Arrangement), a reciprocal commitment to provide judicial assistance with respect to court-ordered interim measures in aid of arbitral proceedings. The Arrangement went into effect on October 1, 2019, officially making Hong Kong the first and only seat outside of mainland China from which parties to international arbitral proceedings may successfully seek and obtain interim measures from mainland Chinese courts in aid of their arbitration.

While the text of the Arrangement, especially in light of the language "mutual assistance," may appear to suggest that the courts of both Hong Kong and mainland China will be engaging in this practice of court-ordered interim measures in aid of foreign arbitral proceedings for the very first time, it should be clarified that such is not true. Because the Hong Kong courts have already established their practice of granting interim measures in aid of arbitral proceedings, whether seated in or outside of Hong Kong, the great significance of the Arrangement lies solely with the fact that it enables parties to Hong Kong-seated arbitral proceedings to avail themselves of access to interim measures issued by the mainland Chinese courts to be enforced in mainland China. Prior to the Arrangement, if any party foresaw the need for interim measures in mainland China, the parties had no choice but to seat their arbitration in mainland China, about which they – particularly foreign parties – have been reluctant to do due to their concerns of potential lack of impartiality and independence of arbitral institutions as well as courts in mainland China. Therefore, the Arrangement has brought exciting prospects for the international arbitration community, especially those with China-related matters in light of the accelerated economic growth in China. Also importantly, while Hong Kong has established itself as one of top five most preferred seat of arbitration for international arbitrations, now it has all the more potential to rise to the very top as an unparalleled seat of arbitration since the Arrangement effectively has made Hong Kong the only seat outside of mainland China to benefit from such commitment.

In this article, the substance, significance, and implications of the Arrangement are examined. While only time will reveal the actual effects of the Arrangement on resolution of disputes for arbitral parties with matters relating to counterparties, assets, properties, and/or evidence in mainland China, it is certainly meaningful to shed light on the status of its use in the past six months since the Arrangement went into effect, with information made available by the Hong Kong International Arbitration Centre (HKIAC) during the HKIAC Webinar series in April of 2020. Before delving into the discussion and implications of the Arrangement in Section 3, the significance of interim measures in international arbitration and current circumstances of interim measures in support of international arbitral proceedings in mainland China and Hong Kong are examined first in Section 2 in order to thoroughly comprehend the effects of the Arrangement, with concluding remarks in Section 4.

2. Interim Measures in Aid of International Arbitral Proceedings

2.1. The Significance of Interim Measures in International Arbitration

International arbitration is based on parties' agreement to resolve their dispute(s) by arbitration through an arbitral award issued by an arbitral tribunal of the parties' choosing

rather than resorting to litigation in national courts. As shown by the results from the International Arbitration Survey (2018) conducted by the Queen Mary University of London, due to some of the characteristics commonly known as the advantages of international arbitration, such as, enforceability of arbitral awards, avoiding specific legal systems/national courts, procedural flexibility, and ability of parties to select arbitrators, international arbitration has been a well-regarded and highly preferred method of resolving cross-border disputes. While much of arbitral proceedings are fundamentally based on party autonomy, because arbitral tribunals lack coercive powers, some judicial assistance – for instance, with respect to issuance and/or enforcement of interim measures, taking of evidence, dealing with third parties, recognition and enforceability of arbitral awards, as well as, setting aside of arbitral awards – from national courts of arbitral seats and/or where arbitral awards are sought to be enforced, is necessary. Such necessity is inevitable, even assuming full voluntary compliance of arbitral orders and/or awards by the parties. Consequently, the seat of arbitration, or arbitral seat, which is the legal place of arbitration and not necessarily the physical location of where the arbitral proceedings take place, exerts a substantial effect on arbitral proceedings, by way of applicable national laws, such as, the national arbitration legislations, which govern procedural issues of arbitral proceedings. The seat of arbitration is generally designated by the parties in their arbitration agreement, but in the absence of the parties' agreement to the seat of arbitration, the arbitral tribunal or the arbitral institution selects the seat of arbitration. Born (2012) noted that in international arbitration contexts, only in rare cases where the parties have failed to incorporate any arbitral institutional rules and/or could not have come to an agreement on the seat of arbitration, national courts would get involved in the selection process of seat of arbitration. Therefore, and particularly for the purposes of this article, the critical significance of the seat of arbitration cannot be underscored more, in light of the Arrangement having made Hong Kong the first and only seat outside of mainland China from which parties may successfully seek and obtain interim measures from the Chinese courts in aid of their arbitral proceedings.

Interim measures, which are also known as interim relief, conservatory, and/or provisional measures, are protective relief that are issued in order to prevent one of the parties to proceedings from deliberately destroying the relevant evidence and/or transferring properties and/or assets while arbitral proceedings are pending, so that the proceedings may be carried out effectively and also to ensure that following an arbitral award, the prevailing party will be able to successfully enforce the arbitral award. Article 17(2) of the UNCITRAL Model Law on International Commercial Arbitration (2006) defines interim measures as any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute. As such, interim measures often have substantial effects on the resolution of the dispute(s), as they protect the relevant properties, assets, and/or evidence necessary to resolve the disputes as well as injunctions in order to maintain the status quo until the arbitral award is rendered. Therefore, without interim measures, a party may dissipate assets or hide and/or even destroy evidence. Consequently, parties to international arbitral proceedings have increasingly been relying on interim measures.

While the availability of interim measures in international arbitration is governed primarily by national arbitration legislation and the parties' arbitration agreement, national courts are

generally vested with the authority to order interim measures, and courts' authority to grant interim measures extends to situations where such measures are needed in support of arbitration proceedings. In addition, many of prominent international arbitral institutions empower arbitral tribunals with the authority to grant interim measures in their arbitration rules. Some of exemplary rules providing such authority can be found in Article 28 of the International Chamber of Commerce (ICC) Rules (2017) of Arbitration, Article 30 of Arbitration Rules (2016) of the Singapore International Arbitration Centre (SIAC), Article 23 of the HKIAC Administered Arbitration Rules (2018), as well as, Article 25 of the London Court of International Arbitration (LCIA) Arbitration Rules (2014). Arbitral tribunal-ordered interim measures are binding on the parties and are enforced upon application to a competent court, unless there are grounds for refusing recognition or enforcement. As such, although arbitral tribunals and national courts often enjoy concurrent jurisdiction over interim measures, parties may be limited by the relevant national arbitration legislation, such as the Chinese Arbitration Law, which mandates parties to institution-administered arbitrations to resort only to national courts for interim measures in aid of their arbitral proceedings. Like China, Italy also prohibits arbitral tribunals from issuing seizures and any other interim measures, giving its national courts the exclusive authority to grant interim measures pursuant to the Italian Civil Procedure Code article 818.

2.2. Interim Measures in Aid of International Arbitrations in Mainland China

Article 28 of the Arbitration Law of the People's Republic of China (1994) provides that if a party applies for preservation of property, then the arbitration commission must submit the party's application to the people's court in accordance with the relevant provisions of the Civil Procedure Law. Articles 10 through 16 of the Chinese Arbitration Law provide rigid requirements and descriptions of designated arbitration commissions, which may be distinct from the international practice and what are commonly referred to as international arbitration institutions. If a party applies for preservation of the evidence where the evidence may be destroyed or lost or difficult to obtain at a later time, then the arbitration commission shall submit to the basic people's court in the place where the evidence is located pursuant to Article 46 of the Chinese Arbitration Law. Additionally, according to Article 68, if a party to a foreign-related arbitration applies for preservation of the evidence, the foreign-related arbitration commission shall submit the application to the intermediate people's court in the place where the evidence is located. While there is no other special provisions for arbitration involving foreign elements relating to interim measures in the Chinese Arbitration Law, Article 65 makes clear to apply other relevant provisions of the Arbitration Law for matters not covered in the chapter dealing with special provisions for arbitration involving foreign elements. In short, the Chinese courts have exclusive authority to grant interim measures in aid of arbitral proceedings under the Chinese Arbitration Law, and applications for such must be submitted by an arbitration commission, as direct applications by parties are not allowed.

Moreover, it is paramount to note that until the Arrangement became effective, in order to obtain interim measures from mainland Chinese courts in aid of international arbitrations, the arbitral proceedings must have taken place within mainland China. However, because of the perception that mainland Chinese courts and arbitral institutions may not be independent or impartial due to political and social factors, parties to international arbitrations, and in particular, foreign parties, have not preferred mainland China as their seat of arbitration. According to the International Arbitration Survey (2010) conducted by the Queen Mary University of London and School of International Arbitration, respondents to the survey regarded mainland China, along with Moscow, with one of the most negative perceptions as

a potential seat of arbitration. Also, Nobles (2012) found that although the Arbitration Court of the China Chamber of International Commerce (CIETAC) is one of the most prominent permanent arbitration institutions in China and thus is far more preferred over many other Chinese arbitral institutions, it is still overcoming the perception of being biased in favor of domestic parties in international arbitration.

Additionally, the legal status of arbitral awards rendered by foreign arbitration institutions in mainland China remains unclear because China takes a distinct approach as to determining the nationality of arbitral awards – based on where the particular arbitral institution is established and located – which departs from the international practice of determining such based on the seat of arbitration. For instance, Tao (2012) noted that the arbitral award issued by the ICC Court of Arbitration was deemed a French arbitral award according to the Chinese approach, regardless of where the arbitral proceedings took place – even if the proceedings had taken place in mainland China – because the ICC is an arbitration institution established and located in France. Consequently, it has often been suggested for foreign parties to specify other places, such as Hong Kong or Singapore, as their seat of arbitration, in the interest of consistent and predictable recognition and enforceability of arbitral awards. Thus, the Arrangement is a significant breakthrough for parties of international arbitrations with legitimate interests to be protected by interim measures ordered by mainland Chinese courts for their Hong Kong-seated arbitrations.

2.3. Interim Measures in Aid of International Arbitral Proceedings in Hong Kong

The Hong Kong Arbitration Ordinance has largely adopted the UNCITRAL Model Law (2006), which is in line with the international practice. In particular, Hong Kong has adopted the exact text of Article 17 of the Model Law in Section 35(1) of the Arbitration Ordinance, providing authority to arbitral tribunals to grant interim measures upon a party's request. In addition to having given effect to the exact language of Article 17 of the Model Law, the Hong Kong Arbitration Ordinance has the added language as Section 35(2) provides further that, the interim measure referred to in Section 35(1) to be construed to include an injunction but not including an order under Section 56 of the Arbitration Ordinance. Also, Section 35(3) provides that if the arbitral tribunal granted an interim measure, upon application of any party, the tribunal may issue an arbitral award to the same effect as the interim measure.

Section 36 of the Arbitration Ordinance, which has adopted and thereby given effect to the text of Article 17 A of the Model Law, sets forth the conditions that must be satisfied in order for interim measures to be granted by an arbitral tribunal. When a party requests an interim measure to (a) maintain or restore the status quo pending the determination of the dispute, (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself, or (c) preserve assets out of which a subsequent award may be satisfied, the party must satisfy the following two conditions before the arbitral tribunal may grant the interim measure: firstly, the party must show that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted, and secondly that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. According to Section 36 of the Hong Kong Arbitration Ordinance, the determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. However, when a party is requesting an interim measure for preservation of potentially relevant evidence, the two conditions set forth above only apply to the extent that

the arbitral tribunal considers appropriate. Therefore, arbitral tribunals are granted more discretion and flexibility in their determination of whether such conditions have been satisfied before issuing an interim measure of preserving relevant evidence pursuant to Section 36(2) of the Arbitration Ordinance.

Additionally, Hong Kong courts enjoy concurrent authority with arbitral tribunals to grant interim measures in aid of arbitral proceedings under the Hong Kong Arbitration Ordinance, as Section 21 of the Arbitration Ordinance provides that it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection, and for a court to grant such measure. Section 45 of the Arbitration Ordinance, which governs court-ordered interim measures, did not adopt the corresponding provision of the Model Law, but instead, Section 45(2) specifically provides the authority for Hong Kong courts to grant interim measures to any arbitral proceedings which have been or are to be commenced in or outside of Hong Kong. Such broad and inclusive provision reflects the pro-arbitration attitude of Hong Kong courts. Interim measures under Section 45 of the Hong Kong Arbitration Ordinance are consistent with the type(s) and description(s) of the interim measures provided in Article 17(2) of the Model Law, given effect to by Section 35(1) of the Arbitration Ordinance. Moreover, for non-Hong Kong arbitrations, the Hong Kong courts may grant an interim measure only if the arbitral proceedings are capable of giving rise to an arbitral award that may be enforced in Hong Kong, and the interim measure sought belongs to a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the Hong Kong court, according to Section 45(5) of the Hong Kong Arbitration Ordinance.

In addition to having adopted the Arbitration Ordinance that is very much in line with the international practice, another important reason that Hong Kong has evolved into one of the most preferred seat of arbitration is the pro-arbitration attitude by the Hong Kong judiciary. Eliasson (2010) has noted that Hong Kong courts have established a reputation to be efficient and reliable, and in order to respect party autonomy, intervention by the Hong Kong courts is limited to those necessary to ensure the efficiency of the proceedings, such as, with respect to document production, different forms of interim measures, and ordering production of evidence before the arbitral tribunals. Additionally, Hong Kong was ranked the most judicially independent in Asia and eighth globally, according to the World Economic Forum's Global Competitiveness Report (2018). Furthermore, as aforementioned, even prior to the Arrangement calling on the Hong Kong courts for mutual assistance in aid of arbitral proceedings, Hong Kong courts have already extended the arbitration-friendly attitude to arbitral proceedings whether seated in or outside of Hong Kong. Of particular significance is the case in which the Hong Kong court continued an injunction granted to preserve the defendant Singapore company's assets (bank accounts) within Hong Kong, in support of a Singapore arbitration in the case of *Top Gains Minerals Macao Commercial Offshore Ltd. v. TL Resources Pte Ltd.* (2015). In the court's decision, Justice Chan clarified the relevant test applicable in deciding whether the interim measure should be granted in support of arbitral proceedings seated outside of Hong Kong: the court should first consider whether the facts of the case warrant the grant of interim measures if substantive proceedings were brought in Hong Kong, and where the relief sought is for a Mareva injunction (order to freeze assets), the test would still be whether the applicant can show a good arguable case that there is a real risk of dissipation of assets, and secondly, whether it is unjust or inconvenient for the court to grant the interim measures. With respect to the second prong of the test, the court should consider whether the interim measure sought is currently the subject of arbitral proceedings, and whether the court considers it more appropriate for the arbitral tribunal to deal with the interim measure being sought.

With this general background and understanding of interim measures in support of international arbitral proceedings in mainland China and Hong Kong, the substance, significance, and implications of the Arrangement are discussed in the next Section.

3. The Arrangement

3.1. What the Arrangement Entails – The Main Relevant Substance

As aforementioned, the Arrangement is particularly significant as it effectively provides access to interim measures ordered by mainland Chinese courts for parties to institutionally administered arbitrations with Hong Kong as their seat of arbitration to be sought against respondents with assets, properties, and/or evidence located in mainland China. Until this landmark Arrangement, Chinese court-ordered interim measures were unavailable for parties in arbitral proceedings seated outside of mainland China, and Hong Kong became the first and only seat of arbitration outside of mainland China from which parties may successfully obtain interim measures from Chinese courts that will be fully enforceable in mainland China. Although in nature, the Arrangement calls for mutual assistance in support of arbitral proceedings by the courts of mainland China as well as those of Hong Kong, courts in Hong Kong have been ordering interim measures in aid of arbitrations seated in, as well as, outside of Hong Kong, as aforementioned. Hence, the primary components of the Arrangement, which provides for reciprocal commitment by the mainland Chinese courts and thereby offers an unparalleled advantage for parties of Hong Kong-seated institutional arbitral proceedings with China-related disputes, are examined in this section.

First and foremost, interim measures that are available under the Arrangement from courts of mainland China and those from Hong Kong are not textually identical, and therefore must be addressed. First, only three types of interim measures may be sought from courts of mainland China: (1) property preservation, (2) evidence preservation, and (3) conduct preservation. On the other hand, from the Hong Kong courts, (1) injunction and other interim measure for the purpose of maintaining or restoring the status quo pending determination of the dispute, (2) taking action that would prevent, or refraining from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings, (3) preserving assets, and (4) preserving evidence that may be relevant and material to the resolution of the dispute, may be sought pursuant to Article 1 of the Arrangement. The interim measures that may be sought from Hong Kong courts are essentially the same as those provided under the aforementioned relevant provisions of the Model Law and the Hong Kong Arbitration Ordinance.

While the actual language may not be identical, interim measures sought to preserve assets and/or property as well as to preserve evidence may overlap in substance. "Conduct preservation" available from mainland Chinese courts, while not a commonly used phrase, generally are used to compel or prohibit parties from performing certain actions in intellectual property cases, according to the Interpretation of the Supreme People's Court on Several Issues Concerning Laws Application to Review of the Conduct Preservation for Intellectual Property and Competition Dispute Cases (2015). Therefore, relief sought to preserve conduct may nonetheless be construed as injunctive relief issued in order to maintain or restore the status quo and/or prevent imminent harm or prejudice to arbitral proceedings, corresponding to interim measures that are available from the Hong Kong courts. Thus, although the language describing each interim measure may differ in a technical sense, due to the broad scope of such language describing the types of available interim

measures, those available from the courts of mainland China and Hong Kong may ultimately be not as different as they may appear.

Next, Article 2 of the Arrangement narrowly defines "arbitral proceedings in Hong Kong" as those seated in Hong Kong and administered by one of the listed arbitral institutions or permanent offices. Therefore, *ad hoc* arbitrations, which are arbitrations conducted without the benefit of an appointing authority or generally pre-existing arbitration rules, and are subject only to the parties' arbitration agreement and applicable national arbitration legislation, are not included under the Arrangement for mutual assistance between courts of Hong Kong and mainland China in court-ordered interim measures in aid of arbitrations. It is further provided that the list of institutions and permanent offices is subject to confirmation by both sides, and as of September 26, 2019, the Hong Kong government announced the following six arbitral and dispute resolution institutions and permanent offices that are eligible for applying to the mainland Chinese courts for interim measures: (1) HKIAC, (2) CIETAC – Hong Kong Arbitration Center, (3) ICC – Asia Office, (4) Hong Kong Maritime Arbitration Group, (5) South China International Arbitration Center – Hong Kong, and (6) eBRAM International Online Dispute Resolution Centre.

Article 3 of the Arrangement provides that a party to arbitral proceedings in Hong Kong may make an application for an interim measure to 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, by reference to the provisions of the Civil Procedure Law and the Arbitration Law of the People's Republic of China, and relevant judicial interpretations.

A highly notable feature of the Arrangement is that it allows parties to arbitral proceedings seated in Hong Kong to directly apply for interim measures from the Chinese courts. One of the unique characteristics about Chinese arbitration is that in order to seek and obtain interim measures from the Chinese courts, applications for such must be submitted/passed on to the competent people's court by arbitration institutions, pursuant to the Chinese Arbitration Law. However, the Arrangement explicitly allows the parties to apply directly for interim measures, as long as the parties do not make separate applications to more than one people's court, where the property or evidence is situated fall within the jurisdiction of different people's courts. While the ability of parties to apply directly to the competent courts departs from the usual mainland Chinese arbitration practice, it is consistent with the urgency underlying interim measures and falls in line with international arbitration practice. Furthermore, the experience of HKIAC has revealed some benefits of bypassing the procedural hurdle of having an arbitral institution submit applications for interim measures to the Chinese courts under the Arrangement: HKIAC noted that the application process for interim measures has been quicker for parties to directly apply to the mainland Chinese courts rather than through the arbitral institution because local counsel in mainland China would know best the quickest way to file such applications, including particular courts, particular judges, among other local advantages, while Hong Kong-based arbitral institutions, such as the HKIAC, would not necessarily have access to such advantages. It was also reported during the HKIAC Webinar Series (2020) that applicants were better able to keep control of the timing of the applications for interim measures, if made directly.

Furthermore, the letter of acceptance issued by the relevant arbitration institution plays an important role under the Arrangement because according to Article 3, if the application for interim measures is made before the relevant institution or permanent office has accepted the case, and the people's court of mainland has not received a letter from an institution or permanent office certifying its acceptance of the case within 30 days after the interim measure has been issued, the people's court of mainland China shall discharge the interim measure.

Article 4 of the Arrangement sets forth the necessary materials, including the letter from the relevant institution or permanent office certifying its acceptance of the relevant arbitration case, to be submitted to the people's court in mainland.

Of particular significance, the letter of acceptance by the relevant arbitral institution or permanent office plays an important role in the application for interim measures from a mainland Chinese court. For instance, any party to arbitral proceedings seated in Hong Kong and administered by HKIAC under its Administered Arbitration Rules or other rules issued by HKIAC or the UNCITRAL Arbitration Rules may apply to the Intermediate People's Court for interim measures in accordance with the Arrangement, as HKIAC is one of the six arbitral institutions or permanent offices qualified under Article 2. Thus, HKIAC may provide assistance in facilitating any applications for interim measures before or after HKIAC accepts the arbitration, and the party must make a request for letter of acceptance with the copy of the application for interim measures including all supporting materials. It should be noted that while HKIAC does not charge any fee for issuing letters of acceptances, it may charge fees for providing additional facilitation under the Arrangement. As of April 29, 2020, HKIAC has issued the requested letters of acceptances either on the same day or the next day of the request on an *ex parte* basis, unless the applicant has indicated otherwise. The letters of acceptances are directly delivered to the applicants, sealed original hard-copy as well as by electronic mail. With the original hard-copy, the applicant would apply to the mainland court for interim measures. It was reported during the HKIAC Webinar series (2020) that upon requests from the Chinese courts with respect to the applications for interim measures, HKIAC has confirmed specific information regarding the applications and the cases pending with the HKIAC.

Additionally, Articles 5 and 7 of the Arrangement set forth the necessary information that must be specified on the application for interim measures from the mainland Chinese courts and the courts in Hong Kong, respectively. On one hand, Article 5 includes particulars of the parties, details of the application, including the amount applied to be preserved and/or the particulars of the conduct to be preserved, the facts and justifications on which the application is based, together with the relevant evidence, clear details of the property and evidence to be preserved, information about the property in mainland China to be used as security, among others. On the other hand, Article 7 includes the answer asserted or likely to be asserted by the party against whom the application is made, as well as any facts that might lead the court not to grant the interim measure being sought or not to grant it on an *ex parte* basis, in addition to the common requirements under Article 5, such as, the particulars of the parties and the details of the request and justification for such application. Subsections (4) and (5) of Article 7 are notable and distinguishable requirements from those of Article 5, and such discrepancies arise primarily from the principle of full and frank disclosure required by the Hong Kong courts.

Finally, it is important to note that parties seeking interim measures from the mainland Chinese courts should be sure to sufficiently and specifically explain the urgency of circumstances calling for the need of an interim measure, such as, the legitimate rights and interests of the applicant may suffer irreparable damage or the enforcement of an arbitral award may become difficult, as required by Article 5(3) of the Arrangement. While not included in the text of the Arrangement, parties should bear in mind that the Hong Kong courts would grant interim measures in support of foreign arbitral proceedings if the applicant demonstrates that there is a good arguable case that the foreign proceedings are capable of giving rise to a judgment or award that may be enforced in Hong Kong, and it would not be unjust or inconvenient for the courts to grant such, as aforementioned.

3.2. Applications Made under the Arrangement and their Status as of April 29, 2020

As of April 2020, the HKIAC is the only arbitral institution that has dealt with applications for interim measures under the Arrangement. The very first application was filed on the date the Arrangement went into effect on October 1, 2019, for which HKIAC issued its letter of acceptance on the following day, and the application was granted by the Shanghai Maritime Court on October 8, 2019. Such a quick turnaround by the Chinese court serves as evidence of serious undertaking of the commitment to review such applications expeditiously, as required under Article 8 of the Arrangement. As of April of 2020, seven of total of 20 applications for interim measures that have been filed before the mainland Chinese courts have been granted: Applications sought for preservation of assets in total amount of USD 890 million, and the Chinese courts (in Beijing, Lianyungang, Shanghai, Xiamen, Zhaoqing, Shenzhen, and Nanjing) have ordered preservation of assets worth USD 353 million. The applications mainly sought to preserve assets, with one or two exceptions that sought to preserve evidence, which is consistent with the general understanding that Chinese courts are reluctant to order interim measures beyond preservation of assets and/or property. Given the quick turnaround with the applications that had been filed with the Chinese courts before the impact of the COVID-19 pandemic, HKIAC seems to expect the results for the remaining applications to be forthcoming as the backlog with courts may ease up in near future.

Moreover, the composition of applicants and respondents for interim measures provides an informative finding in that foreign parties (primarily from the Netherlands, Switzerland, Japan, Hong Kong, Singapore, the Cayman Islands, and the British Virgin Islands) made up 70 percent of the applicants and as much as 40 percent of the respondents with assets and/or properties in mainland China. Such findings are significant because they demonstrate that the Arrangement has been used by mainland Chinese as well as foreign parties in obtaining interim measures to be enforced against not only mainland Chinese parties but also foreign parties whose assets and/or properties are located in mainland China.

3.3. Implications of the Arrangement

3.3.1. Hong Kong and its Prospect to Become THE Most Preferred Seat of Arbitration

While London, Paris, New York, and Geneva have long enjoyed their status as the most preferred seats of arbitration in international arbitration, Singapore emerged as a regional leader in Asia around 2010. According to the International Arbitration Survey (2010), the top most influential factors for such responses were formal legal infrastructure (e.g., the national arbitration law, track record in enforcing agreements to arbitrate and arbitral awards, neutrality and impartiality of legal system), law governing the substance of the dispute, and convenience of the seat of arbitration (e.g., location, industry specific usage/prior use by organization, established contacts with lawyers in jurisdiction, language/culture, efficiency of court proceedings).

Since then, Hong Kong has rather quickly risen to become and remain as one of the top five preferred seat of arbitration by users of international arbitration as demonstrated by the findings of the International Arbitration Survey (2015) conducted by Queen Mary University of London and School of International Arbitration, in which Hong Kong was ranked among the top three most frequently used, as well as, preferred seat of arbitration. Furthermore, such results conveyed a great momentum shown by Hong Kong and Singapore as the third and fourth most popular seats of international arbitration, respectively. In addition to the

arbitration-friendly and reliable legal infrastructure that Hong Kong has to offer, Eliasson (2010) noted that the geographical and cultural proximity to mainland China have also played important roles in its development as an ideal neutral seat of arbitration that may be accepted by Chinese companies as well as "western" companies.

Now with the Arrangement and its favorable treatment of Hong Kong to be the first and only seat of arbitration outside of mainland China, from which parties may avail themselves of mainland Chinese court-ordered interim measures, parties with China-related matters should ensure to clearly specify Hong Kong as their seat of arbitration and designate one of the qualified arbitral institutions under Article 2 of the Arrangement, in order to benefit from the Arrangement. Therefore, the Arrangement, which many in the international arbitration community refer to as a "game-changer," undoubtedly offers an unparalleled advantage for Hong Kong to rise to the very top of the list of the most preferred seat of arbitration, especially given the size and exponential growth of China-related business transactions all over the world and subsequent cross-border disputes to follow. Furthermore, as third-party funding of arbitration is permitted in Hong Kong, the Arrangement would likely encourage and reassure some third-party funders as it provides better access to assets and/or properties located in mainland China that may be necessary to satisfy and recover on their claims.

3.3.2. Implications of Potential Changes to the Perception of Mainland China-related Arbitral Proceedings

Foreign parties have consistently expressed their reluctance in choosing mainland China as their seat of arbitration due to concerns of persisting intervention by the Chinese government, which potentially harms the independence and impartiality of arbitral tribunals, as well as the courts according to Trigo (2016)'s study on recent developments in arbitration in China. However, the reported composition of applicants for interim measures from mainland Chinese courts and respondents against whom the interim measures were sought to be enforced against under the Arrangement thus far, reveals some positive outlook for mainland China and its reputation in the world of international arbitration.

As aforementioned, it appears that the Arrangement is not being used exclusively by either the foreign party applicants or the mainland Chinese applicants. Also, and perhaps more importantly, because the interim measures applied under the Arrangement have not been sought to be enforced exclusively against – or even disproportionately against – mainland Chinese parties, the prospects of the positive impact that the Arrangement may have on the overall fair and effective resolution of disputes in support of international arbitration may even be better than anticipated. Therefore, if the mainland Chinese courts continue to carry out their commitment to expeditious and mutual assistance on court-ordered interim measures in aid of arbitral proceedings pursuant to the Arrangement, the Arrangement may ultimately help users of international arbitration overcome some of their concerns about the Chinese courts' bias against non-Chinese parties, as well as, their reluctance about arbitrating China-related matters.

Additionally, in today's world, many nations around the world have extensive trade relationships with mainland China due to the accelerated economic growth in China. Of particular significance to Korea, because China is a very prominent trade partner for Korea, as demonstrated by findings by the Observatory of Economic Complexity (2018) that mainland China was Korea's number one trading partner making up 25.9 percent (USD 160 billion) of total of Korean exports, with Korea ranking as China's fourth trade partner, making up 4.14 percent (USD 107 billion) of total of Chinese exports (if excluding Hong Kong, which took account for 10.9 percent and USD 282 billion, Korea would have ranked

third). Therefore, China-related disputes and conflicts are inevitable for Korean businesses as a result of the sheer volume of commercial and investment transactions that take place between the two. Thus, Korean companies and other parties conducting business transactions with their counterparts whose assets and/or properties are in mainland China can and should certainly take advantage of the benefits the Arrangement offers in order to achieve more effective and enforceable dispute resolutions. Hence, if parties foresee the need for interim measures issued from mainland Chinese courts, the parties should clearly and unambiguously designate Hong Kong as their seat of arbitration and select one of the six qualified arbitral institutions to administer their arbitral proceedings in their arbitration agreement(s) and/or dispute resolution clause(s). Due to the broad scope of the interim measures that may be available pursuant to the Arrangement, Korean parties may request the relevant mainland Chinese court to order their counterparts in China to suspend and/or refrain from engaging in infringement conduct, to continue construction work as promised, and/or to continue with shipment(s), in addition to properly preserve/freeze assets and properties before any deliberate destruction and/or dissipation may take place, as aforementioned. Furthermore, while only time will tell, there may be additional international arbitration institutions, such as the Korean Commercial Arbitration Board (KCAB), which do not currently have qualifying operations in Hong Kong but may consider seeking to establish one to be confirmed as one of the qualified arbitral institutions under the Arrangement in order to benefit their users as well as promote their status as an international arbitral institution.

The significance of enforceable interim measures and the Arrangement, the game-changing legal mechanism that allows access to such, cannot be overstated because in many cases, without such, a favorable arbitral award may ultimately be rendered an empty judgment – about which foreign parties have had the strongest reluctance about arbitrating China-related matters – if assets and/or properties could not have been timely preserved for due enforcement of the arbitral award.

4. Conclusion

As discussed above, the Arrangement is a landmark agreement that provides access to interim measures from the mainland Chinese courts to parties with institutionally administered arbitral proceedings seated in Hong Kong. Consequently, the Arrangement is particularly significant for Hong Kong as it offers an unparalleled advantage for its competitiveness as a seat of arbitration, given the fact that Hong Kong is the only seat outside of mainland China from where parties to arbitral proceedings may successfully seek and obtain interim measures from the courts of mainland China.

More significantly, the Arrangement is a breakthrough for users of international arbitration with disputes related to Chinese parties, assets, properties, and/or evidence in mainland China, especially in light of China's rapid economic growth and its extensive and prominent trade relationships with many nations in today's world. As long as parties clearly designate Hong Kong as the seat of arbitration and specify one of the six qualified arbitral institutions pursuant to Article 2 of the Arrangement to administer the proceedings in their arbitration agreement, they can take advantage of this landmark reciprocal commitment undertaken by the mainland Chinese courts. Also, as the COVID-19 pandemic has caused tremendous economic struggles for so many around the world, the need for interim measures would prove to be more critical during such difficult times. Moreover, the HKIAC, which has already enjoyed a large caseload involving mainland Chinese parties, due not only to Hong Kong's proximity to mainland China but also to its status as among the top five most preferred

international arbitral institutions according to the International Arbitration Surveys (2015/2018), its caseload may only be expected to increase since the HKIAC is currently one of the six qualified arbitral institutions under the Arrangement.

Finally, while arbitral institutions may facilitate with applications for interim measures from the mainland Chinese courts, in particular with the necessary letters of acceptances by the institutions, parties should be reasonable and strategic and consider whether they would prefer bypassing the procedural hurdle of having the arbitral institution applying for interim measures, and instead, apply directly to the relevant court in China since the Arrangement provides an exceptional mechanism permitting direct applications by the parties. It should be noted that because the courts in Hong Kong have already established their practice of granting interim measures in support of arbitral proceedings seated in, as well as, outside of Hong Kong even prior to the Arrangement, this article intentionally focused on discussing and highlighting the significance of the reciprocal commitment undertaken by the mainland Chinese courts.

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