On 1 October 2019, 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”) came into force. This major development provides a means for parties to an arbitration seated in Hong Kong to seek interim measures from the Mainland Chinese courts.

Under the Arrangement, parties to arbitrations that fulfil the following two criteria will be able to apply to the PRC courts for interim measures in aid of their arbitrations:

- the arbitration is seated in Hong Kong; and
- the arbitration is administered by one of the institutions that fulfil the qualifications set out under the Arrangement.

The following six institutions have been designated as qualifying institutions:

- Hong Kong International Arbitration Centre;
- China International Economic and Trade Arbitration Commission 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.

Parties can apply for (i) asset preservation order; (ii) evidence preservation order; and/or (iii) conduct preservation order either before the arbitration has commenced or during the course of the arbitration. As a condition for granting the interim measure, the PRC courts may require the applicant to provide security. Applications for interim measures in aid of arbitrations seated in Hong Kong may be made regardless of whether the arbitration commenced before or after the Arrangement came into force.

The interim measure may be sought before the arbitration is commenced, but the PRC court will discharge the interim measure if the applicant cannot show that a qualifying institution is administering the arbitration within 30 days of the grant of the interim measure.

One unique feature is that the Arrangement provides that, if the interim measure is sought during an arbitration, application for interim measures are to be submitted to the appropriate mainland Chinese Court (i.e. the Intermediate People’s Court where the assets, evidence or the respondent is located) through the institution administering the arbitration. However, the Supreme People’s Court has issued a memorandum recognizing that such a procedure would not be conducive to the urgent nature of interim measures applications. Hence, parties to Hong Kong seated arbitration should be allowed to file their applications directly to the Mainland Chinese court and...
let the Mainland Chinese court confirm the authenticity of the application with the relevant institution.

As of December 2019, the HKIAC has received eleven applications and at least four of the applications for preservation of assets have already been granted.

**Anti-suit injunctions**

In 2019, we have seen a handful of applications made to the Hong Kong Court for anti-suit injunctions based on breaches of arbitration clauses. In *Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian* [2019] HKCFI 482, an anti-suit injunction was granted to restraint proceedings commenced in the Shenzhen Qianhai Cooperation Zone People’s Court. In this case, the Hong Kong Court granted the injunction even though the Qianhai Court had rejected an earlier jurisdictional challenge. The Court further noted that it will not recognize and enforce a foreign judgment made in breach of a dispute resolution agreement pursuant to section 3 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance (Cap 46).

In *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] HKCFI 530; [2019] HKCFI 2983, an anti-suit injunction was granted to restraint proceedings commenced in Shandong, China. In this case, it was held that the scope of an arbitration agreement which was expressed to be made by “a party and its affiliates” can cover any disputes arising from the agreement which involves the party’s affiliates even if the affiliates concerned had not signed the agreement. The Court has further confirmed its jurisdiction to grant anti-suit injunction even if the arbitration tribunal is still deciding on applications to join the parties in arbitration.

In *AIG Insurance Hong Kong Limited v Lynn McCullough and William McCullough* [2019] HKCFI 1649, an anti-suit injunction was granted to restraint proceedings commenced in the US District Court for the Southern District of Florida, Miami Division. It was held that if a foreign proceeding was in substance a claim to enforce a party’s obligations under a contract, the party to the contract had the right to prevent a claim pursued against it pursued otherwise than by the contractually agreed mode no matter whether the enforcing party is a party to the arbitration agreement in the contract or not.

In *GM1 v KC* [2019] HKCFI 2793, an anti-suit injunction was granted to restraint proceedings commenced in Suzhou, China. In this case, it was held that the fact that (i) the foreign court may insist on its own jurisdiction; (ii) it may not be possible to discontinue or withdraw the foreign proceedings after it has been accepted; and (iii) the arbitration clause is subject to disputes were not grounds to refuse an anti-suit injunction.

These cases all reaffirmed the robust pro-arbitration approach adopted by the Hong Kong Court and the principle that for cases between parties to an arbitration agreement, an anti-suit injunction will ordinarily be granted to restrain a party from suing in a non-contractual forum unless there are strong reasons to the contrary.

**Arbitration Clauses in Winding-up Proceedings**


In *Lasmos*, previous authorities were substantially departed from and it was held that, save for exceptional cases, a creditor’s winding-up petition should “generally be dismissed” where three requirements are met:

1. If a company disputes the debt relied on by the petitioner;
2. The contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and
3. The company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affirmation according to the winding up rules.

Before *Lasmos*, the debtor had to show that the petitioning debt was bona fide disputed on substantial grounds to dismiss an insolvency petition. The effect of this new approach is that the company is entitled to have the petition dismissed where there is an arbitration clause as long as the three requirements are met.
In both *But Ka Chon* and *Sit Kwong Lam*, the Court of Appeal did not find it appropriate to decide whether the Lasmos approach is correct because the debtor had not taken any steps to commence arbitration and the third requirement under the *Lasmos* approach was therefore not met. In *Sit Kwong Lam*, the Court also found that the arbitration agreement had not been incorporated in the contract in dispute.

However, the Court of Appeal expressed reservations on the *Lasmos* approach in both judgments:

In *But Ka Chon*, the Court observed that:

1. The jurisdiction of the court to order a stay is founded on the discretion of the court and therefore it is questionable whether a firm rule to exercise the discretion in one way would be right and consistent with the legislative intent.
2. The Eastern Caribbean Court of Appeal had already declined to adopt the same approach followed in *Lasmos* and it is doubtful whether it is sufficient to show only that the debt was not admitted instead of a bona fide dispute on substantial ground.

In *Sit Kwong Lam*, to prevent opportunistic attempts to invoke the *Lasmos* approach in the future, the Court emphasized that it was not necessary to commence arbitration for the Court to dismiss of stay a winding-up petition – all that was required of the debtor was that they had taken the steps required under the arbitration clause to commence the process of arbitration. However, the genuine intention to arbitrate must be demonstrated in a filed affirmation.

**Third Party Funding**

On 1 February 2019, the key provisions (save for those related to third party funding of mediation) of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 permitting third party funding in arbitration in Hong Kong came into full operation.

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