



Successful completion of cross-border asset preservation worth more than \$20 million

WILLIAM KW LEUNG & CO
SOLICITORS & ARBITRATORS

19 December 2019 | Contributed by William KW Leung & Co

Arbitration & ADR, Hong Kong

- 📌 Introduction
- 📌 Significance of MAA
- 📌 Overview of MAA
- 📌 Timing and procedures
- 📌 Types of interim measure available from mainland courts
- 📌 Asset preservation endeavour before Lianyungang Intermediate People's Court
- 📌 Comment

Introduction

On 1 July 1997 sovereignty of Hong Kong was returned to China and the 'one country, two systems' constitutional principle applied thereafter, whereby Hong Kong's legal system remained distinct from China's legal system. The scope and depth of judicial exchanges and cooperation between the two jurisdictions have continuously been widened and deepened, resulting in an increase in quantity and diversity of legal and juridical issues between the two places. Their respective legal communities aim to deepen inter-regional judicial mutual assistance to facilitate effective dispute resolution through fairness and justice.

On 26 September 2019 the Judicial Committee of the Supreme People's Court adopted 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 (hereinafter, the Mutual Assistance Arrangement (MAA)), which took effect on 1 October 2019. This is the seventh judicial assistance arrangement negotiated between the mainland and the Hong Kong special administrative region since Hong Kong's return to China. It is also the first document on arbitration asset preservation assistance signed between China and other jurisdictions. This move marks the closer judicial assistance between the two jurisdictions under the 'one country, two systems' principle.

Significance of MAA

Pursuant to the MAA, parties to a Hong Kong-seated arbitration can seek interim measures from the mainland courts. Previously, this option was available only for arbitrations seated in mainland China because:

- the mainland courts had no power to grant interim measures in support of foreign-seated arbitrations; and
- interim measures by an emergency arbitrator or arbitral tribunal in a foreign-seated arbitration were unenforceable by the mainland courts.

Previously, parties may have felt that they had no option but to adopt a clause providing for mainland China-seated arbitration, which was to be administered by an onshore arbitral institution in mainland China. However, with the MAA this is no longer the only option, which will have a significant impact on the choice of dispute resolution forum in China-related transactions.

Overview of MAA

Under Article 2 of the MAA, a party to arbitral proceedings in Hong Kong may apply for interim measures from the relevant mainland courts in accordance with the law of the requested place⁽¹⁾ (ie, relevant Chinese laws and regulations). Likewise, parties to arbitral proceedings administered by a mainland arbitral institution⁽²⁾ may apply for interim measures from the Hong Kong High Court in accordance with the law of the requested place⁽³⁾ (ie, relevant Hong Kong laws and regulations).

Arbitral proceedings in Hong Kong⁽⁴⁾ include those which are seated in Hong Kong and administered by a prescribed list of institutions or permanent offices which are established or set up in Hong Kong, including:

- the Hong Kong International Arbitration Centre (HKIAC);
- the International Chamber of Commerce – Hong Kong;
- the China International Economic and Trade Arbitration Commission – Hong Kong; and
- the China Maritime Arbitration Commission – Hong Kong.

Notably, the MAA does not extend to *ad hoc* arbitrations (eg, an arbitration under the United Nations Commission on International Trade Law rules that is not administered by any institution) or arbitrations administered by arbitral institutions without an office in Hong Kong, even if those arbitrations are seated in Hong Kong.

Timing and procedures

The MAA specifies the relevant procedures and documents that must be submitted in applications seeking interim relief from a mainland court. An application may be made both before or after the relevant arbitral institution accepts a notice of arbitration.⁽⁵⁾ If an application is made after the institution's acceptance of a notice of arbitration, a party may submit its application either to the institution, which will forward it to the relevant mainland court,⁽⁶⁾ or directly to the relevant mainland court.⁽⁷⁾

Types of interim measure available from mainland courts

Pursuant to Article 1 of the MAA, the types of interim measure available from the mainland courts include:

- property preservation;
- evidence preservation; and
- conduct preservation.

Anti-suit injunctions in support of a Hong Kong arbitration should be available from the mainland court.

Asset preservation endeavour before Lianyungang Intermediate People's Court

On 27 November 2019, pursuant to the MAA, the Lianyungang Intermediate People's Court in Jiangsu Province, China (ie, a mainland court) assisted the HKIAC in an arbitration which had been referred to it by the HKIAC. The arbitration successfully completed a cross-border asset preservation valued at more than \$20 million in Lianyungang city.⁽⁸⁾ This is the first case in China where the HKIAC – having delivered papers directly to a mainland court under the auspices of the MAA – has successfully completed an asset preservation within 60 days of the MAA coming into effect, thus effectively safeguarding the parties' legitimate rights and interests.

The MAA has not only laid a solid foundation for Hong Kong arbitral institutions (eg, the HKIAC) to effectively protect parties' legitimate rights and interests, but also further enhanced the global influence of Hong Kong as an international venue for arbitration. This is a typical example of the country's practice of 'one country, two systems' in the Hong Kong special administrative region and strong policy support provided by the mainland. Moreover, the Lianyungang Intermediate People's Court's assistance to the HKIAC has demonstrated the confidence and openness of the mainland's judiciary and enables more Hong Kong legal professionals to see the fairness, justice and inclusiveness of the mainland's judiciary.

Comment

Previously, there was arguably a lack of effective judicial mutual mechanisms between Hong Kong and mainland China. However, following the *ex parte* cross-border asset preservation operation, it appears that this situation has improved. The MAA not only provides a new platform for promoting mutual legal assistance between Hong Kong and China, but also sets a new game-changing mechanism for international commercial investment arbitration. It also provides numerous fresh topics for future legal research in the private international law field.

For further information on this topic please contact William Leung at William KW Leung & Co by telephone (+852 2810 6199) or email (leung@jwlw.com). The William KW Leung & Co website can be accessed at www.jwlw.com.

Endnotes

- (1) Article 8 of the MAA.
- (2) Article 6 of the MAA.
- (3) Article 8 of the MAA.
- (4) Article 2 of the MAA.
- (5) Article 3 of the MAA.
- (6) *Id.*
- (7) Speech by Madam Yang Yan-li, office director of Hong Kong Macau Judicial Affairs of the Supreme People's Court at Shenzhen Court of International Arbitration on 9 November 2019.
- (8) The background of this case has already been widely reported on in the following twin decisions by Lam J: *Dickson Valora Group (Holdings) Company Limited v Fan Ji Qian* ([2019] 2 HKLRD 123) (available [here](#)) (which is the "first of its kind in this jurisdiction in which an anti-suit injunction is granted against a person who is not a party to the arbitration agreement" (Paragraph 8 of Decision on Costs, 11 December 2019 by G Lam J)) and *Dickson Holdings Enterprise Company Limited v Moravia CV* ([2019] 3 HKLRD 210) (available [here](#)).

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



William Leung

