ICC and HKIAC publish guidance on applications to Mainland courts for interim relief in support of Hong Kong arbitrations

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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 came into force on 1 October 2019, allows parties to arbitral proceedings seated in Hong Kong to apply, at any time before an arbitral award is made, to Mainland courts for interim measures including property preservation, evidence preservation and conduct preservation (see our previously published briefing). The Arrangement applies to arbitrations administered by, among others, the International Court of Arbitration of the International Chamber of Commerce – Asia Office in Hong Kong (“ICC Secretariat Asia Office”) and the Hong Kong International Arbitration Centre (the “HKIAC”).

The International Chamber of Commerce (“ICC”) and the HKIAC each published guidance on 1 December 2019 and 16 December 2019 respectively to parties to arbitral proceedings seated in Hong Kong and administered by the ICC or the HKIAC and who wish to apply to Mainland courts for interim relief. Both institutions adopt largely similar procedures for the submission of applications under the Arrangement and, notably, distinguish between applications made before the commencement of arbitration and those made thereafter. Details of the application procedures are discussed below.

Application to a competent Mainland court

The applicant should submit its application to the Intermediate People’s Court of the place of residence of the counterparty or the place where the property or evidence in question is situated. The applicant should not make separate applications to two or more competent Mainland courts.

The applicant should set out in its application (i) the particulars of the parties; (ii) the details of the interim relief sought; and (iii) the facts and legal arguments that form the basis of the application, including an explanation as to why interim relief is considered necessary.

Applications by parties to ICC Secretariat Asia Office-administered proceedings

Applications may be made before or after the ICC Secretariat Asia Office has accepted the arbitration case. However, the application procedure will differ depending on whether the application is made in pending ICC arbitrations, or prior to the filing of a Request for Arbitration with the ICC.
**Procedure for applications made in pending ICC arbitrations**

A party to a pending ICC arbitration should notify the ICC Secretariat Asia Office of its intention to apply for interim relief as soon as possible, preferably before the application is made.

In addition to providing the ICC Secretariat Asia Office with copies of the application and supporting documents, the applicant is also required to submit a written request to the ICC Secretariat Asia Office for an Acceptance and Transfer Letter, which the ICC Secretariat Asia Office will issue if it is satisfied that: (i) the pending ICC arbitration is a commercial arbitration and (ii) the form of interim relief sought is available under the Arrangement.

Whilst the Arrangement provides that the arbitral institution shall forward the application to the competent Mainland court, the ICC recommends that the applicant submit the application together with the Acceptance and Transfer Letter directly to the competent Mainland court.

**Procedure for applications made prior to filing of Request for ICC Arbitration**

If a party wishes to make an application prior to filing a Request for Arbitration, it should notify the ICC Secretariat Asia Office as soon as possible, preferably before the application is made, and the application should be made directly to a competent Mainland court.

If the relevant Mainland court grants the interim relief sought, the applicant is required to file a Request for Arbitration with any ICC office within 20 days from the date of granting of interim measures and the arbitration will be assigned to the ICC Secretariat Asia Office. The applicant must then submit a written request to the ICC Secretariat Asia Office to issue an acceptance letter certifying that the Request for Arbitration has been accepted. Once received, the applicant must submit the acceptance letter to the relevant Mainland court. If the applicant fails to submit an acceptance letter within 30 days of the granting of interim measures, such measures would be discharged.

**Applications by parties to HKIAC-administered proceedings**

Applications may be made before or after the HKIAC has accepted the arbitration case. However, similar to an ICC-administered arbitration, the application procedure will differ depending on whether the application is made before or after the HKIAC has accepted the arbitration.

**Procedures for applications made after the HKIAC has accepted the arbitration**

A party may submit the application for interim relief directly to the competent Mainland court, together with a Letter of Acceptance issued by the HKIAC. To obtain a Letter of Acceptance from the HKIAC, the applicant is required to submit a written request for the Letter of Acceptance to the HKIAC, as well as copies of the application, supporting documents and any other information required by the HKIAC. If the HKIAC decides to issue a Letter of Acceptance, it will provide copies of the Letter of Acceptance to the applicant and to the competent Mainland court upon its request.

**Procedures for applications made before the HKIAC has accepted the arbitration**

If a party wishes to make an application before the HKIAC has accepted the arbitration, the party should submit its application directly to a competent Mainland court.

If the relevant Mainland court grants the interim relief sought, the applicant is required to commence an arbitration at the HKIAC and obtain a Letter of Acceptance from the HKIAC. The HKIAC may issue a Letter of Acceptance once it has accepted an arbitration. If the applicant fails to submit a Letter of Acceptance to the competent Mainland court within 30 days of the granting of interim measures, such measures would be discharged.

**Comments**

The guidance notes issued by both institutions provide much-needed clarity and certainty as regards the applicable procedures for interim relief applications pursuant to the Arrangement. Our experience of handling interim relief applications pursuant to the Arrangement since 1 October 2019 has been that, in cases of demonstrable urgency, both the ICC and the HKIAC are willing to demonstrate flexibility in adopting practices that strike a balance between strict compliance with the provisions of the Arrangement and the objective of ensuring sufficient and timely protection of the applicants’ interests.
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