Bridging an Access-to-Justice Gap for International Commercial Dispute Resolution: Recent Developments of Interim Measures in Cross-Border Chinese Arbitration

RAYMOND GAO*

As interim measures in international arbitration have gained prominence in recent decades, the arbitral authority to issue these remedies has been met with increasingly widespread acceptance across different jurisdictions. Legal scholarship on the issue has proliferated over time, yet little ink has been spilled on arbitrator-issued interim measures under Chinese law. With a focus on recent developments, this Article aims to make three contributions. First, from a comparative perspective, it provides a systematic review of arbitral interim measures under Chinese law. In particular, by detailing the institutional constraints Chinese law imposes, this Article demonstrates the practical dilemma of "binding-yet-unenforceable" arbitrator-issued interim measures. Second, this Article analyzes whether a party to a Mainland China-seated arbitration should seek enforcement of arbitral interim measures or instead directly apply to Hong Kong courts for interim measures. As demonstrated in two recent high-profile cases, this avenue may sidestep institutional constraints under Chinese law and expand the under-exploited role for arbitral interim measures in Chinese arbitration, to the extent that enforcement is sought in Hong Kong. Third, against the Mainland's previous default rules of "no-enforceable-

* Ph.D. Candidate and Research Officer, School of Regulation and Global Governance, Australian National University; LLM in International Legal Studies, New York University School of Law. The author would like to thank the editorial team of the *Columbia Journal of Transnational Law* for their insightful comments and valuable contribution to the editing process. Email: rayyagao@gmail.com.

interim-measures" for offshore arbitrations, this Article reviews an important recent institutional innovation that now permits a party in an eligible Hong Kong arbitration to obtain preservation measures from Mainland courts. This change may normalize practice as a manifestation of inter-regional judicial assistance in support of international commercial arbitration. Capable of constructing a new normal for various stakeholders and practitioners alike, these recent developments are instrumental in bridging the access-to-justice gap for cross-border Chinese arbitrations.

INTRODUCTION

Commonly wielded by contemporary courts across different jurisdictions, interim measures have long been hailed as a strategically important legal remedy to ensuring access to justice.[1] The judicial competence to grant provisional relief often proves indispensable in preventing a party to a dispute from taking actions that could have substantially undermined or vitiated the other party's legal rights. Notably, interim measures serve to ensure that a party's substantive claim is not rendered meaningless as a result of a recalcitrant party's evasion of its obligations during or before the commencement of proceedings.[2] This protective capacity explains why interim measures

1. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978) (describing interim measures, in the form of injunctions, as "the most striking remedy wielded by contemporary courts").

2. Charles N. Brower & W. Michael Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 AM. J. INT'L L. 24, 24 (1986); Chester Brown, *The*

have become one of "those general principles of law common to all legal systems."[3]

With the sharp rise of international arbitration as an alternative to national courts in resolving transnational commercial disputes,[4] international arbitral rules have strengthened the capacity of arbitral tribunals to issue interim measures.[5] In parallel, a growing number of jurisdictions have recognized the arbitral authority to grant interim measures—either through domestic statutes, case law, or other sources of law.[6] Nevertheless, the general consensus on the importance of such an arbitral remedy has not dispelled controversies over the extent and conditions of its availability across various coun-

Inherent Powers of International Courts and Tribunals, 76 BRIT. Y.B. INT'L. L. 195, 195 (2005); Dan Sarooshi, *Provisional Measures and Investment Treaty Arbitration*, 29 ARB. INT'L 361, 361–62 (2013).

3. Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 RECUEIL DES COURS 9, 23 (1992).

4. *See* Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 778 (2002); Tatyana V. Slipachuk & Per Runeland, *Kiev: From Zero to 800 Cases per Year in Less Than 10 Years*, 11 AM. REV. INT'L ARB. 585, 585–86 (2000).

5. *See* U.N. Comm'n Int'l Trade L., UNCITRAL Arbitration Rules (as revised in 2010), art. 26 (Apr. 2011) [hereinafter UNCITRAL Arbitration Rules 2010] [https://perma.cc/2EU2-AAE3]; Int'l Chamber Com., 2021 Arbitration Rules, art. 28 (effective Jan. 1, 2021) [hereinafter ICC Rules] [https://perma.cc/R4X9-8JYL]; Arb. Inst. Stockholm Chamber Com., Arbitration Rules, art. 37 (Jan. 1, 2017) [hereinafter SCC Rules] [https://perma.cc/7HRK-LA94]; London Ct. of Int'l Arb., Arbitration Rules, art. 25 (Oct. 1, 2020) [hereinafter LCIA Rules] [https://perma.cc/89W6-WZUQ]; Sing. Int'l Arb. Ctr., Arbitration Rules of the Singapore International Arbitration Centre, rule 30 (Aug. 1, 2016) [hereinafter SIAC Rules] [https://perma.cc/PL4C-8PHM]; H.K. Int'l Arb. Ctr., Administered Arbitration Rules 2018, art. 23 (effective Nov. 1, 2018) [hereinafter HKIAC Rules] [https://perma.cc/9N7U-E47M].

6. *See, e.g.*, U.N. Comm'n Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006, art. 17 H (2008) [hereinafter UNCITRAL Model Law 2006]. With article 17 dedicated to arbitral interim measures in international commercial arbitration, UNCITRAL Model Law 2006 has been adopted by Australia, Belgium, New Zealand, Ireland, Slovenia, South Africa, Mauritius, Mexico, Peru, Costa Rica, the Canadian provinces of Ontario and British Columbia, and the U.S. state of Florida, among others. For a complete list of jurisdictions that have adopted UNCITRAL Model Law 2006, see U.N. Comm'n Int'l Trade L., *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006* [https://perma.cc/5Y3S-6DVG]. *See also* Tijana Kojović, *Court Enforcement of Arbitral Decisions on Provisional Relief: How Final is Provisional?*, 18(5) J. INT'L ARB. 511, 511 (2001) (noting that countries like France and the United States have recognized the arbitral authority to order provisional measures through jurisprudence, where their respective national arbitration laws "stop short of an express recognition").

tries.[7] Rather, jurisdictions have approached the issue differently, manifesting distinct practices on arbitral interim measures. At the core, the controversies at issue generally focus on certain fundamental issues, including: (1) the types of interim measures available in a given jurisdiction; (2) the jurisdiction's capacity to grant interim measures and the legal and institutional restraints thereof; (3) substantive conditions governing the issuance of interim measures; and (4) compliance with interim measures, particularly the state court enforcement of arbitrator-issued interim measures.[8]

While scholars have examined interim measures in international commercial arbitration,[9] existing literature has yet to systematically explore the legal status of arbitral interim measures under Chinese law.[10] Furthermore, scant attention has been accorded to cross-border judicial assistance in support of Chinese arbitrations and the interaction between Chinese courts and an offshore arbitration.

---

7. *See* Aceris Law LLC, *Interim Measures in International Arbitration: A Need for Irreparable Harm?* (May 10, 2019) [https://perma.cc/V3KF-QFTP] (describing the lack of uniform standards in international arbitration for issuing interim measures and the controversies surrounding the criteria laid out by article 17A of UNCITRAL Model Law 2006); Stephen Benz, Note, *Strengthening Interim Measures in International Arbitration*, 50 GEO. J. INT'L L. 143, 146–47 (2018) (criticizing the low standards applied by arbitral tribunals for issuing interim measures relative to national courts, and highlighting the lack of harmonization in enforcing arbitral interim measures across different national courts of Germany, the United States, and the United Kingdom). *See also* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2466 n.231 (2014) (criticizing article 17A of UNCITRAL Model Law 2006: "Among other things, Article 17A apparently makes no provision for parties' agreements on the standards of proof, omits any reference to urgency, unduly focuses 'irreparable' harm on monetary damages (as distinguished from non-monetary relief), imposes a single standard for different types of interim relief and omits reference to security for costs."); Campbell McLachlan, *The Continuing Controversy over Provisional Measures in International Disputes*, 7 INT'L L. F. DU DROIT INT'L 5, 6 (2005).

8. *See* McLachlan, *supra* note 7, at 6.

9. Stephen M. Ferguson, *Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results*, 12 INT'L TRADE L.J. 55, 55 (2003); BORN, *supra* note 7, at 2462; Jan K. Schaefer, *New Solutions for Interim Measures of Protection in International Commercial Arbitration: English, German and Hong Kong Law Compared*, 2 ELEC. J. COMP. L. pt. 1 (1998) [https://perma.cc/45RH-LKZP]; William Wang, *International Arbitration: The Need for Uniform Interim Measures of Relief*, 28 BROOK. J. INT'L L. 1059, 1061 (2003); Gregoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 123–24 (1999).

10. To avoid possible confusion, "interim measures," "provisional measures," "provisional relief," "preservation measures," and "preservatory measures" are used interchangeably throughout this Article.

Aiming to fill this gap, this Article focuses on arbitral interim measures under the legal framework of the People's Republic of China (the "PRC," "Mainland China," or "Mainland").[11] Specifically, it parses recent developments in arbitral and judicial decisions, and evaluates institutional mechanisms for cross-border Chinese arbitrations. This Article explores three questions. The first concerns the status quo of interim measures in aid of commercial arbitration under Chinese law. This Article identifies the distinguishing features of provisional relief in Chinese commercial arbitration. It also addresses the legal status and relevant institutional restraints of arbitrator-issued interim measures under Chinese law. While existing PRC law has established an almost exclusive jurisdiction for Chinese courts in ordering interim measures to facilitate Mainland-seated arbitrations, the recently revised arbitral rules of major Mainland arbitration institutions have conferred authority on arbitrators to also issue provisional relief, apparently altering the status quo.[12] Nevertheless, since PRC law has yet to recognize its *enforceability*, arbitrator-granted provisional relief thus far has been mired in a "*binding-yet-unenforceable*" legal quandary. Consequently, under Chinese law, the arbitral competence to grant provisional relief is far from complete. Indeed, it remains highly constrained, with arbitral interim measures still rare in practice.

Second, this Article considers the possibility for arbitral parties to opt out of default rules by strategically seeking the judicial assistance of an offshore forum in aid of a Mainland-seated arbitration. This maneuver is far from theoretical and has, in fact, materialized in two recent judicial decisions in Hong Kong.[13] One concerns the en-

11. Under public international law, the People's Republic of China (the "PRC") is a sovereign state exercising jurisdiction over the Mainland China (the Mainland), Hong Kong, and beyond. In the interest of clarity and brevity, throughout this Article, the "PRC" or "China" refers to the Mainland, the "PRC law" or "Chinese law" means the applicable law of the Mainland (which does not apply to Hong Kong), "Chinese courts" refers to the Mainland judiciary, and "Chinese arbitrations" means arbitral proceedings seated in the Mainland and administered by Mainland arbitration institutions. *See* Joint Declaration on the Question of Hong Kong, China-U.K., arts. 1–3, Dec. 19, 1984, 1399 U.N.T.S. 61.

12. *See, e.g.*, Justin D'Agostino, *Key Changes to the CIETAC Arbitration Rules*, KLUWER ARB. BLOG (Apr. 11, 2012) [https://perma.cc/ZR8D-9CLX]; Sammy Fang, *China: New CIETAC Rules Give Tribunal Power to Determine Interim Measures*, DLA PIPER INT'L ARB. NEWSL. (Mar. 27, 2012) [https://perma.cc/VLL9-ACPW].

13. Under the "One Country, Two System" constitutional principle, Mainland China and Hong Kong are two distinct jurisdictions in many important aspects. Heavily steeped in the common law tradition thanks to its British colonial heritage, Hong Kong's legal system is substantially different from that of the Mainland. *See* THE BASIC LAW OF THE HONG KONG

forcement of interim measures issued by an emergency arbitrator appointed by the Beijing Arbitration Commission (the "BAC"). The other decision involves the court's grant of interim measures to assist an arbitral proceeding administered by the China International Economic and Trade Arbitration Commission (the "CIETAC"). These decisions demonstrate that parties to Mainland-seated arbitrations have the ability to obtain provisional relief in Hong Kong courts, offering an additional route for securing the fruits of the arbitration process.

Third, this Article discusses whether a party to an offshore arbitration could apply for court-ordered interim measures from the Mainland judiciary. Given the silence of the PRC law on this matter, the answer has long been negative. However, this is no longer the case due to a recent institutional innovation: the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (the "Arrangement").[14] This bilateral instrument may normalize a new practice according to which Mainland courts order provisional relief in aid of eligible Hong Kong arbitral proceedings, thereby helping to bridge an access-to-justice gap for cross-border dispute resolution.

This Article proceeds in five parts. Part I provides a brief introduction of arbitrator-issued interim measures in international commercial arbitration, highlighting the policy rationales and modern practice behind this relief. Next, Part II focuses on interim measures in aid of arbitral proceedings under the Mainland legal framework. Then, Part III analyzes a notable exception to the default framework, which allows Hong Kong courts to enforce or order interim measures to assist a Mainland-seated arbitral proceeding. Further, Part IV reviews the prospects for a Hong Kong arbitration to seek interim measures from Mainland courts. Finally, Part V summarizes and draws concluding remarks.

I. ARBITRATOR-GRANTED INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION

This Part briefly surveys arbitrator-issued interim measures in aid of international commercial arbitration. Section A provides an overview of interim measures in international commercial arbitration,

---

SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA [CONSTITUTION], Mar. 17, 2008, art. 2 [https://perma.cc/4NEB-9PKR].

14. *See infra* Part IV.

with a focus on the normative grounds and policy rationales underlying arbitral provisional relief. Section B then compares arbitrator-granted interim measures with court-ordered interim measures, illustrating policy implications through a comparative perspective. Finally, Section C reviews emergency arbitration procedure and associated rationales and problems.

A. Arbitral Interim Measures: Definition and Rationales

Interim measures include various forms of temporary preservative remedies granted to safeguard the rights of a disputing party against adverse influence, prejudice, or disadvantage until an arbitral tribunal renders a final award.[15] A party may find it essential to seek the protection during the pendency, or even prior to the commencement, of proceedings. Therefore, international arbitral institutions have empowered arbitral tribunals to grant binding interim measures.[16] Some arbitral rules also allow an emergency arbitrator to grant interim measures prior to the constitution of an arbitral tribunal.[17]

The fundamental rationale undergirding interim measures is to adequately preserve parties' rights and legitimate interests pending final resolution of the dispute.[18] There is sometimes a concern that one party may evade its obligations during or before the arbitration, causing the other to suffer an imminent and irreparable harm.[19] Such evasive moves include tampering with evidence material to the outcome of the dispute, transferring key assets, or disposing of the subject matter of the dispute in anticipation of an unfavorable arbitral

15. UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, 42, U.N. Doc. A/CN.9/264 (Mar. 25, 1985); ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 4 (2005); Ferguson, *supra* note 9, at 55.

16. *See* sources cited *supra* note 5.

17. *See infra* Section I.C.

18. Mika Savola, *Interim Measures and Emergency Arbitrator Proceedings*, 23 CROAT. ARB. Y.B. 73, 73 (2016); Schaefer, *supra* note 9, § 3.1.2. The core normative justification underlying interim measures is a corollary of a self-evident legal principle—"justice is not to be evaded"—which has gradually embedded into the general principles of law universal to all legal systems. *See* Neil Andrews, *Fundamental Principles of Civil Procedure: Order Out of Chaos*, *in* CIVIL LITIGATION IN A GLOBALISING WORLD 19, 27 (X.E. Kramer & C.H. van Rhee eds., 1994); *see also* LAWRENCE COLLINS, ESSAYS IN INTERNATIONAL LITIGATION AND THE CONFLICT OF LAWS 10–11 (1994).

19. Savola, *supra* note 18, at 82.

award.[20] Given that international commercial arbitration can be a protracted process,[21] a party facing such prejudice should be able to effectively prevent it from occurring before the proceedings conclude. Primarily focused on maintaining the status quo and preserving the sanctity of the process, provisional measures are indispensable to the efficacy and effectiveness of international arbitration.[22] Further, the use or mere availability of interim measures may facilitate amicable dispute resolution by bolstering the bargaining position of a party in negotiation—thereby compelling the opposing party to settle the dispute.[23]

Given these advantages, interim measures have become increasingly significant in modern arbitration. Today, international arbitration proceedings tend to last longer, involve higher sums (increasing associated contentiousness), and implicate more international and geographically dispersed parties.[24] Moreover, dila-

20. *Id*. at 73.

21. *Id.* at 74–75; *see* Martin Valasek & Jenna Anne de Jong, *Enforceability of Interim Measures and Emergency Arbitrator Decisions*, in NORTON ROSE FULBRIGHT INT'L ARB. REP., May 2018, at 17, 17.

22. McLachlan, *supra* note 7, at 14–15. *See also* Ferguson, *supra* note 9, at 55 (noting that interim measures "have the [e]ffect of compelling parties to behave in a way that is conducive to the success of the proceedings, preserving the rights of the parties, preventing self-help, keeping peace among the parties, and ensuring that an eventual final award can be implemented."); V.V. Veeder, *Provisional and Conservatory Measures*, *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 21, 21 (1999) (arguing that arbitral interim measures can be "at least as, or even more important than, an award," since it could effectively maintain the status quo and restrain a recalcitrant party from thwarting the whole arbitration procedure).

23. Andrea Carlevaris & José Ricardo Feris, *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, 25 ICC INT'L. CT. ARB. BULL. 25, 37 (2014) (noting that "experience suggests also that an emergency arbitrator's order can be a powerful incentive for the parties to settle. Not just the content of the order, but also the mere availability of emergency arbitrator proceedings may contribute to, and even facilitate, the amicable resolution of the dispute.") [https://perma.cc/V7DH-BN3]; GEOFFREY MA & NEIL KAPLAN, ARBITRATION IN HONG KONG: A PRACTICAL GUIDE 346 (2003); Hong Shi & Yanhua Lin, *Comparison of Interim Measures in Arbitration with Preservation in Mainland Courts*, PKULAW (June 2, 2020) [https://perma.cc/7UCZ-VNTZ] (noting that "preservation measures are often akin to 'nuclear weapons' for the parties in the legal arsenal"); Press Release, Teresa Cheng, Sec'y, H.K. Dep't of Just., Interim Measures in Arbitration: Surprise Attack or Offensive Defence? (Mar. 31, 2019) [https://perma.cc/7RQG-HUZ2].

24. The duration of an International Chamber of Commerce (ICC) arbitration proceeding averages one to two years. W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 20–21 (3d ed. 2001); Savola, *supra* note 18, at 96; Kojović, *supra* note 6, at 512.

tory tactics are regularly used during contentious proceedings.[25] These factors all contribute to the growing importance of interim measures.

That said, little consensus exists across different jurisdictions regarding the appropriate use and scope of interim measures.[26] Notwithstanding this disagreement, several key features emerge. With respect to the substantive criteria governing the issuance of interim measures, an applicant party generally needs to demonstrate: (1) the prima facie jurisdiction; (2) a reasonable likelihood of success on the merits; (3) the urgency of the circumstances; (4) a showing of irreparable harm that would occur if the relief sought is not granted; and (5) proportionality or the balance of convenience (i.e., balancing the harm between both parties).[27]

Notably, interim measures are of limited legal effect: provisional relief is binding only upon the parties to the arbitration—meaning that an arbitral tribunal generally lacks power to order interim measures against a third party that is not privy to the arbitration.[28] This is because the powers of an arbitral tribunal to grant interim measures derive from the disputing parties' agreement to arbitrate the dispute and a third party, by definition, is not bound by the arbitration agreement.[29] In addition, interim measures generally may

25. Schaefer, *supra* note 9, pt. 2.

26. Dana Renée Bucy, *How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law*, 25 AM. U. INT'L L. REV 579, 581, 585; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 340–50 (4th ed. 2004). *See also supra* note 7 and accompanying text.

27. *See* UNCITRAL Model Law 2006, *supra* note 6, art. 17. *See also* UNCITRAL Arbitration Rules 2010, *supra* note 5, art. 26(3); Anja Havedal, *SCC Practice Note: Emergency Arbitrator Decisions Rendered 2015-2016*, ARB. INST. STOCKHOLM CHAMBER COM., 17 (2017) [https://perma.cc/622N-65JV].

28. JEAN-FRANÇOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 605, 615 (2007).

29. *See* BORN, *supra* note 7, at 2446. Born argues that:

> [A]n arbitral tribunal would have the power to order a party to take steps vis-à-vis third parties to prevent or accomplish specified actions. For example, a corporate entity could be ordered to direct its subsidiary to take certain steps (e.g., return or preserve specified property, deliver or safeguard funds). Such orders test the limits of arbitral powers, but, in appropriate cases, where necessary to accomplish justice, a tribunal has the authority to issue them.

Id.

not exceed the final relief sought,[30] are of temporary effect, and may be subsequently altered or modified by the arbitral tribunal.[31]

Interim measures can be grouped into three categories, which sometimes overlap.[32] Measures in the first category are meant to facilitate the conduct of arbitral proceedings.[33] Measures in the second generally endeavor to maintain or restore the status quo pending the final determination of the issues in dispute,[34] thereby avoiding or minimizing current or imminent loss, damage, or prejudice.[35] Finally, measures in the third category facilitate the enforcement of future arbitral awards or ensure the presence of sufficient assets to satisfy an

30. *See* YESILIRMAK, *supra* note 15, at 7.

31. *See, e.g.*, SIAC Rules, *supra* note 5, at 14 (r. 26.1); *see Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, *in* ICSID CONVENTION, REGULATIONS, AND RULES 99, 117 (r. 39) (2003). *See also* U.N. Comm'n Int'l Trade L., *Possible Future Work in the Area of International Commercial Arbitration*, ¶ 116, U.N. Doc. A/CN.9/460 (Apr. 6, 1999) [hereinafter *Possible Future Work*] ("An interim measure may be imposed for the duration of the arbitration or it may be of a more temporary nature and expected to be modified as matters evolve.").

32. *See* U.N. Comm'n Int'l Trade L., *Settlement of Commercial Disputes: Preparation of Uniform Provisions on Interim Measures of Protection*, ¶ 16, U.N. Doc. A/CN.9/WG.II/WP.119 (Jan. 30, 2002); *see* UNCITRAL Model Law 2006, *supra* note 6, art. 17(2).

33. These measures typically include: (1) orders requiring the preservation or collection of evidence relevant to the outcome of the dispute; (2) orders providing for the inspection of particular goods, assets, property, site, or documents; (3) orders restraining a party from bringing legal proceedings with respect to a given cause of action, in breach of the parties' arbitration agreement (i.e., arbitral anti-suit injunctions), and (4) orders forbidding public disclosure in breach of confidentiality obligations. *See* Savola, *supra* note 18, at 77; BORN, *supra* note 7, at 2488–91, 2501–03; YESILIRMAK, *supra* note 15, at 207, 211–12; JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 595–96 (2003).

34. For a discussion of the fluid nature of the concept "status quo," see *Safe Kids in Daily Supervision Ltd. v McNeill* [2010] NZHC 605 at [¶¶ 23–26] (N.Z.).

35. Common examples include orders restraining parties from disposing the subject matter of the dispute, orders directing parties to deposit their shares at issue in a trust, orders for the sale of perishable goods and placing the proceeds in an escrow account, orders requiring a party to continue its performance of a contract, orders suspending the use of disputed patents and trademarks, orders suspending the legal effect of a corporate resolution, and orders prohibiting certain activities that are likely to aggravate parties' position pending the dispute resolution. *See* U.N. Comm'n Int'l Trade L., *Settlement of Commercial Disputes: Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement*, ¶ 63, U.N. Doc. A/CN.9/WG.II/WP.108 (Jan. 14, 2000); *see also* McLachlan, *supra* note 7, at 6; Savola, *supra* note 18, at 77–78; BORN, *supra* note 7, at 2488–91, 2501–03; YESILIRMAK, *supra* note 15, at 207, 211–12; LEW ET AL., *supra* note 33, at 595–96.

award.[36] Commonly known as freezing orders or *Mareva* injunctions,[37] these measures aim to ensure that the prevailing party's substantive claim is not made nugatory or meaningless—such that it turns out to be a pyrrhic victory—due to the adverse party's deliberate dissipation of assets, which could substantially deteriorate its financial condition.[38]

B. The Arbitral Authority to Grant Interim Measures

Historically, the power to grant interim measures in aid of arbitration was held exclusively by state courts.[39] This is not surprising, given that the prevalence of international commercial arbitration is a modern phenomenon.[40] However, over the last decades, arbitral tribunals have increasingly been recognized as having concurrent jurisdiction to grant interim measures.[41]

Admittedly, court-ordered interim measures enjoy certain advantages and may be more appropriate in some contexts. Most notably, court-ordered interim measures are directly enforceable, while arbitral tribunals generally lack both executory authority outside the confines of the arbitral process and coercive means to enforce an arbitral decision against an adverse party. Therefore, compared to the situation where a party to an arbitral proceeding requests a court enforce an arbitral interim measure issued in another forum, directly

36. Press Release, Cheng, *supra* note 23; Savola, *supra* note 18, at 78.

37. *Mareva* injunctions are orders that freeze the defendant's assets from dissipating in the jurisdiction concerned. *See* Mareva Campania Naviera S.A. v. Int'l Bulkcarriers S.A. [1980] 1 All ER 213 at 213 (Eng. C.A.).

38. Broadly speaking, this relief encompasses security for claims and security for costs. Typical examples include: (1) orders restraining a party from disposing of the object at issue; (2) orders preventing dissipation or transferal of assets; (3) orders requiring a party to provide a bank guarantee with the applicant; (4) orders for a separation of a certain money to secure payment of claimant's monetary claim for fear of the respondent's imminent insolvency; and (5) orders for security to cover arbitration costs and legal fees. *See* BORN, *supra* note 7, at 2492–97; Press Release, Cheng, *supra* note 23; LEW ET AL., *supra* note 33, at 597–602; YESILIRMAK, *supra* note 15, at 213–18.

39. CHARTERED INST. ARBS., INTERNATIONAL ARBITRATION PRACTICE GUIDELINE—APPLICATIONS FOR INTERIM MEASURES 1 (2015) [https://perma.cc/MT2X-KKES].

40. Wang, *supra* note 9, at 1059 (describing the recent rapid expansion of use of international commercial arbitration since the post-World War II era).

41. Savola, *supra* note 18, at 74; Benz, *supra* note 7, at 145 (mentioning the recent trend of international arbitral institutions augmenting tribunals' authority to issue interim measures and that "[i]n the late 1990s and early 2000s, more and more participants in international arbitration looked to arbitral tribunals to issue interim measures . . . .").

applying for court-ordered interim measures may improve the procedural economy of the overall process.[42] And at the very least, court-ordered provisional relief provides an important default option for dispute resolution in general.

On the other hand, court-ordered interim measures are subject to the inherent limitations of judicial proceedings, making them unsuitable for some disputes. In general terms, court proceedings are often a long process fraught with uncertainty and unpredictability: judges and juries may not possess sufficient commercial expertise; parties may doubt the impartiality, independence, or competence of a particular jurisdiction's judiciary (or just hope to avoid the burdensome or unfavorable procedural features of a given court); and court proceedings may destroy the matter's confidentiality.[43] As a result, relying on court-ordered interim measures may undermine the very reasons that drive parties to choose arbitration in the first place.

In addition to the concerns outlined above, when it comes to international arbitration, litigating the matter of interim measures in a foreign court can engender significant costs and risks. Because international arbitration is increasingly conducted in a neutral jurisdiction with little or no connection to the subject-matter of the dispute, the courts may lack effective jurisdiction over the parties or the assets concerned, requiring parties to request interim measures from a court in another jurisdiction.[44] It is common for parties to "frown upon the imposition of foreign state court procedures, [the] need for translation and [the] use of a foreign language, as well as the need to retain a local counsel."[45] In addition, such a judicial proceeding may be lengthy and uncertain—given that the court that reviews the case from scratch may solicit detailed arguments from the parties, and its decision might be appealed.[46] All of these factors inevitably increase the overall costs and risks of the dispute resolution process.

Arbitral interim measures address many of these concerns. Through their consent to the arbitration agreement, the parties can se-

42. Donald Francis Donovan, *The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal*, *in* NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 203 (Albert Jan van den Berg ed., 2005); Ronald Wong, *Interim Relief in Aid of International Commercial Arbitration: A Critique on the International Arbitration Act*, 24 SING. ACAD. L.J. 499, 502 (2012).

43. Savola, *supra* note 18, at 74.

44. *Possible Future Work*, *supra* note 31, ¶ 119.

45. Savola, *supra* note 18, at 74.

46. Wong, *supra* note 42, at 502.

lect a set of procedures and rules commonly used in resolving transnational disputes, choose an international language, and engage competent legal counsel that could not have litigated before local courts. Besides, an experienced arbitral tribunal that is already familiar with the case may more quickly make a decision that is binding and non-appealable, thereby achieving greater efficiency and certainty for the overall process.[47]

In cross-border dispute resolution where multiple jurisdictions are involved, the arbitral seat—the place of the arbitration—is not necessarily the place of enforcement. Strategically, in this context, having a single tribunal experienced at arbitrating similar disputes adjudicate interim measures often proves preferable to other alternatives. This transnational approach helps avoid the need to bring parallel proceedings to numerous state courts with overlapping jurisdictions, which may result in incoherent and contradictory decisions.[48] Moreover, compared with those ordered by a local court, interim measures granted by an international arbitral tribunal are more likely to be recognized and enforced by the judiciary of another country—not only in the jurisdictions that have adopted the UNCITRAL Model Law 2006, but even in some countries that have not.[49] In addition, to the extent that the arbitral decision needs to be enforced in a particular jurisdiction other than the arbitration seat, resorting to arbitrator-issued interim measures could enable a party to access the types of

47. *Id.*; *Possible Future Work*, *supra* note 31, ¶ 120 ("It is therefore argued that resources would be used more efficiently if parties were able to make their requests for enforceable interim measures directly to the arbitral tribunal, rather than to the court, as the tribunal is already familiar with the case and is usually more technically apprised of the subject-matter.").

48. Savola, *supra* note 18, at 74.

49. *See* UNCITRAL Model Law 2006, *supra* note 6, art. 17(H)(1) ("An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, *irrespective of the country in which it was issued*, subject to the provisions of article [17(I)]") (emphasis added). Furthermore, under article 17(I), recognition or enforcement of an arbitral interim measure may be refused only for one of the enumerated reasons, and not based on substantive grounds. *Id.* art. 17(I). *See also* James E. Castello & Rami Chahine, *Enforcement of Interim Measures*, *in* THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS 100, 107 (J William Rowley QC et al. eds., 2019) (mentioning that the impact of the UNCITRAL Model Law 2006 may extend beyond the thirty plus states that adopted the revisions regarding enforceability of arbitral interim measures and detailing a recent trend among some national courts toward broader recognition and enforcement of interim measures issued by foreign arbitral tribunals, even absent an express statutory provision to that effect). In contrast, for court-ordered interim measures from another jurisdiction, no equivalent dynamics exist.

provisional relief available in international arbitration—beyond the confines of the national law of the arbitral seat on the issue—thereby offering an additional tool of legal redress. In this way, the overall efficiency and effectiveness of the arbitration process could be improved.

However, the comparative advantages of arbitral interim measures do not necessarily mean that arbitral provisional relief could readily *replace* court-ordered interim measures in all jurisdictions and circumstances. Admittedly, arbitrator-granted provisional relief is subject to its own limitations, most notably the lack of enforceability in some jurisdictions (as discussed in Part II). And in many instances, arbitral interim measures and court-ordered provisional relief are not mutually exclusive, but rather co-existent and mutually reinforcing. However, the discussion above reveals an important and even indispensable role that arbitral interim measures could play in *supplementing* court-ordered interim measures in resolving disputes. Moreover, given its unique advantages,[50] it is not uncommon for arbitral provisional measures to provide the applicant with a better and more efficient legal remedy than court-ordered interim measures.[51] For instance, if two disputing parties agree to arbitrate in country A but enforcement needs to take place in country B, the arbitral tribunal may order interim measures that are not available to courts in country A. Such measures may better suit the claimant's needs—such as a *Mareva* type injunction against the respondent's assets located in country B or an order restraining the respondent from transferring its disputed shares of a company listed in country B. These arbitral provisional measures may be more effective in securing the fruits of the pending arbitral proceeding, provided that the parties will comply with them or the court in country B would enforce them.

Recognizing the important advantages that arbitrator-granted interim measures provide in the effective and efficient resolution of cross-border commercial disputes,[52] the arbitral rules of many prominent international arbitral institutions expressly endow arbitral tribunals with the ability to issue provisional relief.[53] Moreover, many jurisdictions have modernized their domestic laws, recognizing arbitral

50. *See supra* notes 47–49 and accompanying text.

51. Savola, *supra* note 18, at 89; *Possible Future Work*, *supra* note 31, ¶ 120.

52. Savola, *supra* note 18, at 73–74; Valasek & Jong, *supra* note 21, at 17.

53. *See, e.g.*, UNCITRAL Arbitration Rules 2010, *supra* note 5, art. 26; ICC Rules, *supra* note 5, art. 28; SCC Rules, *supra* note 5, art. 37; LCIA Rules, *supra* note 5, art. 25; SIAC Rules, *supra* note 5, r. 30; HKIAC Rules, *supra* note 5, art. 23.

authority to grant interim measures and ensuring the enforceability of such orders.[54] To date, the majority trend is to recognize that arbitral tribunals enjoy a *concurrent* jurisdiction with state courts to grant interim measures in commercial arbitration.[55] However, there are still a few jurisdictions, including the Mainland, which uphold the *exclusive* competence of state courts to order provisional relief as a matter of law.[56]

C. Interim Measures Granted by an Emergency Arbitrator

An inherent limitation to arbitrator-granted interim measures is the inability of an arbitral tribunal to order relief before it is properly constituted.[57] In the context of international disputes, the formation of a three-person arbitral tribunal may take many weeks, if not months—particularly if one party is highly uncooperative or consistently raises challenges to the nominated arbitrators.[58] In extreme cases, a recalcitrant party may strategically take advantage of this initial procedural void to dissipate its assets, such that it becomes "judgment-proof," undermining the arbitral tribunal's ability to provide an effective remedy at a later stage.[59] To fill this gap, the arbitral rules of many major arbitration institutions provide for emergency arbitrator procedures.[60] Generally, an arbitration institution swiftly appoints an emergency arbitrator upon request; and the appointed emergency arbitrator is vested with the power to grant emergency relief if appropriate or necessary based on the circumstances.[61]

Compared to interim relief granted by an arbitral tribunal, such emergency relief may encounter greater uncertainties when seeking enforcement from courts.[62] Two interrelated issues are par-

54. *See* UNCITRAL Model Law 2006, *supra* note 6, art. 17.

55. Savola, *supra* note 18, at 74.

56. INTERIM MEASURES IN INTERNATIONAL ARBITRATION 169, 215–16, 438, 447–50 (Lawrence W. Newman & Colin Ong eds., 2014).

57. Savola, *supra* note 18, at 74–75.

58. *Id.*; Valasek & Jong, *supra* note 21, at 17.

59. Savola, *supra* note 18, at 74–75; Valasek & Jong, *supra* note 21, at 17.

60. *See, e.g.*, ICC Rules, *supra* note 5, art. 29; SCC Rules, *supra* note 5, app. II; LCIA Rules, *supra* note 5, art. 9(B).

61. *See, e.g.*, ICC Rules, *supra* note 5, art. 29; SCC Rules, *supra* note 5, app. II; LCIA Rules, *supra* note 5, art. 9(B).

62. Savola, *supra* note 18, at 93 (mentioning that, except for a few limited exceptions, most national laws are silent on the enforceability of emergency arbitrator decisions, such

ticularly troublesome. The first pertains to whether an emergency arbitrator qualifies as an "arbitrator" or whether an emergency arbitrator decision constitutes an "award." The second concerns the enforceability of emergency interim relief under the applicable national laws by the courts of the state.

The first issue stems from the fact that two influential instruments addressing enforcement in international commercial arbitration—the New York Convention and the UNCITRAL Model Law 2006[63]—do not provide a clear definition of the terms "arbitral award" and "arbitral tribunal." This creates uncertainty as to how national courts must deal with a decision of an emergency arbitrator pursuant to the underlying arbitral rules.[64]

The New York Convention is silent on the enforceability of arbitral interim measures. Its rules only apply to "arbitral awards"—to the apparent exclusion of interlocutory or procedural orders from the scope of its application.[65] Further, across many jurisdictions, an "award" is generally considered to be something with "final" legal effect, particularly given that the New York Convention provides that the court of the jurisdiction where enforcement is sought may resist enforcement of an award on the ground that it is not yet "binding."[66] However, based on the arbitral rules, emergency rulings are generally temporary and binding only in the interim, because they expire after a certain period of time by default or because

---

that it may be difficult for such measures to be enforced by courts); Valasek & Jong, *supra* note 21, at 18 (describing the uncertainties on the status of an "emergency arbitrator" and emergency arbitral relief under article 17 of the UNCITRAL Model Law 2006).

63. Valasek & Jong, *supra* note 21, at 18 ("In international commercial arbitration, the key enforcement mechanisms are the . . . New York Convention . . . and the applicable domestic arbitration laws, many of which are based on the UNCITRAL Model Law . . . .").

64. Baruch Baigel, *The Emergency Arbitrator Procedure Under the 2012 ICC Rules: A Juridical Analysis*, 31 J. INT'L. ARB. 1, 6, 8 (2014).

65. *See* Valasek & Jong, *supra* note 21, at 18; Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. I, V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; *see also* Savola, *supra* note 18, at 94 ("[T]he fact that many emergency arbitrator rules grant the emergency arbitrator the power to 'award' interim measures is unlikely, in and of itself, to add to their enforceability, because parties are not free to define what an 'award' is; this obviously extends to any provisions of institutional arbitration rules as well. Rather, it is the various national laws which determine whether or not a provisional measure can take the form of a proper award and be the object of enforcement.").

66. Valasek & Jong, *supra* note 21, at 18. *See* New York Convention, *supra* note 65, at art. V(1)(e) ("Recognition and enforcement of the award may be refused . . . if . . . [t]he award has not yet become *binding* on the parties . . . .") (emphasis added).

the decision may be altered or suspended by a subsequently formed arbitral tribunal (which is typically not bound by such a decision).[67] Therefore, arbitrator-granted emergency relief, with its temporary and interim-binding nature, arguably does not qualify as an "arbitral award" under the New York Convention.[68]

Unlike the New York Convention, the UNCITRAL Model Law (as revised in 2006) explicitly addresses interim measures.[69] It provides that arbitral interim measures—as long as they are not in the form of a preliminary order—shall be recognized as binding and enforceable.[70] Furthermore, the arbitral tribunal may consist of a single arbitrator.[71] But, uncertainty exists as to whether emergency relief is enforceable, because the model statute has not clarified whether an emergency arbitrator may qualify as an "arbitral tribunal" or an "arbitrator."[72] This aside, the fact that the arbitral rules allow a subsequently formed arbitral tribunal to modify or revoke an emergency arbitrator decision seems to suggest a distinction between an arbitral tribunal (or an arbitrator) and an emergency arbitrator.[73] In addition, many jurisdictions have not adopted the 2006 amendments of the UNCITRAL Model Law that oblige state courts to enforce arbitral interim measures, subject to the conditions concerned.[74]

The second issue, again, related to the enforceability of emergency interim relief under national law. The fact that many arbitral rules make emergency arbitrator decisions *binding* upon the parties,[75]

67. *See* Valasek & Jong, *supra* note 21, at 17; Savola, *supra* note 18, at 94.

68. *See* Valasek & Jong, *supra* note 21, at 17; Savola, *supra* note 18, at 94.

69. UNCITRAL Model Law 2006, *supra* note 6, art. 17.

70. *Id.* art. 17(H)(1).

71. *Id.* art. 10(1).

72. *See* Valasek & Jong, *supra* note 21, at 18. Savola, *supra* note 18, at 94.

73. *See* Savola, *supra* note 18, at 94.

74. Valasek & Jong, *supra* note 21, at 18.

75. *See, e.g.*, ICC Rules, *supra* note 5, art. 29 ("The parties undertake to comply with any order made by the emergency arbitrator."); SCC Rules, *supra* note 5, app. II, art. 9(1), (3) ("An emergency decision shall be binding on the parties when rendered… By agreeing to arbitration under the Arbitration Rules, the parties undertake to comply with any emergency decision without delay."); SIAC Rules, *supra* note 5, sched. 1, Emergency Arbitrator ("The parties agree that an order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made, and undertake to carry out the interim order or Award immediately and without delay."); HKIAC Rules, *supra* note 5, sched. 4 ("Any Emergency Decision shall have the same effect as an interim measure granted pursuant to Article 23 of the Rules and shall be binding on the parties when rendered.").

does not automatically translate into *enforceability* in state courts.[76] Depending on the applicable law, the fact that an emergency arbitral decision is *binding* may merely mean that parties are contractually bound by its terms, and that failure to comply entails a contractual obligation to pay damages or provide specific performance—falling short of the full effect of an arbitral award.[77] Further, the fact that many arbitral rules empower an emergency arbitrator to render a decision in the form of an "award" is also not conclusive in and of itself. After all, national law decides whether such an emergency arbitrator "award" is enforceable.[78] The arbitral rules themselves do not.

To date, few national arbitration laws have explicitly recognized the enforceability of emergency arbitrator relief—except for those of Hong Kong and Singapore.[79] Absent express statutory provisions of domestic law, it is up to state courts to determine whether an emergency arbitrator decision is enforceable under national law.[80]

II. INTERIM MEASURES IN AID OF ARBITRAL PROCEEDINGS UNDER CHINESE LAW

This Part analyzes the PRC legal framework governing interim measures in arbitral proceedings and reveals a set of distinctive features. Section A gives an overview of statutory preservation measures under Chinese law. Section B examines Mainland courts' largely exclusive powers to order statutory preservation measures. Next, Section C evaluates the recent revisions of arbitral rules by major Mainland arbitration institutions, establishing a new arbitral power with respect to interim measures, as well as the legal dilemma undercutting their effectiveness in practice. Section D turns to the Mainland judiciary's assistance on interim measures for offshore arbitrations. Finally, Section E summarizes several salient features of China's approach and discusses the structural constraints on arbitral interim measures imposed by PRC law.

---

76. *See* Savola, *supra* note 18, at 93–4; Valasek & Jong, *supra* note 21, at 18.

77. Savola, *supra* note 18, at 95 (citing Jason Fry*, The Emergency Arbitrator–Flawed Fashion or Sensible Solution?*, 7 DISPUTE RESOLUTION INT'L 179, 196 (2013)).

78. *See* Savola, *supra* note 18, at 93–94.

79. *See* Valasek & Jong, *supra* note 21, at 18 ("In actuality, few domestic arbitration laws address the enforceability of emergency arbitrator relief.").

80. *See id*.

A. Statutory Preservation Measures Under Chinese Law

In Mainland China—a jurisdiction that has not adopted the UNCITRAL Model Law—the Arbitration Law and the Civil Procedure Law constitute the backbone of the legal framework governing arbitral proceedings. This legal framework recognizes three types of interim measures that a party may request from a competent court: (1) property preservation; (2) evidence preservation; and (3) conduct preservation.

A judicial order requiring the preservation of property often takes the form of an asset freeze or an attachment of property.[81] Under article 103 of the Civil Procedure Law, Mainland courts may issue an order to preserve the property at issue through seizure, impoundment, a freeze on accounts, or any other means provided by the law.[82] Preservation is limited to property within the scope of the underlying dispute, such as the subject matter of a contract or the payment due under a loan agreement.[83] Property preservation orders are generally similar in nature to *Mareva* injunctions, or freezing orders, used in common law jurisdictions.

Evidence preservation orders are issued to preserve evidence in connection with an underlying proceeding.[84] A court may preserve relevant evidence that is likely to be destroyed or unlikely to be obtained at a later time.[85] Common examples include a judicial order to preserve copyright-infringing computer software located within the respondents' place of business or to maintain closed circuit television videos that captured a breach of contract or a tortious act.[86]

Finally, an order to preserve a party's conduct requires a party to perform a specific act or to refrain from engaging in certain con-

---

81. *See* The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012), art. 100 (China) [https://perma.cc/9ZLU-APRS].

82. *See id.* art. 103; *see* Falk Lichtenstein, *Interim Measures in China*, CMS EXPERT GUIDE TO INTERIM MEASURES § 3.3 (Nov. 29, 2018) [https://perma.cc/HCS2-UPVX].

83. *See* Civil Procedure Law of the People's Republic of China (2012), art. 102; *see also* Lichtenstein, *supra* note 82, § 3.3.

84. *See* Civil Procedure Law of the People's Republic of China (2012), art. 81.

85. *See* Shenqingren Outeke Gongsi, Auduobi Gongsi Shenqing Suqian Zhengju Baoquan An (申请人欧特克公司、奥多比公司申请诉前证据保全案) [Case of Applicant Autodesk Company and Adobe Company's Application for Pre-Litigation Evidence Preservation], Sup. People's Ct. Guiding Case No. 11, Sept. 9, 2015 [https://perma.cc/M2AV-VB2A].

86. *See id.* Case 10(1).

duct.[87] Common examples include judicial orders "prohibiting the respondent from disposing of the subject matter of a contract or forcing the respondent to cease committing a tortious act."[88] In intellectual property disputes, a conduct preservation order may include an order restraining the respondent from infringing upon a party's copyrights, trademarks, or trade secrets.

If broadly construed, an order of conduct preservation may include anti-suit injunctions granted to assist an arbitral proceeding.[89] However, in practice, Mainland courts typically refrain from directly ordering anti-suit injunctions, and instead adopt "an alternative approach to achieve the same goal."[90] Pursuant to article 124(2) of the Civil Procedure Law, when a party brings a proceeding before a court in breach of a written arbitration agreement, the court shall dismiss the claim and notify the plaintiff to apply for arbitration instead.[91]

The requirements for obtaining preservation measures under Mainland law depend on whether an underlying arbitral proceeding has been commenced. To request preservatory measures *after* the commencement of an arbitral proceeding, an applicant must prove the following elements. For property preservation and conduct preservation, the applicant must show that, without preservation measures, the party would suffer loss, damage, or prejudice (either due to the conduct of the opposing party or for other reasons) or that it may be difficult, if not impossible, to enforce a future arbitral award.[92] With respect to evidence preservation, the applicable standard requires that the evidence concerned is likely to be destroyed or lost, or would be difficult to obtain at a later time.[93] In both scenari-

87. *See* Civil Procedure Law of the People's Republic of China (2012), art. 100.

88. *Id.*; Lichtenstein, *supra* note 82, § 3.4.10.

89. *See* Ning Fei, Sheng Chang Wang & Jing Liu, *International Arbitration 2020: China*, *in* INTERNATIONAL ARBITRATION LAWS AND REGULATIONS 2020 (Joe Tirado ed., 2020) [https://perma.cc/936f-brmp] (commenting that "at least at a theoretical level, the Chinese court may order anti-suit injunctions in aid of international arbitration, or . . . domestic litigation").

90. *Id.*

91. *See id.*; *see* Civil Procedure Law of the People's Republic of China (2012), art. 124(2).

92. The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 28(1) (China) [https://perma.cc/P4CU-RCCQ]; Civil Procedure Law of the People's Republic of China (2012), art. 100(1).

93. Arbitration Law of the People's Republic of China (1994), art. 46; Civil Procedure Law of the People's Republic of China (2012), art. 81(1).

os, provision of security is not necessarily a "must," unless the courts so demand, in light of the circumstances of the case.[94]

Of course, more demanding standards apply for preservation measures sought *prior* to the commencement of an arbitral proceeding. Under article 101(1) of the Civil Procedure Law, a party may request property preservation and conduct preservation before arbitration proceedings commence when the circumstances are so urgent that it would otherwise suffer irreparable harm.[95] Similarly, article 81(2) provides that a party may request evidence preservation before arbitral proceedings commence if the circumstances are so urgent that evidence relevant to the controversy is likely to be destroyed, lost, or difficult to obtain at a later time.[96] However, to receive such pre-arbitral preservation measures, the applicant must provide security and commence the anticipated arbitration within thirty days after the issuance of the order; otherwise the court will rescind the measures *ex officio*.[97] Additionally, after accepting an application for preservation measures, the court must also determine whether to grant pre-arbitral preservation measures within forty-eight hours; and if the court orders such measures, it shall enforce them immediately.[98]

Substantively, unlike the UNCITRAL Model Law, Chinese law does not require a showing of a reasonable likelihood of success on the merits (i.e., a *prima facie* case).[99] Though authoritative interpretation suggests that courts *may* account for this factor when evaluating the whole circumstances, they are not *obliged* to do so when making a decision.[100] Neither does the law demand courts consider

94. Civil Procedure Law of the People's Republic of China (2012), art. 100(2). However, under this provision, if the court, following deliberation, demands the applicant to provide security, failure to do so would result in a rejection of the application. *Id.*

95. *Id.* art. 101(1).

96. *Id.* art. 81(2).

97. *Id*. art. 101(1), (3).

98. *See id.* art. 101(2).

99. *See supra* notes 92–93, 95–96, and accompanying text. In contrast, under the UNCITRAL Model Law 2006, the party requesting an interim measure must prove "a reasonable possibility that the requesting party will succeed on the merits of the claim." *See* UNCITRAL Model Law 2006, *supra* note 6, art. 17(A)(1)(b).

100. *See* Yaxin Wang (王亚新), Haidian Fayuan Zhuanjia Zixun Weiyuanhui (海淀法院专家咨询委员会) [Expert Advisory Committee, Haidian Court], Haidian Fayuan Caichan Baoquan Xiangguan Falv Wenti Yantaohui Shilu (海淀法院财产保全相关法律问题研讨会实录) [Seminar on Legal Issues Related to Property Preservation in Haidian Court] (Aug. 14, 2020) [https://perma.cc/79EH-USEM].

the "balance of convenience"—whether the harm that the applicant would suffer substantially outweighs the burden imposed on the respondent.[101]

However, on its face, the Civil Procedure Law's "irreparable harm" element for pre-arbitral preservation measures is more restrictive than the standard under the UNCITRAL Model Law and the UNICTRAL Arbitration Rules, which require that the "harm [be] not adequately reparable."[102] In practice, though, practitioners and commentators have noted that Mainland courts do not construe this term restrictively.[103] Therefore, in relative terms, the threshold for applying interim measures under the PRC law is actually lower than that in UNCITRAL Model Law jurisdictions, such as Hong Kong, and in international commercial arbitration.

Under Chinese law, unlike in international arbitration, applications for preservation measures are conducted—procedurally speaking—on an *ex parte* basis.[104] Courts neither require the participation of the opposing party, nor hold hearings to decide whether to grant preservation measures. By contrast, in international arbitration, the application process for interim measures are typically conducted on an *inter parte* basis, ensuring both parties an equal opportunity to

101. *See supra* notes 92–93, 95–96 and accompanying text; *see also* Haifeng Li, *First Emergency Arbitrator Proceedings in China and Enforcement in Hong Kong*, GLOB. ARB. NEWS (Oct. 9, 2018) [https://perma.cc/Z6A5-PRJE]. In comparison, the UNCITRAL Model Law requires "[h]arm 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*." *See* UNCITRAL Model Law 2006, *supra* note 6, art. 17(A)(1)(a) (emphasis added); *see also* UNCITRAL Arbitration Rules 2010, *supra* note 5, art. 26(3)(a) (incorporating the same language as that of the UNCITRAL Model Law 2006); Press Release, Cheng, *supra* note 23.

102. *See infra* Section IV.C. (comparing the substantive standards governing the grant of court-ordered interim measures under PRC law and Hong Kong law); UNCITRAL Model Law 2006, *supra* note 6, art. 17(A)(1)(a); UNCITRAL Arbitration Rules 2010, *supra* note 5, art. 26(3)(a); *see also* Press Release, Cheng, *supra* note 23 (noting that the Working Group of UNCITRAL Model Law "once considered requiring 'irreparable harm'" yet "eventually settled for a less restrictive wording of 'harm being not adequately reparable'" as a condition in article 17(A)(1)(a)).

103. Li, *supra* note 101.

104. The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012), arts. 81, 100, 101 (China) [https://perma.cc/9ZLU-APRS]; *see* Savola, *supra* note 18, at 79 ("[I]t is widely accepted that there is no place for purely *ex parte* arbitral interim relief in international arbitration."); *see also* Shi & Lin, *supra* note 23.

present their cases.[105] All else equal, the *ex parte* procedure could make court-ordered preservation measures under Chinese law particularly attractive and contribute to greater procedural efficiency where there is a significant risk of the opposing party transferring assets or disposing of the property in anticipation of an adverse ruling.

However, the *ex parte* nature of this procedure is subject to an exception. When an opposing party objects to the court's decision on preservation measures, it may apply for reconsideration of the matter under the Civil Procedure Law.[106] If this party proffers sufficient evidence to make a disputable case, the court may—but is not required to—conduct a hearing.[107] This due process right may partly alleviate the tensions arising from *ex parte* application for interim measures, though it does add an element of uncertainty to the process as a whole.

B. An Almost Exclusive Power of Chinese Courts to Order Interim Measures in Chinese Arbitration

While the majority of countries recognize the *concurrent* jurisdictions of arbitral tribunals and state courts to award interim measures,[108] Chinese law has conferred an almost *exclusive* power on Chinese courts to order interim measures in aid of arbitration proceedings. Neither the Arbitration Law nor the Civil Procedure Law allows an arbitral tribunal to grant interim measures to assist an arbitral proceeding.[109] Not only does the law remain silent on arbitral in-

105. Shi & Lin, *supra* note 23; Savola, *supra* note 18, at 80 ("Many commentators therefore conclude that *ex parte* provisional relief is beyond the power of arbitral tribunals [in international commercial arbitration] . . . Most arbitral rules do not permit *ex parte* application.").

106. Civil Procedure Law of the People's Republic of China (2012), art. 108; *see* Zuigao Renmin Fayuan Guanyu Shiyong 《Zhonghua Renmin Gongheguo Minshi Susong Fa》de Jieshi, Fashi [2015] Wu Hao (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释，法释 [2015] 5 号) [Interpretation of the Supreme People's Court Concerning the Application of the Civil Procedure Law of People's Republic of China, Judicial Interpretation No. 5 [2015]] (promulgated by the Sup. Peoples Ct., adopted Dec. 18, 2014, effective Feb. 4, 2015), art. 171 (China) [https://perma.cc/3YYV-R3TF] (requiring that upon upholding such an objection, the Court shall revoke or modify the preservation measures granted).

107. Wang, *supra* note 100.

108. Savola, *supra* note 18, at 74.

109. *See* Sanjna Pramod, *Hong Kong*, ASIA-PAC. ARB. REV. 50, 51 (commenting that "the Arbitration Law of the People's Republic of China does not enable a party to seek interim relief from an arbitral tribunal but only from a competent court").

terim measures, it also sets forth a procedure for requesting interim measures in which only the courts enjoy decision-making authority.[110]

In this process, a party submits its application for interim measures to the arbitration commission that administers the underlying arbitral proceeding.[111] Upon receipt of the documents, the arbitral commission transfers the application to a competent court,[112] which renders a decision on preservation measures in accordance with the Civil Procedure Law.[113]

It is generally understood that these statutory provisions confer the power to order interim measures almost exclusively upon a competent Chinese court.[114] Instead, an arbitral commission—having no decision-making authority of its own—is obliged to pass on the request for interim measures to a court, functioning in a fashion akin to a mere "interchange station."[115] Compared with the

110. Civil Procedure Law of the People's Republic of China (2012), arts. 81, 100, 101 (failing to make any mention of arbitral interim measures, despite being the relevant provisions that address court-ordered interim measures); The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 28, 46, 68 (China), http://www npc.gov.cn/wxzl/wxzl/2000-12/05/content_4624 htm [https://perma.cc/P4CU-RCCQ]. It is noteworthy that articles 28, 46, and 68 of the Arbitration Law provide that an arbitration commission, upon receipt of a party's application for interim measures, *shall* transfer the application to a competent court for the latter's review and decision-making. Given that these provisions themselves left virtually no room for an arbitral tribunal or an arbitration commission to grant interim measures, commentaries generally construed them as meaning that "under current Chinese law, the power to take interim measures in aid of arbitration is *exclusively* reserved for the people's court." *See, e.g.*, Fei et al., *supra* note 89 (emphasis added).

111. Arbitration Law of the People's Republic of China (1994), arts. 28, 46, 68.

112. *Id.* A competent court generally means a court located where the property or evidence to be preserved are or where the domicile of the party against whom the interim measures are sought is. *Id*.

113. *See id.*; Civil Procedure Law of the People's Republic of China (2012), arts. 81, 100, 101.

114. Fei et al., *supra* note 89; Wenjie Gao (高文杰), *Zhongguo Zhongcai Baoquan he Linshi Cuoshi Zhidu de Lifa Quewei he Jianyi (中国仲裁保全和临时措施制度的立法缺位和建议)* [*The Legal Vacuum of Chinese Arbitration Preservation and Interim Measures and Solutions*], 100 BEIJING ARB. 21, 24 (2017); Terence Xu & Yunqiu Shen, *Emergency Arbitrator Proceedings and the GKML Case*, CHINA BUS. L.J. (Nov. 14, 2018), https://www.vantageasia.com/emergency-arbitrator-proceedings-gkml-case/ [https://perma.cc/N29B-XUZ7].

115. Arbitration Law of the People's Republic of China (1994), arts. 28, 46, 68. These provisions have not even mentioned the role of an "arbitral tribunal," suggesting the latter's

direct application to a court for interim measures, this institutional arrangement risks causing delay in the process, unnecessarily undermining the efficiency of provisional relief.[116]

On balance, the PRC has designated the courts as the sole body with authority to order interim measures in aid of arbitral proceedings. With the powers of decision-making concentrated in the Mainland judiciary, arbitration institutions serve a highly subsidiary role akin to an "interchange station," primarily transferring parties' application documents.

C. The Newly Established Arbitral Authority to Grant (Emergency) Interim Measures

In addition to the domestic statutes governing interim measures, the rules that are adopted by arbitration institutions and selected by the parties themselves play an important role in the legal framework governing arbitration. Such rules may fill the void—left by Chinese law—with respect to interim measures, raising the question of whether arbitral rules, to which parties have already consented, could empower arbitrators to grant interim measures.

1. New Arbitral Rules Authorizing Arbitral Interim Measures

Major Mainland arbitration institutions, such as the CIETAC and the BAC, have revised their arbitral rules to authorize arbitrators to order interim measures.[117] These recent revisions bring the Chinese practice more in line with international commercial arbitration.[118] The revisions empower an arbitral tribunal to grant any interim measures it deems necessary or appropriate in accordance with the

irrelevance and lack of meaningful decision-making authority in this process. *See id.*; Yu Xifu (于喜富), *Lun Zhongcai Linshi Jiuji Cuoshi de Jueding Yu Zhixing (论仲裁临时救济措施的决定与执行)* [*On the Decision-Making and Enforcement of Interim Measures in Arbitral Proceedings*], 1 SHANDONG JUST. 63 (山东审判), 67–68 (2006).

116. Yu, *supra* note 115; *see also* Xu & Shen, *supra* note 114.

117. *See infra* notes 120–123 and accompanying text.

118. Ashley M. Howlett, *CIETAC Issues New Arbitration Rules: Interim Measures and Consolidation Among the Highlights*, JONES DAY (Apr. 2012) [https://perma.cc/DJ2F-KN2J] ("This is the first time that the CIETAC arbitration rules have allowed an arbitral tribunal to grant interim measures . . . [as such] CIETAC continues to move in the right direction and is becoming more established and recognized as an international arbitration institution.").

applicable law.[119] For instance, the arbitral rules of CIETAC, the largest and oldest Mainland arbitration institution, underwent such a revision. Article 23(3) of CIETAC Rules, amended in 2015, provides:

> At the request of a party, the arbitral tribunal may decide to order or award any interim measure it deems necessary or proper in accordance with the applicable law or the agreement of the parties and may require the requesting party to provide appropriate security in connection with the measure.[120]

Additionally, article 23(1) of the CIETAC Rules reads: "Where a party applies for [preservation measures] pursuant to the laws of the People's Republic of China, CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law."[121] The plain language of the arbitral rules appears to grant the right of election to the parties, who could either apply for court-ordered preservation measures or request arbitrator-granted interim measures, based on their preference.

Likewise, article 62(1) of the BAC Rules, revised in 2019, provides:

> At the request of the parties, the Arbitral Tribunal may order any interim measures it deems appropriate in accordance with the applicable law. An order for interim measures may take the form of a decision of the Arbitral Tribunal, an interim award . . . or any other form permitted by the applicable law. Where neces-

119. *See* China Int'l Econ. & Trade Arb. Comm'n, CIETAC Arbitration Rules 2015, art. 23(3), (effective Jan. 1, 2015) [hereinafter CIETAC Rules 2015] [https://perma.cc/8WBM-X4HS]; *see also* Beijing Arb. Comm'n., Arbitration Rules, art. 62(1) (effective Sept. 1, 2019) [hereinafter BAC Rules 2019] [https://perma.cc/5TVN-DNVG]. This revision first appeared in Beijing Arb. Comm'n, Arbitration Rules, art. 62(1) (effective Apr. 1, 2015) [hereinafter BAC Rules 2015] [https://perma.cc/NC2E-YPAT].

120. CIETAC Rules 2015, *supra* note 119, arts. 23(3). This revision first appeared in the CIETAC Arbitration Rules 2012. *See* Int'l Econ. & Trade Arb. Comm'n, CIETAC Arbitration Rules 2012, art. 21(2) (eff. May 1, 2012) ("At the request of a party, the arbitral tribunal may order any interim measure it deems necessary or proper in accordance with the applicable law, and may require the requesting party to provide appropriate security in connection with the measure. The order of an interim measure by the arbitral tribunal may take the form of a procedural order or an interlocutory award.").

121. CIETAC Rules 2015, *supra* note 119, art. 23(1).

> sary, the Arbitral Tribunal may require the requesting parties to provide appropriate security.[122]

This revision co-exists with, rather than displaces, article 62(2), which permits the parties to apply for court-ordered interim measures.[123]

Further, the rules of both CIETAC and BAC have established emergency arbitrator procedures that empower an emergency arbitrator to grant provisional relief.[124] Article 63 of the BAC Rules allows for an emergency arbitration procedure prior to the constitution of the arbitral tribunal.[125] Under this rule, following a party's application, the BAC may appoint an emergency arbitrator to expediently decide whether to grant interim measures in such manner as they deem appropriate in an *inter parte* basis (so as to ensure the parties "a reasonable opportunity to present their cases").[126] Similar provisions exist in the arbitral rules of CIETAC, China (Shanghai) Pilot Free Trade Zone Court of Arbitration, and the Shenzhen Court of International Arbitration (SCIA).[127] These rules bear a strong resemblance to the

122. BAC Rules 2019, *supra* note 119, art. 62(1).

123. *Id.* art. 62(2). It bears noting that article 62 is situated in Chapter VIII (Special Provisions for International Commercial Arbitration), meaning that this provision only applies to international commercial arbitrations (that is, arbitral proceedings deemed by the arbitral tribunal to have international elements), as well as arbitrations relating to Hong Kong, Macao, and Taiwan. *Id.* art. 61. For domestic arbitration proceedings, article 17 applies and it requires the BAC to transfer the party's application for preservation measures to a competent court for the latter's determination. *Id.* art. 17(3). Therefore, the BAC arbitral rules have not established arbitral authority to order interim measures for domestic arbitrations.

124. *See id.* art. 63; CIETAC Rules 2015, *supra* note 119, art. 23(2). art. 63.

125. BAC Rules 2019, *supra* note 119, art. 63(1). Like article 62, article 63 only applies to international commercial arbitrations and arbitrations relating to Hong Kong, Macao, and Taiwan, and thus is not available to domestic arbitrations.

126. *Id.* art. 63(6).

127. CIETAC Rules 2015, *supra* note 119, art. 23(2) ("In accordance with the applicable law or the agreement of the parties, a party may apply to the Arbitration Court for emergency relief pursuant to the CIETAC Emergency Arbitrator Procedures (Appendix III). The emergency arbitrator may decide to order or award necessary or appropriate emergency measures. The decision of the emergency arbitrator shall be binding upon both parties."); Shanghai Int'l Econ. & Trade Arb. Comm'n, The China (Shanghai) Pilot Free Trade Zone Arbitration Rules, arts. 20, 21(1), 22 (effective Jan. 1, 2015) [https://perma.cc/Z2FP-ESYS] (noting article 20 as the "Interim Measures in Arbitration," article 21(1) as the "Emergency Tribunal," wherein "[a]ny party may, who intends to apply for interim measure(s) during the period between the acceptance of a case and the constitution of the tribunal, apply for an emergency tribunal," and article 22 as "Rendering Decisions on Interim Measures"); Shenzhen Ct. Int'l Arb., Arbitration Rules, art. 26(1) (effective Feb. 21, 2019) [hereinafter

rules of major international arbitration institutions, such as the ICC, SCC, and LCIA, regarding emergency arbitration procedures.[128]

If the arbitral interim measures made under these rules were fully enforceable by Mainland courts, the revisions could unlock new potential for Chinese arbitration. Indeed, they would permit the parties to elect arbitrators as the decision-makers able to issue provisional relief in a concrete dispute. Moreover, this authority would establish concurrent jurisdiction for both state courts and arbitral tribunals (and emergency arbitrators) over interim measures—thereby removing the disparities between Chinese arbitration and international arbitration on this matter. Unfortunately, the legal effect thus far remains subject to institutional constraints imposed by Chinese law, limiting the extent to which these reforms may be realized.

2. The "Binding-Yet-Unenforceable" Legal Dilemma

PRC law remains silent on whether an arbitral tribunal or emergency arbitrator can issue interim measures. Even so, the arbitration agreement arguably *binds* the parties to the interim measures granted by arbitrators. Since the parties have agreed to arbitrate pursuant to rules authorizing interim measures, it follows that the parties have consented to arbitral interim measures.[129] Indeed, the mandate and competence of international arbitration rest on parties' consent to the arbitration agreement, which likewise governs the scope and limits of an arbitrator's authority.[130] Accordingly, the binding effect of arbitral interim measures would not hold were the parties to state that

SCIA Rules 2019] [https://perma.cc/VKJ5-F7NR] ("Where it is permissible under the applicable laws to the arbitration proceedings, a party who needs to apply for interim measure(s) due to any emergency may, during the time period between the commencement of the arbitration proceedings and the formation of the arbitral tribunal, submit a written application to the SCIA for the appointment of an emergency arbitrator. The decision on whether to grant such application for appointment shall be made by the SCIA . . . .").

128. *See* CIETAC Rules 2015, *supra* note 119, art. 23(2); BAC Rules 2019, *supra* note 119, art. 63; SCIA Rules 2019, *supra* note 127, art. 26; ICC Rules, *supra* note 5, art. 29; SCC Rules, *supra* note 5, app. II; LCIA Rules, *supra* note 5, art. 9B.

129. Donald Francis Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and Proposals for Moving Forward*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 82, 83 (Albert Jan van den Berg ed., 2003).

130. *See Watkins-Johnson Co. v. Islamic Republic of Iran*, Award No. 429-370-1 (July 28, 1989), 22 Iran-US CTR 218, 296; *see also* Interim Award in ICC Case No. 7929 (2000), X.X.V. Y.B. COMM. ARB. 312, 316.

they did not consent to arbitrators' authority to grant interim measures.[131]

Separately, although Chinese law does not expressly prohibit arbitral interim measures, it does not recognize the *enforceability* of arbitral decisions involving interim measures either. While the law acknowledges the legal effect and enforceability of court-ordered preservation measures, it fails to place arbitral interim measures on an equal footing with orders by domestic courts. Without any statutory provisions addressing whether an arbitral tribunal or an emergency arbitrator is empowered to grant interim measures, the legal effect—particularly the enforceability—of arbitral decisions on interim measures remains unclear.[132] PRC law provides that only an "arbitral award" concerning the merits of the dispute is enforceable through courts; yet this provision does not expressly cover an arbitral decision on interim measures.[133] Simply put, PRC law remains silent on the matter and falls short of recognizing the authority of arbitrators to grant interim measures.[134] Given that "Chinese courts usually interpret their authority narrowly and are reluctant to take action absent explicit statutory authorization,"[135] such arbitral decisions, whether in the form of an order or award, remain unenforceable

131. Wong, *supra* note 42, at 502.

132. *See* The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 28, 46, 68 (China) [https://perma.cc/P4CU-RCCQ] (setting forth the procedure to apply for court-ordered preservation measures as merely requiring the arbitral commission concerned to forward a party's application to a competent court, and stopping there without any mention of the arbitral authority to grant interim measures); The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012), arts. 81, 100, 101 (China) [https://perma.cc/9ZLU-APRS]; *see also* Fei et al., *supra* note 89.

133. Arbitration Law of the People's Republic of China (1994), arts. 9, 58; Civil Procedure Law of the People's Republic of China (2012), arts. 237, 275. Though these provisions have not defined an "arbitral award" per se, they clearly regard an "arbitral award" as a final decision that addresses the merits of a dispute with *res judicata* effect. Therefore, by implication, the ordinary meaning of an "arbitral award" in the Arbitration Law and Civil Procedure Law does not refer to an interlocutory or procedural measure without final effect. *See infra* Section II.D (detailing the meaning of an "arbitral award" under Chinese law).

134. *See* Pramod, *supra* note 109, at 51; *see also* Howlett, *supra* note 118.

135. Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China*, 46 CORNELL INT'L L.J. 361, 374 (2013) (arguing that this is the case "[p]artly due to the civil law tradition"). For more information about the civil law tradition, see JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 34–38 (3d ed. 2007).

through courts.[136] Unsurprisingly, arbitral interim measures remain extremely rare in Chinese arbitration. Currently, there are no reported cases in which Mainland courts have enforced interim measures ordered by an arbitral tribunal.

The lack of enforceability of arbitral interim measures, however, does not necessarily mean that an arbitral tribunal or an emergency arbitrator seated in the Mainland lacks the authority to order interim measures. Instead, authority to grant provisional relief may derive from the parties' arbitration agreement, which implicitly embodies their consent to be bound by such an arbitral decision, unless otherwise stipulated. The lack of statutory recognition likewise does not indicate that arbitrator-granted interim measures would be completely ineffective in the Mainland's arbitration practice. More appropriately, the parties' consent to arbitration binds themselves to arbitral decisions on interim measures, yet these decisions cannot be enforced in court. These dynamics therefore ensnare parties in a paradoxical "binding-yet-unenforceable" dilemma.

3. Incomplete Arbitral Authority on Interim Measures

Even without the support of a compulsory enforcement mechanism, arbitral tribunals still have *informal powers* to induce voluntary compliance with arbitral interim measures.[137]

In the consensual, quasi-judicial process of arbitration, the effectiveness of arbitral decisions on interim measures often rests on their persuasive effect and potential to induce a party's voluntary compliance.[138] For example, an arbitral tribunal may draw adverse inferences about a party's failure to comply with an order to preserve evidence; in addition, the tribunal could allocate an appropriate portion of arbitration costs to the non-complying party, given its unjustified breach of the order.[139] The informal powers of arbitrators to im-

136. Howlett, *supra* note 118 ("[T]here remain significant problems with enforcement . . . Chinese courts have no legal basis to enforce such interim measures.").

137. Carlevaris & Feris, *supra* note 23, at 37 ("Experience shows that interim measures ordered by arbitrators are often complied with without coercion, and that parties do not readily disregard an interim decision while a decision on the merits is pending."); *see also* Savola, *supra* note 18, at 87–88 (stating that "anecdotal evidence suggests that there is generally a high degree of voluntary compliance with interim measures ordered by arbitral tribunals").

138. Kojović, *supra* note 6, at 512.

139. *Possible Future Work*, *supra* note 31, ¶ 118 ("[A]s a practical matter, parties tend to comply with such measures anyway, for example, in order to avoid responsibility for costs

pose such soft "sanctions" against non-compliance may incentivize parties to voluntarily comply with arbitral interim measures.[140] Parties and their arbitration counsel "are often sensitive to how their procedural behavior will reflect on the arbitrators when the tribunal reaches its final decision on the merits."[141] In fact, several empirical studies suggest that there is a high degree of voluntary compliance with arbitrator-granted interim measures.[142]

However, arbitrators' informal powers to induce parties' voluntary compliance should not be overstated. Commentators increasingly note that the "traditional view that parties comply with the decisions of arbitrators who are appointed by them does not find general acceptance nowadays"—instead, the parties in modern arbitration "are often reluctant to rely on the other parties' good will (voluntary compliance)."[143] Given that contemporary arbitration has increasingly resembled litigation in terms of additional formalities, duration, costs, and perhaps antagonism,[144] "placing too much faith in the parties' cooperative spirit seems to be a romantic echo of the

caused by the failure to implement the measure, or because they are reluctant to displease the arbitral tribunal."); Fei et al., *supra* note 89; Kojović, *supra* note 6, at 519; Savola, *supra* note 18, at 86–87; Shi & Lin, *supra* note 23.

140. *See* H.K. INST. OF ARBS., REPORT OF COMMITTEE ON HONG KONG ARBITRATION LAW 127–28 (2003) [https://perma.cc/7CH3-KEJE] ("In practice, an order is usually voluntarily complied with by the party concerned as it may be afraid that non-compliance with the order may have an adverse impact on the ultimate decision of the arbitral tribunal.").

141. *See* Savola, *supra* note 18, at 87. *See* Eric A. Schwartz, *The Practices and Experience of the ICC Court*, *in* CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION 59, 59 (1993) ("Parties seeking to appear before the arbitrators as good citizens who have been wronged by their adversary will generally not wish to defy instructions given to them by those whom they wish to convince of the justice of their claims.").

142. *See, e.g.*, Michelle Grando, *The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop*, WOLTERS KLUWER: KLUWER ARB. BLOG (July 20, 2016) (finding that sixty-two percent of the provisional relief granted by arbitral tribunals is complied with by the adverse parties without the need to resort to courts to seek compulsory enforcement); *see also* Richard Naimark & Stephanie Keer, *Analysis of UNCITRAL Questionnaires on Interim Relief*, *in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH (Christopher Drahozal & Richard Naimark eds., 2005) (showing that in more than ninety percent of the cases surveyed, the parties have adhered to arbitral tribunals' decisions on provisional relief).

143. *See* YESILIRMAK, *supra* note 15, at 239; Savola, *supra* note 18, at 88.

144. See Kojović, *supra* note 6, at 512; Fali S. Nariman, *The Spirit of Arbitration — The Tenth Annual Goff Lecture*, 16 ARB. INT'L. 261, 263 (2000) (lamenting that "'ceremonies' are multiplying, formalities are on the increase and much time is spent in adapting the arts of litigation").

'good old times' when arbitration was a friendly forum . . . ."[145] Today, court enforcement of arbitral interim measures has become essential to ensuring the effectiveness of the arbitral process.[146]

Arbitrators' power to draw adverse inferences is limited. Of course, it is appropriate for arbitrators to draw negative conclusions in the black-and-white scenario where a party has inexplicably failed to comply with arbitral interim measures ordering the preservation or production of evidence.[147] But uncooperative parties are often able to craft a colorful argument explaining their actions, using "reasons of local law, changed circumstances, acts of third parties, or other issues that at least partially excuse or blur their noncompliance."[148] As for provisional measures besides disclosure-related orders, the extent to which an arbitral tribunal is empowered to draw adverse inferences from a party's non-compliance—particularly in relation to the assessment of damages—remains uncertain.[149] Ultimately, arbitrators must carry out their "arbitral mandate and obligation to resolve the dispute impartially" and "in accordance with the law and evidentiary record," irrespective of whether a party has behaved as a "good citizen."[150] Drawing adverse inferences from the failure to comply with non-disclosure-related interim measures may lead an arbitral tribunal to depart from its mandate and obligation.[151]

Moreover, the recognition of arbitral authority to grant interim measures remains incomplete until the *enforceability* of such measures is ensured as well.[152] At best, the "informal powers" of arbitrators to encourage voluntary compliance with granted interim measures is only a short-term remedy to the persistent absence of a compulsory enforcement mechanism.[153] A strategic breach may oc-

145. Kojović, *supra* note 6, at 512.

146. *See id.* at 512; YESILIRMAK, *supra* note 15, at 237–38; Savola, *supra* note 18, at 88.

147. *See* BORN, *supra* note 7, at 2448; Savola, *supra* note 18, at 87.

148. BORN, *supra* note 7, at 2448.

149. *See* Savola, *supra* note 18, at 87 (n.40) (contending that "[a]dverse inferences are arguably appropriate only where there is no logical reason for failure to comply").

150. BORN, *supra* note 7, at 2448.

151. *See id*.

152. *See* Kojović, *supra* note 6, at 511–12.

153. *See* Savola, *supra* note 18, at 87 ("[T]he consequences of the lack of enforceability of arbitral provisional measures may also be diluted, at least to some extent, by the arbitral tribunal's power to draw *adverse inferences*. But there are limits to that power as well . . . ."); *Possible Future Work, supra* note 31, ¶ 118 ("[T]here are many cases where the party refuses to comply with the interim measure without regard to the potential adverse consequences, such as responsibility for costs.").

cur where the net benefits far outweigh the perceived costs.[154] For example, in a dispute over property that cannot easily be reclaimed or compensated by monetary damages once transferred to a third party, a recalcitrant party may opt to secretly transfer the object in blatant violation of arbitral provisional measures.[155] This concern is particularly pressing today, given the relative ease of moving assets and property across jurisdictions. In such a case, the party requesting arbitral interim measures may have few meaningful alternatives other than resorting to courts for compulsory enforcement.[156]

Therefore, just as an unenforceable legal remedy could hardly become effective, arbitral interim measures may be futile without state-sanctioned enforcement mechanisms.[157] Since arbitrators lack sovereign authority and coercive powers to enforce provisional relief against a recalcitrant party beyond the confines of the arbitral process,[158] the intervention of PRC courts to ensure enforcement is of paramount importance toward safeguarding access to justice.

In sum, arbitral interim measures are "binding-yet-unenforceable" under Chinese law. Through the arbitration agreement, the parties are bound by arbitral decisions on interim relief. Nevertheless, because courts cannot enforce such measures, the arbitral authority to grant interim measures and emergency relief remains far from complete. On balance, continued reliance on parties' voluntary compliance may prove insufficient to address the urgent necessity of preserving the status quo and safeguarding the integrity of the proceedings at a critical juncture within an arbitral proceeding.

D. Cross-Border Judicial Assistance of Mainland Courts on Interim Measures

For parties in foreign-seated arbitrations that seek enforcement in China, the ability of Chinese courts to provide judicial assis-

154. In such an instance, a recalcitrant party, disregarding the arbitral decisions to the contrary, might take deliberate activities to defy an arbitration, obstruct the integrity of the procedure, and evade its obligations during the proceedings, thereby frustrating the fundamental purpose of arbitration from the outset. *See* BORN, *supra* note 7, at 2448 (arguing that at times the parties "may well be willing to sacrifice some measure of their appearance as 'good citizens' if noncompliance with provisional measures brings them significant benefits").

155. *See id.*

156. *See* Savola, *supra* note 18, at 95.

157. *See* Wong, *supra* note 42, at 503.

158. *See* Brower & Tupman, *supra* note 2, at 24.

tance for provisional relief is vital to ensuring their substantive and procedural rights. In this context, the intervention of courts could generally take two forms: (1) court-ordered interim measures in aid of arbitration; or (2) enforcement of arbitrator-granted provisional relief.

With respect to the first category of judicial assistance, PRC law has historically only allowed parties in arbitrations administered by Mainland arbitral institutions to apply for court-ordered preservation measures.[159] Neither the Arbitration Law nor the Civil Procedure Law has mandated Mainland courts to accord the same relief for arbitral proceedings seated outside the Mainland.[160] Rather, both laws refer to "arbitral commissions" as institutions established in the Mainland under the PRC law.[161] Mainland courts generally adopt a conservative approach, construing statutory silence to mean they are unable to order preservation measures for offshore-seated arbitrations, thus limiting themselves from action in the absence of explicit legal authorization.[162] However, a groundbreaking institutional in-

159. *See* Teresa Cheng, Sec'y, Hong Kong Dep't Just., Panel Session on Practical Considerations and Implications of 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" (Oct. 22, 2019) [https://perma.cc/C8TW-K4Q2].

160. *See* The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 10–15 (China) [https://perma.cc/P4CU-RCCQ]; *see generally* The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012) (China) [https://perma.cc/9ZLU-APRS]. Both laws make no mention of the eligibility of parties in offshore-seated arbitral proceedings to apply for court-ordered preservation measures.

161. *See, e.g.*, Arbitration Law of the People's Republic of China (1994), art. 10 (providing that the establishment of an arbitration commission shall be registered by the judicial administrative department of the province, autonomous region, or municipality directly under the Central Government).

162. For instance, in *DONGWON F & B v. Shanghai Lehan Commercial Co., Ltd.*, the Shanghai No. 1 Intermediate People's Court rejected a party's application for court-ordered property preservation measures, reasoning that since the applicant had commenced an arbitral proceeding seated outside China at the Korean Commercial Arbitration Board, the court lacked legal basis for accepting such an application. *See* DONGWON F & B v. Shanghai Lehan Commercial Co., Ltd, Hu Yi Zhong Shou Chu No. 2, 2014. Gao, *supra* note 114, at 24–25 (noting that in Chinese judicial practice, because of the silence of legislation on this point, Chinese courts generally do not exercise their discretion to order preservation measures or enforce arbitral interim measures for foreign-seated arbitrations, and thus far, no successful case has been brought on this matter); *see* Cheng, *supra* note 159. *See also* William Leung, *Successful Completion of Cross-Border Asset Preservation Worth More than $20 Million*, INT'L L. OFF. (Dec. 19, 2019) [https://perma.cc/6YW3-DMC8]

novation, the Arrangement, has carved out an important exception to this rule for eligible arbitrations seated in Hong Kong.[163] Unfortunately, for the rest of overseas-seated arbitrations court-ordered interim measures remain unavailable.

In a similar vein, Mainland courts do not recognize or enforce arbitral provisional measures granted by an offshore-seated arbitral tribunal.[164] This is not surprising, given that even for Mainland-seated arbitrations, the PRC law has yet to recognize the enforceability of arbitral decisions on interim measures.[165]

In response to these institutional constraints, one possible avenue for a party in an offshore-seated arbitration looking to sidestep such a predicament may be to invoke the New York Convention, which China ratified in 1987.[166] But the ability to use this option de-

(commenting that "the [M]ainland courts had no power to grant interim measures in support of foreign-seated arbitrations"); *see also* Zhang, *supra* note 135, at 374. That said, there is a narrow exception to this rule. As provided by a judicial interpretation of the Supreme People's Court, where the relevant maritime dispute has been submitted for arbitration outside China and the involved property is located within China, if a party applies for property preservation to the maritime court of the place where the said property is located, the maritime court shall accept the application. But this provision only applies to enumerated maritime disputes, and the property to be preserved is limited to vessels, cargos carried by a vessel, as well as fuel and supplies of a vessel. *See* Zuigao Renmin Fayuan Guanyu Shiyong 《Zhonghua Renmin Gongheguo Haishi Susong Tebie Chengshufa》 Ruogan Wenti de Jieshi, Fashi [2003] San Hao (最高人民法院关于适用《中华人民共和国海事诉讼特别程序法》若干问题的解释, 法释 [2003] 3 号) [*Interpretation of the Supreme People's Court on the Application of the Special Maritime Procedure Law of the People's Republic of China*, Judicial Interpretation No. 3 [2003]], (promulgated by the Judicial Comm. Sup. People's Ct., Jan. 6, 2003, effective Feb. 1, 2003), SUP. PEOPLE'S CT. GAZ., Feb. 2003, art. 21(2), *translated in Interpretation of the Supreme People's Court on the Application of the Special Maritime Procedure Law of the People's Republic of China*, LAWINFOCHINA [https://perma.cc/P7GE-2FM2]; *see also* Wei Sun, *Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures: Interpretations from a Mainland China Perspective—Part I*, WOLTERS KLUWER: KLUWER ARB. BLOG (July 24, 2019) [https://perma.cc/6H2T-MVF6].

163. *See infra* Part IV.

164. *See* Gao, *supra* note 114, at 24–25; Cheng, *supra* note 159; Leung, *supra* note 162 (describing the unenforceability of interim measures ordered by an emergency arbitrator or arbitral tribunal in a foreign-seated arbitration); Zhang, *supra* note 135, at 374.

165. *See supra* Sections II.B., II.C.

166. Zuigao Remin Fayuan Guanyu Zhixing Woguo Jiaru de 《Chengren ji Zhixing Waiguo Zhongcai Caijue Gongyue》 de Tongzhi, Fa [Jing] Fa [1987] Wu Hao (最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知, [法(经)发[1987] 5 号) [Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China, Fa [Jing] Fa [1987] No.5] [https://perma.cc/Q6S7-4VD6].

pends on whether an arbitral grant of interim measures qualifies as an "arbitral award" under the Convention. Since the Convention fails to define this term, the issue is essentially left to the courts of the jurisdiction where enforcement is sought. In the minority, the view favoring enforcement of arbitral provisional measures as an "arbitral award" under the Convention finds support from several notable commentators and practitioners of international arbitration,[167] as well as a number of U.S. court decisions.[168]

In contrast, the prevailing view answers the question in the negative.[169] In this respect, a leading case is *Resort Condominiums International Inc. v. Bolwell & Anor* (the "RCI case").[170] In that case, RCI, a U.S. company, had entered into a license agreement with RCIA, an Australian company, stipulating that RCI provided trademarks and expertise to RCIA to develop business in Australia, in exchange for royalties (among other obligations).[171] After a dispute regarding royalty fees and revenue under the parties' licensing agreement, RCI successfully obtained an "Interim Arbitration Order and Award" from a single U.S.-based arbitrator.[172] The arbitral decision enjoined the respondents from entering into agreements with companies other than RCI in Australia and issued an anti-suit injunction.[173] The claimant sought recognition and enforcement of the U.S. arbitral decision from Australian courts, and the case eventually went to the Supreme Court of Queensland.[174]

Ultimately, the Australian Supreme Court denied the request, holding that the Convention only applied to arbitral awards that finally resolved the merits of the underlying disputes.[175] First, the court found that the arbitral decision on interim relief did not qualify as an "arbitral award" under article I(1) of the Convention.[176] The court

167. *See, e.g.*, Kojović, *supra* note 6, at 523–24; BORN, *supra* note 7, at 2514–15; Veeder, *supra* note 22, at 22.

168. *See, e.g.*, Publicis Commc'n v. True N. Commc'n Inc., 206 F.3d 725, 729 (7th Cir. 2000); Island Creek Coal Sales Co. v. City of Gainesville, Fla., 729 F.2d 1046, 1049 (6th Cir. 1984).

169. *See* Savola, *supra* note 18, at 85.

170. *See* Resort Condo. Int'l Inc. v. Bolwell (1993) XX Y.B. COMM. ARB. 628, at 42 (Austl.).

171. *See id.* at 2–3.

172. *Id.* at 8–9.

173. *Id.* at 9.

174. *Id.* at 19.

175. *Id.* at 42.

176. *Id. See* New York Convention, *supra* note 65, art. I(1).

reasoned that the requested "Order and Award" was merely "some interlocutory or procedural direction or order which does not resolve the disputes."[177] Instead, the court found that an "award" under the Convention must determine all, or at least some, rights with respect to the subject matter of the dispute.[178] It explained that article I of the Convention provides that an "arbitral award" must be an award "arising out of differences between persons," a phrase limited to legal differences regarding the subject matter of the dispute.[179] Second, the court ruled that the award was not "final," as it was "liable to be rescinded, varied, or reopened by the tribunal" in subsequent arbitral proceedings.[180] Therefore, the award could not be subject to enforcement by Australian state courts under the Convention. In sum, this case holds that, to be enforceable under the Convention, an arbitral award must determine at least some rights and duties in terms of the subject matter of the dispute between the parties, and must be *final*, rather than procedural or interlocutory. Though the judgment has sparked controversy,[181] it represents a majority view on this matter—at least outside the United States.[182]

And there are good reasons to believe that Chinese courts would adopt this view, as it dovetails with the conventional meaning of an "arbitral award" under PRC law. Though Chinese law has not

177. *Resort Condo. Int'l Inc.*, XX Y.B. COMM. ARB. 628, at 20.

178. *Id.* at 30.

179. *Id.* at 19.

180. *Id.* at 11–12.

181. For a critique of this approach, see Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18(2) ICC INT'L CT. ARB. BULL. 1, 2 (2007) [https://perma.cc/4SP6-ZP67].

182. Savola, *supra* note 18, at 86; CRAIG ET AL., *supra* note 24, at 466 (endorsing the decision for having "strong logic"); Michael Pryles, *Interlocutory Orders and Convention Awards: The Case of* Resort Condominiums v. Bolwell, 10 ARB. INT'L 385, 393 (1994). For U.S. court decisions that adopted a minority approach, see sources cited *supra* note 168. *See also* U.N. COMM'N ON INT'L TRADE L., UNCITRAL GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, at 13, U.N. Sales No. E.16.V.7 (2016) [https://perma.cc/DK2P-LGS9] ("Similarly, a United States court held that for a decision to be regarded as an 'award', it needs to finally and definitely dispose of a separate independent claim. In construing the 'finality' requirement, a Colombian court held that awards are final 'not because they put an end to the arbitration or to the tribunal's function, but because they settle in a final manner some of the disputes that have been submitted to arbitration.'"). For these two judicial decisions, see Hall Steel Co. v. Metalloyd Ltd., 492 F. Supp. 2d. 715 (E.D. Mich. 2007); Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice], Dec. 19, 2011, M.P: F. G. Gutierrez, Expediente 11001-0203-000-2008-01760-00, Gaceta Judicial [G.J.] (No. 1664, p. 180) (Colom.) [https://perma.cc/6QHX-SXCY].

defined what constitutes an "arbitral award," article 9 of the Arbitration Law provides that an arbitration under the law shall be *final*, and the courts shall not adjudicate the same dispute once an *arbitral award* is made.[183] Under the Arbitration Law and the Civil Procedure Law, parties may only re-arbitrate the dispute in accordance with a new arbitral agreement or litigate through courts if the *arbitral award* is annulled or set aside by a competent court under the limited grounds provided (which essentially mirror article V of the Convention).[184]

By implication, these provisions treat an "arbitral award" as a *final* decision that determines the substance of their dispute, rather than an interim decision on preservation measures that is subject to subsequent amendment, suspension, or revocation by the tribunal itself. In other words, an arbitral award under Chinese law has the *res judicata* effect that governs the subject matter of the dispute, thereby precluding further judicial or arbitral proceedings by the parties. As such, both the Arbitration Law and the Civil Procedure Law have likely adopted a traditional and relatively restrictive definition of an "arbitral award" highlighting the "finality" requirement.

Due to the silence of the New York Convention on the issue of interim measures and the relatively restrictive provisions of Chinese law on the definition of an "arbitral award," it is highly unlikely that Chinese courts would interpret a decision on interim measures, rendered by a foreign arbitral tribunal, as an "arbitral award" under the Convention. Therefore, it is infeasible for arbitral interim measures made in an offshore arbitration to obtain enforcement from the Mainland judiciary by invoking the Convention.[185]

183. The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 9 (China) [https://perma.cc/P4CU-RCCQ].

184. *Id.* art. 58. *See* The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012), arts. 237, 275 (China) [https://perma.cc/9ZLU-APRS].

185. *See* Edward Liu & Geoffrey Lai, *Shot in the Arm—Mainland Courts Can Order Interim Relief for Hong Kong Arbitrations*, H.K. LAW. (Sept. 2019) [https://perma.cc/9WNX-ZNQT] ("The Mainland courts would not enforce an award for interim measures [rendered by an offshore tribunal] since such [an] award is not seen as 'final' [under the New York Convention].").

E. The Policy Implications of China's Approach

Unlike the majority trend which recognizes the concurrent jurisdictions of arbitral tribunals and state courts to grant interim measures, China's approach is distinctive in three major aspects. First, Chinese law has conferred an almost exclusive power on Chinese courts to order preservation measures in aid of arbitration proceedings. When requesting court-ordered interim measures, neither an arbitration institution nor an arbitral tribunal enjoys any meaningful decision-making authority. Second, while PRC law does not prohibit arbitrators from granting interim measures per se, interim measures ordered by an arbitral tribunal or an emergency arbitrator remain unenforceable. Therefore, under Chinese law, arbitral decisions on provisional measures face a "binding-yet-unenforceable" legal quandary, which substantially restrains the arbitral authority to issue interim relief. As a result, arbitral interim measures remain a rarity in the ordinary practice of Mainland arbitrations and do not come close to challenging the near monopoly courts have in this regard. Third, Chinese courts have little legal basis to provide judicial assistance on interim measures for offshore-seated arbitral proceedings. Rather, the default rules have long required parties to arbitral proceedings administered by the qualified Mainland arbitral institutions to request court-ordered interim measures from the Mainland judiciary.

To be sure, there are merits to the Chinese approach. Conducted on an *ex parte* basis, Chinese court proceedings on interim measures can be quite expedient. Also, based on their inherent judicial powers, Chinese courts may order provisional measures against third parties not bound by an arbitration agreement. Court-ordered preservation measures, such as property preservation, evidence preservation, and conduct preservation, in practice often work as functional equivalents of their counterparts in international arbitration. In addition, the substantive criteria for ordering interim measures under Chinese law do not include the "balance of convenience" element, which may arguably lower the threshold for a successful application. Nevertheless, court proceedings are subject to limitations and, thus, may not be well suited to effectively address transnational commercial disputes in some contexts—particularly where multiple jurisdictions are involved.[186]

However, this institutional framework imposes two substantial structural constraints on arbitral interim measures in China. First,

186. *See supra* Section I.B.

for Mainland-seated arbitral proceedings, the arbitral authority to order provisional relief remains heavily constrained. This means that the disparities between Chinese arbitration and international commercial arbitration in terms of arbitral provisional measures persist, unless enforcement is ensured under Chinese law. More importantly, arbitral interim measures are prevented from playing a more prominent role in *supplementing* court-ordered preservation measures, even though, on some occasions they represent a more efficient and powerful tool to secure the fruits of arbitration. As a result, court-ordered preservation measures, as the default options, have long played a predominant role in Mainland arbitrations, whereas arbitral provisional relief is marginalized as a rare exception.[187]

Second, for arbitral proceedings seated in offshore jurisdictions, Mainland courts do not issue interim measures or enforce those issued by arbitral tribunals.[188] This means that arbitrations administered by a Mainland arbitral institution enjoy a "home advantage" over offshore arbitrations—whether institutional or ad hoc—in that court-ordered preservation measures against a party or its assets located in the Mainland are only available in the case of the former.[189] Aside from creating an uneven playing field, this results in a gap in access to justice for relevant parties in transnational dispute resolution, to the extent that the parties have consented to arbitrate in a neutral third jurisdiction but the country of enforcement is China.

III. ENFORCEMENT AND ISSUANCE OF INTERIM MEASURES FOR MAINLAND-SEATED ARBITRAL PROCEEDINGS BY HONG KONG COURTS

Having reviewed the legal framework governing interim measures in Chinese arbitration in Parts I and II, this Article now turns to a notable exception to the default rules which allows parties to sidestep certain institutional constraints. Though unenforceable

187. *See* Fei et al., *supra* note 89.

188. *See* Cheng, *supra* note 159 (commenting that the default rules for an offshore-seated arbitral proceeding have long been that the parties could "neither seek the Mainland courts to enforce an interim measure issued by the arbitral tribunal nor apply to the Mainland courts for any interim measures in aid of its arbitral proceedings").

189. Shi & Lin, *supra* note 23; Liu & Lai, *supra* note 185 (noting that this gap for offshore arbitrations "historically was a pulling factor for some parties to business transactions with connection to Mainland China to choose to arbitrate in Mainland China so as to avail themselves of interim measures from the Mainland courts").

under PRC law,[190] a party to a Mainland arbitration may seek enforcement of arbitral interim measures in another jurisdiction. Alternatively, parties to a Mainland arbitration may directly request interim measures from a court in an overseas jurisdiction where enforcement is to be sought. These potential responses to PRC law's lack of enforceable arbitral interim measures actually materialized in two recent judicial decisions in Hong Kong. Therefore, far from being merely theoretical, these options hold real promise in overcoming the institutional constraints imposed by the Chinese approach.

One of the decisions involved the first emergency arbitration decision in the Mainland, recognized and enforced by the Hong Kong High Court.[191] The second decision, meanwhile, concerns an order of interim measures by the Hong Kong judiciary to facilitate a Mainland-seated CIETAC arbitration.[192] These judicial decisions represent recent developments in inter-regional judicial assistance and reveal new institutional avenues for improved deployment of interim measures to support cross-border Chinese arbitration.

The following discussion provides a review of this sidestepping strategy. Section A analyzes the statutory conditions for a Hong Kong court to enforce interim measures issued by an offshore-seated arbitral tribunal. Section B delves into the first Mainland-seated emergency arbitration decision that was successfully enforced by a Hong Kong court. Section C then turns to a judicial decision in which a Hong Kong court ordered interim measures in aid of a Mainland-seated arbitral proceeding.

A. Enforcement of Mainland-Seated Arbitrator-Granted Interim Measures in Hong Kong Courts

It is possible for the parties to a Mainland arbitration to work around the institutional constraints imposed by PRC law and tap into the potentials of arbitral interim measures through the forum where enforcement is sought. In the case of Hong Kong, this ability is enabled by an express provision in the Hong Kong Arbitration Ordinance (the "HKAO," or the "Ordinance"), Chapter 609, which man-

190. *See supra* Section II.C.

191. Li, *supra* note 101.

192. *See* Chen Hongqing v. Mi Jingtian, unreported HCMP 962/2017, ¶ 19 (C.F.I. June 27, 2017) (Legal Reference System) (H.K.).

dates the Hong Kong judiciary to recognize and enforce interim measures issued by an offshore-seated arbitral tribunal.[193]

The HKAO was promulgated prior to the 2006 amendments to the UNCITRAL Model Law. Therefore, the HKAO has not adopted the model provisions on recognition and enforcement of interim measures.[194] Rather, the HKAO takes a unique and "liberal approach for recognizing and enforcing interim measures," including the ones ordered by offshore seated arbitral tribunals.[195] Section 61 of the HKAO expressly provides that an order, including an interim measure, made by an arbitral tribunal in arbitral proceedings outside Hong Kong "is enforceable in the same manner as an order or direction of the Court that has the same effect," provided that the court granted leave.[196] This means that a Hong Kong court is empowered to enforce interim measures issued by an offshore-seated arbitral tribunal.

That said, for a Hong Kong court to grant leave, the party seeking enforcement must demonstrate that the interim measures sought "belong to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal."[197] This means that Hong Kong courts can only enforce arbitral interim measures that a Hong Kong-seated arbitral tribunal is entitled to grant, which, for instance, may not include U.S.-style orders for discovery and depositions.[198]

193. Hong Kong Arbitration Ordinance, (2011) Cap. 609, 7–30, § 61; *see also* Press Release, Cheng, *supra* note 23.

194. Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 61; *see* UNCITRAL Model Law 2006, *supra* note 6, art. 17(H)(I).

195. Press Release Cheng, *supra* note 23; *see* Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 61. The HKAO does not incorporate article 17(I) of the UNCITRAL Model Law 2006, which provides the grounds for refusing recognition and enforcement of arbitral interim measures.

196. Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 61(1)(3)(5).

197. *Id.* § 61(2).

198. JOHN CHOONG & J. ROMESH WEERAMANTRY, THE HONG KONG ARBITRATION ORDINANCE: COMMENTARY AND ANNOTATIONS 311 (2011); *see* Press Release, Cheng, *supra* note 23.

B. Enforcement of Emergency Relief Granted by an Emergency Arbitrator Seated in the Mainland in Hong Kong Courts

1. The First Emergency Arbitration Proceeding in the Mainland

Unlike Chinese law, which remains silent on the enforceability of emergency arbitration relief, the HKAO explicitly recognizes its legal effect and enforceability. Under Section 22B of the Ordinance, emergency relief issued by an emergency arbitrator, whether inside or outside Hong Kong, is enforceable in the same manner "as an order or direction of the Court that has the same effect," provided that the court grants leave.[199] However, for an emergency arbitration procedure seated outside Hong Kong, the emergency relief must be of an interim nature, as opposed to a partial arbitral decision that addresses the merits of the dispute.[200]

The theoretical possibility, afforded by the HKAO, of a Hong Kong court enforcing arbitral interim measures in fact materialized in a recent judicial decision, involving a BAC emergency arbitral decision. Though the rules of several major Mainland arbitration institutions have provided for emergency arbitration procedure for some time,[201] how an emergency arbitrator would render emergency relief and whether and to what extent such a decision would be enforced by a court was an open question. This was the status quo until the 2017 *GKML* case administered by the BAC, which was the first instance of an emergency arbitral award in the Mainland. There, a BAC-appointed emergency arbitrator issued an emergency arbitral decision, which was subsequently enforced by the High Court of Hong Kong.[202]

---

199. Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 22B(1).

200. *Id.* § 22B(2) (providing that the emergency relief granted outside Hong Kong shall consist of only one or more temporary measures (including an injunction) "by which the emergency arbitrator orders a party to do one or more of the following": "(a) maintain or restore the *status quo* pending the determination of the dispute concerned; (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 made by an arbitral tribunal may be satisfied; (d) preserve evidence that may be relevant and material to resolving the dispute; (e) give security in connection with anything to be done under paragraph (a), (b), (c) or (d); (f) give security for the costs of the arbitration.")

201. *See supra* Section II.C.

202. Li, *supra* note 101; Wei Sun, *First Emergency Arbitrator Proceeding in Mainland China: Reflection on How to Conduct an EA Proceeding from Procedural and Substantive Perspective*, WOLTERS KLUWER: KLUWER ARB. BLOG (Sept. 1, 2018)

Neither the emergency arbitral decision nor the court decision in *GKML* has been made public. The dispute appears to have arisen from two investment contracts between, on one side, two Hong Kong-registered companies (the claimants), and on the other, a Cayman Islands-registered company (the target company), and its controlling shareholder, a Chinese national with assets in Hong Kong (the respondents).[203] The contracts were governed by PRC law and contained a BAC arbitration clause. The claimants sought to repurchase their shares in the target company after the agreed-upon profit levels had not been achieved, but were concerned that, in the interim, the respondents would dispose of the target company's assets in Hong Kong and other jurisdictions.[204] After weighing several options, the claimants opted to obtain interim relief under the BAC emergency arbitration rules and planned to subsequently request a Hong Kong court for enforcement.[205]

Between the time of the BAC's acceptance of the request for arbitration and the formation of the arbitral tribunal, the claimants filed an application for an emergency arbitrator decision, requesting four types of interim measures: (1) an order requiring the respondents to disclose information regarding their assets in general; (2) an order restraining the respondents from "disposing of, transferring, hiding away or encumbering" their assets generally, as well as some identified assets particularly (such as a loan against a Hong Kong-listed company); (3) an anti-suit injunction restraining the respondents from commencing judicial actions or similar processes in any jurisdictions for the purpose of resisting the enforcement of the emergency arbitral decision; and (4) an order restraining the respondents from encouraging or instructing any third parties to take any actions otherwise prohibited by the emergency arbitral decision.[206]

The BAC swiftly appointed an emergency arbitrator, Wei Sun, to take charge of the procedure.[207] Under article 63(6) of the

---

[https://perma.cc/GJ89-24ND]; Helen Tang & Briana Young, *First Emergency Arbitration Procedure in China*, HERBERT SMITH FREEHILLS ARB. NOTES (Oct. 19, 2018) [https://perma.cc/P8U3-S5FN]; Xu & Shen, *supra* note 114; *First Emergency Arbitrator Award Issued in Mainland China Enforced in Hong Kong*, MAYER BROWN GLOB. INT'L ARB. UPDATE, Jan. 2019, at 11 [https://perma.cc/5Y7U-9SXX].

203. Li, *supra* note 101; Sun, *supra* note 202.

204. Sun, *supra* note 202.

205. Li, *supra* note 101; Xu & Shen, *supra* note 114.

206. Li, *supra* note 101; Sun, *supra* note 202; Tang & Young, *supra* note 202.

207. Xu & Shen, *supra* note 114. Sun, *supra* note 202; *see* BAC Rules 2019, *supra* note 119, art. 63(3).

BAC rules, an emergency arbitrator is vested with a broad discretion to "consider the application for interim measures in such manner as he or she deems appropriate."[208] However, the rules do not establish specific substantive criteria to govern that determination, so Wei Sun drew guidance from "the general practice in international commercial arbitration and arbitration rules from various arbitration institutions such as ICC, SCC, ACICA and HKIAC."[209] Given that the interim measures sought could potentially be enforced in Hong Kong, Sun also took into account the relevant provisions of the HKAO and the judicial approach of the Hong Kong courts for granting *Mareva* injunctions.[210] In analyzing the matter, Sun eventually applied a three-prong test, which required a determination of: (a) whether the claimants had "a reasonable possibility to succeed on the merits;" (b) whether the claimants would suffer "irreparable damages" without interim measures, and whether those damages would "obviously exceed the damages" incurred on the respondents, had the relief sought been in place; and (c) whether the interim measures were reasonable and enforceable.[211]

In ruling on the first element, Sun reviewed the parties' submissions and found that the claimants had a reasonable likelihood of success on the merits.[212] In doing so, he adhered to the general practice of construing the first element in a claimant-friendly manner. Indeed, according to one commentator, this element requires the decision-maker to favor the claimants "so long as he sees no decisive factors capable of precluding the Claimants case de facto or de jure, to the extent he can determine on the basis of prima facie evidence."[213] That being said, a final and determinative decision on the merits of the dispute is left for an arbitral tribunal to be subsequently formed.[214]

---

208. BAC Rules 2019, *supra* note 119, art. 63(6).

209. Sun, *supra* note 202; *see also* Tang & Young, *supra* note 202; Li, *supra* note 101.

210. Li, *supra* note 101.

211. Sun, *supra* note 202. The emergency arbitrator applied an element of "irreparable damages," yet he seemed to treat this as equivalent to the criterion of "harm not adequately reparable," as provided under article 17A(1)(a) of the UNCITRAL Model Law, rather than a more stringent standard. *See id.*; *see also* Li, *supra* note 101; Tang & Young, *supra* note 202.

212. Sun, *supra* note 202.

213. Li, *supra* note 101 (arguing that the standard is whether the emergency arbitrator "could not conclude on the basis of the preliminary submissions that the applicants would not have a reasonable likelihood of success on merits").

214. *See id*.

The second element required Sun to weigh the harm caused to claimants by respondents transferring assets to third parties against the harm suffered by the respondents, had the emergency arbitral decision been granted.[215] In so doing, Sun accorded special attention to the respondents' prospective conduct in the form of novating the loan (owned by the target company against a Hong Kong listed company), concluding that this action could substantially undercut the respondents' financial capacity to later pay the claimants, thereby causing them "irreparable damages."[216] In weighing the convenience, Sun noted that that any restraining orders on the respondents' disposal of the specified assets would be of a temporary nature—and thus would not substantially diminish their value—while without such interim measures, the claimants could suffer serious harm.[217] In addition, Sun found support for his determination from the security provided by the claimants in an amount equal to the potential damages the respondents would incur under the interim measures.[218]

Finally, in analyzing the last element, Sun adopted a context-specific approach. He considered the reasonableness of each separate measure sought in light of the circumstances, and their potential enforceability under Hong Kong law. He also girded against the grant of overinclusive, far-reaching remedies that may be of a too general nature or an unlimited scope.

With respect to the claimants' request to have respondents' assets disclosed in general, Sun found that such disclosure could hardly be deemed "urgent" on the circumstances.[219] Moreover, he noted that such relief was not one of the interim measures allowed under the HKAO, and thus not enforceable in Hong Kong.[220]

In response to claimants' request to restrain the respondents from disposing of assets, Sun found it important to maintain the status quo but confined the injunction to those assets specifically identified by the claimants.[221] According to Sun, an order restraining dissipation of the respondents' *unspecified* assets *in general* would not

215. Sun, *supra* note 202.

216. *Id.*; Li, *supra* note 101.

217. Li, *supra* note 101.

218. *Id*.

219. *Id*.

220. *Id*.

221. *Id.*; Sun, *supra* note 202; Tang & Young, *supra* note 202.

be reasonable, and could impose an undue burden on them—thus risking being unenforceable in Hong Kong.[222]

Sun also categorically dismissed claimants' request for an anti-suit injunction. He based this decision on three reasons. First, according to Sun, anti-suit injunctions were neither necessary nor appropriate as interim measures, and instead would amount to "a severe violation to the basic procedural right of the respondent."[223] In addition, Sun noted that whether the respondents may subsequently deter the enforcement of the emergency arbitral decision was an issue to be decided by the courts where enforcement was sought.[224] In any event, an attempt by the respondents to obstruct enforcement of the decision by relitigating the same matter before a court would likely be taken into account by a later-formed arbitral tribunal in a subsequent proceeding—undermining the reasonableness and necessity of this being treated as a separate remedy in the emergency arbitration procedure.[225]

Finally, in response to claimants' request to restrain respondents from seeking third-party assistance in conducting the otherwise restricted activities, Sun determined that such a request was both reasonable and necessary to ensure effective enforcement of the emergency arbitral decision.[226] Otherwise the respondents could easily circumvent the restrictions imposed or render them futile in practice.[227]

In summary, the BAC emergency arbitrator partially granted the interim measures that the claimants sought. Sun restrained the respondents from: (1) disposing of those assets specifically identified by the claimants; and (2) instructing, encouraging, or hinting to others to conduct the activities restricted under the emergency arbitral decision.[228] In the subsequent enforcement-seeking procedure, the Hong Kong High Court, upon the *ex parte* application of the plaintiffs—the claimants in the emergency arbitration procedure—granted leave for enforcing the emergency arbitral decision pursuant to Section 22B of the HKAO.[229] The court granted respondents fourteen

222. Li, *supra* note 101; Sun, *supra* note 202; Tang & Young, *supra* note 202.

223. Sun, *supra* note 202.

224. Li, *supra* note 101.

225. *See id.*

226. Sun, *supra* note 202; Tang & Young, *supra* note 202.

227. Sun, *supra* note 202; Tang & Young, *supra* note 202.

228. Sun, *supra* note 202; Tang & Young, *supra* note 202.

229. Li, *supra* note 101.

days to raise any objections to the order, which they did not do.[230] Therefore, upon the lapse of the fourteen day-period, the enforcement order entered into effect.[231] Notably, the court enforcement order had the power to constrain any third parties notified of the order—exposing them to contempt of court liability, had they knowingly assisted in or permitted a breach of the order.[232] In addition, the order prohibited certain named entities from transferring any shares of the target company or making relevant payments to the respondents for that purpose.[233]

Interestingly, the criteria and tests applied by the emergency arbitrator differed from the general approach of the Mainland courts in granting preservatory measures. As stated above, the PRC judiciary generally gives no regard to the balance of convenience.[234] However, the emergency arbitral decision engaged in a relatively sophisticated analysis weighing each party's potential hardships, seemingly guided by common law and international arbitration jurisprudence on the matter. Further, the remedies granted remained restrictive in scope, as reflected in the emergency arbitral decision rejecting a general disclosure of the respondents' asset information and declining to restrain transfer of the respondents' unspecified assets. In contrast, PRC courts would normally forbid disposal or use of any concerned assets, unless the value of the assets would not be diminished.[235]

2. Significance and Limits of the *GKML* Case

The significance of this case is three-fold. First, it represents the first emergency arbitration in the Mainland, setting a successful precedent for Mainland arbitration institutions' innovative practice on arbitral interim measures, despite the silence of PRC law on their legal effect. As "unconventional" and rare as it may be, the practice of having an emergency arbitrator issuing interim measures is grounded in the autonomy of the disputing parties, who have granted their consent to the arbitral rules that allow for arbitral provisional relief.[236] In addition, the calculated confidence that the target jurisdic-

230. *Id.*

231. *Id*.

232. *Id*.

233. *Id*.

234. See *supra* Section II.A.

235. Li, *supra* note 101.

236. *See id.*; Sun, *supra* note 202; *see also* BAC Rules 2019, *supra* note 119, art. 63.

tion is likely to enforce an emergency arbitral decision on interim measures, including those emanating from an offshore jurisdiction, has encouraged the BAC to take bold steps toward exploiting this previously untapped possibility.[237] The Hong Kong courts' decisions, enforcing arbitral interim measures emanating from the Mainland may incentivize Mainland arbitral institutions to further strengthen their efforts to tap into the substantial, yet under-utilized potential of arbitral interim measures—bringing Chinese arbitration more in line with international commercial arbitration on this matter.

Second, and more importantly, the Hong Kong judiciary's enforcement of the emergency arbitral relief reveals new potential for Mainland-seated arbitrations in general. While PRC law stops short of recognizing the legal effect and enforceability of arbitral interim measures, claimants in this case effectively circumvented this institutional obstacle by seeking enforcement from Hong Kong courts—allowing arbitral provisional measures to play an important role in safeguarding access to justice for Mainland arbitrations.

While this case is distinctive in that all claimants sought enforcement in Hong Kong courts from the outset, it has become increasingly common that the jurisdiction of the arbitral seat differs from the place where arbitral interim measures are to be enforced.[238] For transnational disputes, the jurisdictions in which enforcement is sought are generally: (a) the respondent's domicile or primary place of business; (b) the location of the respondent's major assets; or (c) the place where the subject matter of the dispute is located.[239] When the location of enforcement is not the same as that of the arbitral tribunal, parties may seek to enforce arbitral interim measures in an offshore jurisdiction. In the context of cross-border Chinese arbitration—given the magnitude of commercial transactions and investment flows between the Mainland and Hong Kong[240]—the role

237. *See* Xu & Shen, *supra* note 114.

238. *See* Savola, *supra* note 18, at 89 (explaining that "the parties have frequently fixed the seat in a 'neutral third country' with no connections to any of the parties. As a consequence, the seat will not necessarily coincide with the country where an arbitral interim measure might have to be enforced.").

239. Kojović, *supra* note 6, at 520.

240. *See Hong Kong and Mainland of China: Some Important Facts*, TRADE & INDUS. DEP'T OF THE GOV'T OF H.K. (June 2020) [https://perma.cc/UTL4-FZUZ] ("Hong Kong was the world's [eighth] largest trading entity in goods in 2019 . . . [and eighth] largest importer and [eighth] largest exporter . . . Hong Kong and the Mainland of China . . . are each other's major trading partner . . . The Mainland [i]s an important location for outward processing activities [for Hong Kong and] . . . Hong Kong is an important location for the Mainland interests . . . Hong Kong [i]s the largest foreign investor in the Mainland . . . .").

of the Hong Kong judiciary in enforcing arbitral interim measures may be substantial.[241] However, thus far, this potential remains under-exploited.[242]

Third, for Mainland arbitrations, the target enforcement jurisdictions need not be limited to Hong Kong. The approach may prove workable elsewhere. As a pro-arbitration jurisdiction, Hong Kong is an obvious candidate—but other jurisdictions are similarly attractive, so long as they have adopted the UNCITRAL Model Law 2006 or recognized the enforceability of offshore arbitral interim measures through domestic law.

Of course, there are limits to this approach. Two conditions must be satisfied for Mainland arbitrations to obtain enforcement of arbitral interim measures in an offshore jurisdiction. First, at least one of the following must be located outside the jurisdiction of the Mainland: the respondents' domicile, primary place of business, place of incorporation, place where they hold assets, or the location of the subject matter of the dispute (such as the property or corporate shares in issue).[243] This is a prerequisite for cross-border enforcement of arbitral interim relief. Second, local law must provide for the enforceability of arbitral interim measures, including emergency relief. Given that few national laws have explicitly recognized the enforceability of emergency arbitration relief,[244] few jurisdictions meet this condition. This second element may also be necessary for interim measures granted by a foreign-seated arbitral tribunal—though to a lesser extent.[245] Together, these two conditions constrain the extent

241. *See 2020 Statistics*, HKIAC [https://perma.cc/9NZB-WYCG] (noting that in terms of the total number of parties that have participated in HKIAC arbitrations as measured by geographical origins or nationalities, the Mainland China ranked second out of a total of forty-five jurisdictions in 2020—being second only to Hong Kong).

242. *See* Yuqiong Du (杜玉琼) & Fuchen Lin (林福辰), *"Yidai Yilu" Beijing Xia Woguo Guoji Shangshi Zhongcai Linshi Cuoshi Zhidu de Lifa Ji Wanshan* (*"一带一路"背景下我国国际商事仲裁临时措施制度的立法及完善*) [*The Legislation and Improvement Regarding Interim Measures in Chinese International Arbitration under the Background of "One Belt, Road"*] , 10 XINAN MINZU DAXUE XUEBAO (西南民族大学学报) [J. SW. MINZU UNIV. 94, 97 (2018) (China) (discussing the enforcement gap facing interim measures issued by arbitral tribunals and emergency arbitrators seated in the Mainland in general).

243. *See* Savola, *supra* note 18, at 89 (noting that in international arbitration, the arbitral seat may not necessarily coincide with the country of enforcement, i.e., the jurisdiction of respondent's domicile or where it has assets).

244. Valasek & Jong, *supra* note 21, at 18 (showing that, in this regard, the domestic laws adopted in Hong Kong and Singapore are an exception).

245. *See* UNCITRAL Model Law 2006, *supra* note 6, art. 17(H)(1) ("An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise

to which the *GKML* case outlined above becomes an effective model for Mainland-seated arbitrations.

C. Hong Kong Court-Ordered Interim Measures in Aid of Mainland-Seated Arbitral Proceedings

1. Statutory Conditions under the HKAO

In addition to seeking court enforcement of arbitral interim measure, parties in Mainland-seated arbitral proceedings can also directly apply for court-ordered interim measures under Hong Kong law. Compared to those granted by arbitral tribunals, court-ordered interim measures possess two unique advantages. First, unlike arbitrator-granted interim relief—which in general may only be directed toward parties to the arbitration—court-ordered interim measures have the power to directly bind parties not in privity to the arbitral agreements (subject to applicable domestic law).[246] Further, while *ex parte* interim relief granted by arbitral tribunals may not be enforceable by courts in some jurisdictions (for instance, those that adopted article 17(C)(5) of the UNCITRAL Model Law), some national courts, including the Hong Kong judiciary, embrace *ex parte* procedures to order interim measures in aid of arbitrations.[247]

Indeed, the Arrangement explicitly mandates that Hong Kong courts order interim measures in aid of Mainland arbitral proceedings.[248] Yet, prior to the Arrangement, the HKAO had already pro-

provided by the arbitral tribunal, enforced upon application to the competent court, *irrespective of the country in which it was issued*, subject to the provisions of article 17 I.") (emphasis added). For the jurisdictions that have adopted this amendment, see *supra* note 6 and accompanying text.

246. Press Release, Cheng, *supra* note 23.

247. *Id*.; *see also* UNCITRAL Model Law 2006, *supra* note 6, art. 17(C)(5).

248. Guanyu Neidi Yu Xianggang Tebie Xingzhengqu Fayuan Jiu Zhongcai Chengxu Xianghu Xiezhu Baoquan de Anpai, Fashi [2019] Shi Si Hao (关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排, 法释 [2019] 14 号) [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, Judicial Interpretation No. 14 [2019]] (promulgated by the Sup. People's Ct., Apr. 2, 2019, effective Oct. 1, 2019) SUP. PEOPLE'S CT. GAZ., Sept. 26, 2019, art. 6 [hereinafter Interim Measures Arrangement] [https://perma.cc/S9JU-2H6J] (China), *translated in 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*, HONG KONG GOV'T DEP'T OF JUST. art. 6 (Apr. 2, 2019) [https://perma.cc/6RKX-XQ92] ("Before the arbitral

vided a mechanism to enable this practice—Section 45 of the Ordinance explicitly provides that a Hong Kong court may grant an interim measure in relation to any arbitral proceedings that have been or are to be commenced (i.e., in the pre-arbitral stage) within or *outside Hong Kong*.[249] The courts are empowered to grant interim measures, regardless of whether similar powers may be exercised by the actual arbitral tribunal hearing the same dispute.[250] This means that—even though it remains contestable whether a Mainland-seated arbitral tribunal has the power to grant interim measures that are generally unavailable under PRC law—Hong Kong courts can still order provisional relief that is appropriate and necessary to facilitate a Mainland proceeding. Further, in weighing whether to order interim measures in aid of an offshore arbitration, Hong Kong law does not require that the provisional relief sought be incidental to the substantive proceedings commenced in Hong Kong.[251] Therefore, a party in a Mainland arbitration does not need to bring a separate legal proceeding concerning the same matter in a Hong Kong court to seek court-ordered interim measures there. In addition, the subject matter of the underlying arbitral proceedings, apart from the procedure to request court-ordered interim measures, need not give rise to an independent cause of action over which the court would have jurisdiction.[252]

Prior to the issuance of the HKAO, Hong Kong courts followed a restrictive approach with respect to interim measures in aid of foreign-seated arbitration.[253] However, this approach has been re-

---

award is made, a party to arbitral proceedings administered by a Mainland arbitral institution may, pursuant to the *Arbitration Ordinance* and the *High Court Ordinance*, apply to the High Court of the HKSAR for interim measure."). Technically, for a party from a Mainland-seated arbitration to apply for court-ordered interim measures from the Hong Kong courts, the Arrangement adds nothing new, but reiterates this possibility under the Hong Kong law.

249. Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(2). Prior to the issuance of the Ordinance—offering such a statutory provision *empowering* Hong Kong courts to order interim measures for foreign arbitration—the Hong Kong courts used to rely on their *inherent jurisdiction* to decide whether to grant interim measures in aid of foreign-seated arbitration. *See* Press Release, Cheng, *supra* note 23; *see also* Owners of the Ship or Vessel "Lady Muriel" v. Transorient Shipping Ltd., [1995] 2 H.K.C. 320, ¶ 6 (C.A.).

250. Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(3).

251. *Id.* § 45(6)(b); Top Gains Mins. Macao Com. Offshore Ltd. v. TL Res. Pte Ltd., unreported HCMP 1622/2015, ¶ 25 (C.F.I.); *see* Pramod, *supra* note 109, at 51.

252. Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(6)(a).

253. A leading case is *Owners of the Ship or Vessel "Lady Muriel" v. Transorient Shipping Ltd.*, in which the Hong Kong Court of Appeal laid out a stringent test to decide whether to exercise the court's *inherent jurisdiction* to grant interim measures in aid of

placed by a more permissive one under the Ordinance. In this regard, a typical case is *Top Gains Minerals Macao Commercial Offshore Ltd. v. TL Resources Pte Ltd.*, in which the court expounded the principles for applying Section 45 of the Ordinance to assist an offshore-seated arbitration.[254] These include: (1) "whether the facts of the case warrant the grant of interim relief if [the] substantive proceedings were brought in Hong Kong," and (2) "whether it is unjust or inconvenient for the court to grant the interim relief."[255]

Top Gains offers a useful frame for understanding how Hong Kong courts employ the more permissive approach under the Ordinance. First, as the court in *Top Gains* explained, the court applies "the general principles governing the grant of interim relief in proceedings brought in Hong Kong," regardless of "whether the underlying proceedings are purely domestic or in aid of some foreign proceedings."[256] This means that, in the context of a *Mareva* injunction, the plaintiff needs to make "a good arguable case," show "a real risk of dissipation of assets," and demonstrate "that the balance of convenience is in favor of the grant of the injunction sought."[257]

For an arbitration commenced or to be commenced *outside* Hong Kong, the court must find that the underlying arbitral proceeding is capable of giving rise to an arbitral award—whether interim or final—that may be enforced in Hong Kong,[258] and that the interim measure requested belongs to "a type or description of interim meas-

---

foreign arbitration: "[W]here a party to an international commercial arbitration, the seat of which is in a place other than Hong Kong, seeks 'an interim measure of protection' from the court of Hong Kong without having first obtained the approval of the arbitrators to his application, the Hong Kong court should *refuse* the application *unless* satisfied that *the justice of the case necessitates the grant of the relief in order to prevent what may be serious and irreparable damage to the position of the applicant in the arbitration*. If . . . the applicant is unable to discharge this (admittedly, very heavy) burden, the Hong Kong court should refuse him relief." Owners of the Ship or Vessel "Lady Muriel" v. Transorient Shipping Ltd., [1995] 2 H.K.C. 320, ¶ 13 (C.A.) (emphasis added); *see also* Press Release, Cheng, *supra* note 23.

254. *Top Gains Mins.*, unreported HCMP 1622/2015, ¶¶ 18–21.

255. *Id*. ¶ 23 (noting that "[t]he principles applicable to the determination of the grant of interim relief under s 21M are now set out in the Court of Appeal decisions in *Compagnia Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd* [2015] 2 HKLRD 458 and *Pacific King Shipping Holdings Pte Ltd v Huang Ziqiang* [2015] 1 HKLRD 830.").

256. *Id*. ¶¶ 26, 30 (citing Pacific King Shipping Holdings Pte Ltd. v. Huang, [2015] 1 H.K.L.R.D. 830, ¶ 27 (C.A.)).

257. *Top Gains Mins.*, unreported HCMP, 1622/2015, ¶¶ 26, 30.

258. *Id.* ¶ 30; Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(5)(a).

ure" that a Hong Kong court may grant in relation to an arbitral proceeding in Hong Kong.[259]

Second, the court considers "whether it would be unjust or inconvenient to grant the interim relief."[260] Relevant factors to consider include "whether the making of the order will interfere with the management of the case in the primary court, e.g. where the order is inconsistent with an order in the primary court or overlaps with it" and "whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting[,] inconsistent[,] or overlapping orders in other jurisdictions, in particular the courts of the state [where] person enjoined resides or where the assets affected are located."[261]

Moreover the court must also determine whether the interim measure sought should be declined because it "is currently the subject of arbitral proceedings," and it is "more appropriate for the interim measure sought to be dealt with by the tribunal."[262] However, this provision does not apply if the parties had not sought interim measures from the arbitral tribunal to the underlying dispute.[263] Additionally, the court must bear in mind that the power to assist an arbitral proceeding seated outside Hong Kong is of an *ancillary* nature and that it serves the purpose of facilitating the process of an offshore court or arbitral tribunal that has *primary* jurisdiction over the arbitral proceedings.[264]

Interestingly, while the *Top Gains* court recognized that it must respect the approach of the foreign court and "be cautious and

259. *Top Gains Mins.*, unreported HCMP 1622/2015, ¶ 30; Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(5)(b).

260. *Top Gains Mins.*, unreported HCMP 1622/2015, ¶ 27.

261. *Id*. (citing Motorola Credit Corp. v. Uzan (No 2) [2004] 1 WLR 113, ¶ 115 (C.A.), where the English Court of Appeal applied five factors to decide whether it was "inexpedient" to make an order under a corresponding provision of the relevant English act, including "whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders," "whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order," and "whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce.").

262. *Id*. ¶ 30; Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(4). *See* Press Release, Cheng, *supra* note 23.

263. *See* Chen Hongqing v. Mi Jingtian, unreported HCMP 962/2017, ¶ 19 (C.F.I. June 27, 2017) (Legal Reference System) (H.K.) (noting that Section 45(4) "is not applicable, since there is no pending application to the arbitral tribunal on the Mainland for the interim measure sought by Chen [the plaintiff] in Hong Kong").

264. Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(7).

slow to take a different view," it still found itself "bound to exercise its own independent discretion in deciding whether there [was] a real risk of dissipation of assets, as a matter of Hong Kong law."[265] Therefore—despite the Singapore court's refusal to grant a worldwide *Mareva* injunction against the respondent (because it did not believe there was a real risk the defendant would dissipate its assets)—the *Top Gains* court ruled that this element had been met and ordered a *Mareva* injunction to restrain the defendant from removing or disposing of some of its assets in Hong Kong.[266]

2. A Landmark Court Decision Facilitating Mainland-Seated Arbitration

As discussed, the HKAO permits a disputing party in a Mainland-seated arbitral proceeding to directly apply for interim measures in Hong Kong courts. This option has been tested and confirmed in a recent high-profile court decision, *Chen Hongqing v. Mi Jingtian*. In that case—which involved a dispute over the control of a Cayman Islands-incorporated, Hong Kong-listed company—the court granted interim measures to preserve the status quo in facilitation of a Mainland-seated CIETAC arbitration.[267]

Under a pledge agreement governed by the PRC law, the defendants in *Chen Hongqing* agreed to offer their shares in a Hong Kong-incorporated private company (that held around twenty-five percent of the Cayman Islands-incorporated company's shares) as a security for the plaintiff's loan to ten other borrowers.[268] Invoking the arbitration provisions contained in the pledge agreement, the plaintiff filed for a CIETAC arbitration in the Mainland, claiming that the defendants had transferred the promised shares to a third party without plaintiff's prior written consent, breaching the parties' pledge agreement.[269] The plaintiff sought to enjoin the execution and preserve the value of the shares and asked the Hong Kong court for,

265. *Top Gains Mins.*, unreported HCMP 1622/2015, ¶ 42. *See also* Press Release, Cheng, *supra* note 23.

266. *Top Gains Mins.*, unreported HCMP 1622/2015, ¶¶ 1, 8.

267. *Chen Hongqing*, unreported HCMP 962/2017, ¶ 80.

268. *Id.* ¶¶ 1, 7, 13 ("[T]he Pledge Agreement provides for the validity, interpretation, enforcement and dispute resolution of the Pledge Agreement to be governed by the laws of the PRC.").

269. *Id.* ¶ 13 ("Any disputes arising from the execution of and relating to the Pledge Agreement are to be arbitrated by CIETAC . . . .").

among other things, interim orders appointing a receiver to exercise the shares' voting and other rights.[270]

The parties contested several key issues. The first issue was whether the plaintiff should have applied for interim relief from the CIETAC arbitral tribunal or the Mainland courts, and whether the grant of interim relief by a Hong Kong court would usurp the jurisdiction of Mainland courts.[271] On this point, the court first acknowledged the *primary* jurisdiction of Mainland courts over the CIETAC arbitral proceeding, before noting that interim measures granted by a Hong Kong court did not constitute a per se interference with the arbitral process or with the parties' agreement to arbitrate.[272] Instead, the court said, it could exercise its powers to order any "appropriate and necessary" interim measures to facilitate the process in the arbitral tribunal or Mainland courts with primary jurisdiction.[273] Additionally, the court held that its jurisdiction and discretionary power to grant interim measures was *ancillary* to the arbitral proceedings and available for the purpose of *facilitating* the process.[274]

The second issue was whether a Hong Kong court has the power to grant a receivership order in support of a Mainland-seated arbitral proceeding[275]—given the lack of clarity with respect to

270. *Id.* ¶ 30.

271. *Id.* ¶ 26. *See Top Gains Mins.*, unreported HCMP 1622/2015, ¶ 27 (holding that the court shall consider "whether it would be unjust or inconvenient to grant the interim relief").

272. *Chen Hongqing*, unreported HCMP 962/2017, ¶¶ 19, 27. In addition, the court found comfort in the fact that "there is no pending application to the arbitral tribunal on the Mainland for the interim measure sought by [the plaintiff] in Hong Kong" (such that Section 45(4) of the Ordinance did not apply). *Id.* ¶ 19. *See also* Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 21 (incorporating article 9 of the UNCITRAL Model Law 2006).

273. *Chen Hongqing*, unreported HCMP 962/2017, ¶ 28; *see* Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45. It may be argued that such a facilitative role in support of the Mainland-seated arbitration in this case is all the more necessary, given that the subject matter of the dispute—the said shares in issue—belonged to a Hong Kong company within the jurisdiction of Hong Kong, rather than the Mainland.

274. *Chen Hongqing*, unreported HCMP 962/2017, ¶¶ 28–29. This is so, regardless of whether similar powers could be exercised by the Mainland arbitral tribunal in this same dispute, and regardless of whether the Mainland courts (with supervisory jurisdiction over the CIETAC arbitration) was best positioned to decide questions concerning the validity or enforceability of the pledge agreement governed by the PRC law. *See* Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(7).

275. Ian De Witt, Robin Darton & Sunny Hathiramani, *Overview of Insolvency Law in Hong Kong*, TANNER DEWITT SOLICITORS [https://perma.cc/2CMG-SKX8] (explaining that under Hong Kong law, courts may appoint a receiver to act as its officer to "protect and preserve assets for creditors" "in relation to a shareholder dispute").

whether the Mainland courts were "in a position to make a preservation order in respect of such [s]hares, and whether such preservation order made by a Mainland court is enforceable in Hong Kong."[276] The *Chen Hongqing* court found that, under Section 45(3) of the Ordinance, it could grant interim measures, regardless of whether an arbitral tribunal seated outside Hong Kong could exercise a similar power.[277] Moreover, the court highlighted that, under Section 45(5)(b) of the HKAO, it must consider whether the receivership order sought in aid of an offshore arbitral proceeding was "a type of measure which the court ha[d the] power to grant in relation to arbitral proceedings in Hong Kong."[278] In this regard, the court found that, under Hong Kong law, it had the jurisdiction and power to order the appointment of a receiver as an interim measure in support of a Hong Kong-seated arbitral proceeding.[279]

The final issue was whether such a receivership order *should* be granted if the substantive proceeding were brought in Hong Kong.[280] First, the court found that there was "a serious question to be tried."[281] Further, it found that the contested shares were "in jeopardy" such that the plaintiff would suffer "irreparable and irreversible harm" unless their transfer was enjoined by the court.[282] Moreover, the court ruled that the "balance of convenience" favored the plain-

276. *Chen Hongqing*, unreported HCMP 962/2017, ¶ 35.

277. *Id.* ¶ 36; *see* Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(3) ("The powers conferred by this [S]ection may be exercised by the Court *irrespective of whether or not similar powers may be exercised by an arbitral tribunal under [S]ection 35 in relation to the same dispute*.") (emphasis added).

278. *Chen Hongqing*, unreported HCMP 962/2017, ¶¶ 36, 38; *see* Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(5)(b).

279. *Chen Hongqing*, unreported HCMP 962/2017, ¶¶ 37–39; *see* also High Court Ordinance, (1998) Cap. 4, §§ 21L, 21M, (providing for authority over "[i]njunction and receiver" and "[i]nterim relief in the absence of substantive proceedings," respectively).

280. *Chen Hongqing*, unreported HCMP 962/2017, ¶ 38. *See* Top Gains Mins. Macao Com. Offshore Ltd. v. TL Res. Pte Ltd., unreported HCMP 1622/2015, ¶ 23 (C.F.I.).

281. *Chen Hongqing*, unreported HCMP 962/2017, ¶¶ 24–25 (finding that plaintiff's claims were not frivolous or vexatious and could potentially succeed on the merits in the context of a receivership order).

282. *Id.* ¶¶ 51–59, 63–72. The court reasoned that plaintiff's security would have been lost if the shares were transferred and registered in the name of a third party. Appointing receivers to control the shares and the shareholder voting rights was the best way to restore and maintain "the status quo existing prior to the acts of the Defendants' transfer and sale of the [s]hares," because doing so preserved "the value of the [s]hares and the interests of the beneficial owner of the [s]hares." *Id.* ¶ 65.

tiff,[283] and that no "less intrusive remedy" existed.[284] On this basis, the court granted the "appointment of receivers to exercise the voting and other rights in the [s]hares" pending the underlying arbitral proceeding.[285]

3. New Potential Revealed

The *Chen Hongqing* case reveals the important role of the judiciary of a pro-arbitration jurisdiction in facilitating an offshore arbitral proceeding. First, it demonstrates that a Hong Kong court can order interim measures to support a Mainland-seated arbitral proceeding, thus providing the means necessary to secure the fruits of a pending arbitral process. Second, parties to an offshore-seated arbitral proceeding may gain access to provisional remedies available under Hong Kong law—including common law injunctions and other measures specified under the UNCITRAL Model Law.[286] Notably, parties may access these remedies, even if the requested measures are unavailable under the law of the arbitral seat or under the applicable law governing the merits of the dispute.[287] Put differently, parties to a Mainland arbitration may seek provisional relief available under Hong Kong law, regardless of whether the Mainland-seated arbitral tribunal or the PRC courts have the powers to grant identical or simi-

283. *Id.* ¶¶ 75–77 (explaining that, given the circumstances, appointing a receiver to maintain and preserve the status quo for the benefit of the ultimate right-holding party—pending a final arbitral award—lowered the risk of injustice).

284. *Id.* ¶¶ 78–79 (noting that the order of receivership sought was "not draconian," but rather served to "preserve the value of the Shares" and "the subject matter of the Arbitration," assuring that the "arbitral process" would not have been rendered futile at a later stage).

285. *Id.* ¶ 80.

286. *See* Simon Chapman, Stella Hu & Joern Eschment, *Hong Kong High Court Appoints Receivers as Interim Measure in Support of Arbitration Proceedings in Mainland China*, HERBERT SMITH FREEHILLS ARB. NOTES (July 4, 2017) [https://perma.cc/G3U8-AL3J] ("The power of the Hong Kong court to grant interim relief in support of foreign arbitral proceedings is well established . . . [and] can be a powerful tool . . . It is particularly noteworthy in the context of China-related disputes, given *the relatively limited preservation measures available from the Mainland courts*.") (emphasis added).

287. *See* Hong Kong Arbitration Ordinance, (2011) Cap. 609, § 45(3) ("The powers conferred by this Section may be exercised by the Court *irrespective of whether or not similar powers may be exercised by an arbitral tribunal under Section 35 in relation to the same dispute*.") (emphasis added); *see also* Chen Hongqing v. Mi Jingtian, unreported HCMP 962/2017, ¶ 17 (C.F.I. June 27, 2017) (Legal Reference System) (H.K.).

lar interim measures under Chinese law—thereby offering an additional avenue to ensure access to justice in a transnational context.

IV. AVAILABILITY OF INTERIM MEASURES IN MAINLAND COURTS FOR PARTIES TO A HONG KONG-SEATED ARBITRATION

As discussed in Part II of this Article, parties to an offshore-seated arbitration long remained unable to seek interim measures from Mainland courts. The Arrangement, however, substantially altered this status quo. Turning to this institutional innovation, this Part proceeds as follows: (1) Section A delves into the legal requirements and the procedure that a party to an arbitral proceeding in Hong Kong must satisfy or follow to apply for interim measures from the Mainland courts; (2) Section B reviews the recent arbitral and judicial practice invoking the Arrangement; (3) Section C analyzes both the potential benefits offered by and the limits inherent in this mechanism.

A. Application for Court-Ordered Interim Measures Under the Arrangement

In April 2019, the PRC Supreme People's Court and Hong Kong Department of Justice jointly promulgated the Arrangement, which took effect on October 1, 2019.[288] The Arrangement governs court-ordered interim measures in aid of cross-border arbitration and formally confers power on Mainland and Hong Kong courts to grant interim relief in facilitation of eligible arbitral proceedings in each other's jurisdiction.

The Arrangement allows parties to a qualified arbitral proceeding in Hong Kong to access various preservative measures available under Mainland law via Mainland courts. Under article 1 of the Arrangement, the term "'[i]nterim measure' . . . includes, in the case of the Mainland, *property preservation*, *evidence preservation* and *conduct preservation*."[289] Thus, the court-ordered interim measures possible under the Arrangement are orders that: (1) prevent or restrain the dissipation or disposal of the assets or property at issue in the dispute; (2) preserve evidence relevant to the underlying claims;

288. Press Release, H.K. Dep't of Just., Interim Measures Arrangement to Take Effect Tomorrow (Sept. 30, 2019) [https://perma.cc/7LBH-H7XQ].

289. Interim Measures Arrangement, *supra* note 248, art. 1 (emphasis added).

or (3) require a party to act in a specific manner or preclude it from certain actions.[290] As such, a party to an eligible arbitration in Hong Kong is endowed with the *legal right* to request these preservatory remedies from the Mainland courts. Among them, conduct preservation measures are the most important in intellectual property-related disputes.[291]

Of course, not every arbitral proceeding in Hong Kong is eligible to invoke the Arrangement. It only applies to arbitral proceedings seated in Hong Kong and administered by a designated arbitral institution.[292] However, it is worth examining what exactly that means. First, the seat of the arbitral proceedings is Hong Kong in two situations: (1) where the parties agreed in the arbitration agreement that Hong Kong would be the arbitral seat; or (2) where the parties have not agreed on the arbitral seat, but the arbitral tribunal has decided that Hong Kong would be the arbitral seat and recorded this in the arbitral award under the applicable arbitral rules or other standards.[293]

Second, the underlying arbitral proceedings must be administered by a designated arbitral institution or its permanent office. The Hong Kong Department of Justice provides the list of qualified arbitral institutions to the PRC Supreme People's Court, subject to both sides' confirmation.[294] The current list includes: HKIAC; CIETAC Hong Kong Arbitration Center; International Court of Arbitration of the International Chamber of Commerce, Asia Office; Hong Kong

290. *See supra* Section II.A.

291. Cheng, *supra* note 159.

292. Interim Measures Arrangement, *supra* note 248, art. 2.

293. Jiang Qibo et al., *《Zuigao Renmin Fayuan Guanyu Neidi Yu Xianggang Tebie Xingzhengqu Fayuan Jiu Zhongcai Chengxu Xianghu Xiezhu Baoquan de Anpai》de Lijie Yu Shiyong (《最高人民法院关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排》的理解与适用) [Explanation and Use of the Supreme People's Court's Interpretation and Application of 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]*, PEOPLE'S CT. DAILY (Sept. 26, 2019) [https://perma.cc/MGL2-JQ3B], *translated in The Supreme People's Court's Interpretation and Application of 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*, HKIAC [https://perma.cc/V86W-VFLB] (noting that by contrast, Hong Kong courts consider Mainland arbitral proceedings eligible under the Arrangement regardless of whether the arbitral seat is in the Mainland or not).

294. *Id.* ("Pursuant to Article 2(2) of the Arrangement, the Department of Justice of Hong Kong has published the criteria, reviewed applications, and determined a list of relevant arbitral institutions or permanent offices that satisfy the criteria.").

Maritime Arbitration Group; South China International Arbitration Center (HK); and eBRAM International Online Dispute Resolution Centre.[295] As a result, the Arrangement does not apply to ad hoc arbitrations, even if seated in Hong Kong.[296] This approach stands in stark contrast to another agreement between the Mainland and Hong Kong on cross-border judicial assistance for enforcing arbitral awards—the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong.[297] This latter agreement covers ad hoc arbitral awards—in addition to institutional arbitral awards—rendered in Hong Kong.[298] According to commentators, the difference in application between the agreements arises primarily out of consideration for the fact that unlike arbitral awards, judicial assistance on interim measures is a type of assistance on interlocutory measures, so the need to "avoid abuse by the applicant and prevent loss to the respondent" figures more prominently.[299]

---

295. Press Release, H.K. Dep't of Just., *supra* note 288.

296. By definition, an ad hoc arbitration refers to an arbitral proceeding where "the parties have opted to create [or select] their own procedures for a given arbitration" without the "formal administration by any established arbitral agency." A typical example is an arbitral proceeding that is specific to a particular contract or dispute and conducted in accordance with UNCITRAL Arbitration Rules without referring to any arbitration institution. *See* Gerald Aksen, *Ad Hoc Versus Institutional Arbitration*, 2 ICC INT'L CT. ARB. BULL. 8, 8 (1991); *see also* David Savage, *Ad Hoc v International Arbitration*, CHARLES RUSSELL SPEECHLYS: EXPERT INSIGHTS (Apr. 1, 2013) [https://perma.cc/VTW2-62TP].

297. Zuigao Renmin Fayuan Guanyu Neidi Yu Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue de Anpai, Fashi [2000] San Hao (最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排, 法释 [2000] 3 号) [Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, Judicial Interpretation No. 3 [2000]] (promulgated by the Judicial Comm. Sup. People's Ct., June 18, 1999, effective Feb. 1, 2000) [https://perma.cc/PH7C-RCD3] *translated in* Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, H.K. GOV'T: DEP'T OF JUST., [hereinafter Mutual Enforcement Arrangement] [https://perma.cc/M9ZV-WLZ2].

298. Edmund Wan et al., *One Arrangement, Two Systems: Considerations When Enforcing Awards between Hong Kong and the PRC*, KING & WOOD MALLESONS INSIGHTS (Sept. 15, 2016) [https://perma.cc/AG83-9PG9]; Zuigao Renmin Fayuan Guanyu Xianggang Zhongcai Caijue Zai Neidi Zhixing de Youguan Wenti de Tongzhi, Fa [2009] Hao (最高人民法院关于香港仲裁裁决在内地执行的有关问题的通知, 法 [2009] 415 号) [Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland, Law No. 415 [2009]] (promulgated by the Sup. People's Ct., Dec. 30, 2009), *translated in Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland*, H.K. GOV'T: DEP'T OF JUST. (Dec. 30, 2009) [https://perma.cc/NC7G-S5GK].

299. Jiang et al., *supra* note 293.

Under the terms of the Arrangement, a party may apply to a Mainland court at any time before an arbitral award is made, including before the commencement of the arbitral proceeding.[300] While arbitral proceedings are pending, the party must submit its application to a designated arbitral institution, which passes it on to a competent Mainland court together with a letter certifying its acceptance of the arbitral case.[301] This practice aligns with applicable PRC law that requires a Mainland arbitral institution to deliver the party's application for preservation measures to a competent court.[302] Importantly, to facilitate the ease and speed of the procedure in cross-border context, the PRC Supreme People's Court has agreed to take a more flexible approach[303]—where an arbitral proceeding has already commenced in Hong Kong, a party may instead submit the application, together with a letter issued by the arbitral institution certifying the acceptance of the case, directly to a competent Mainland court, which may subsequently confirm and verify the information received with the appropriate arbitral institution.[304] The party's ability to *directly* apply for preservation measures from the Mainland courts during an ongoing arbitral proceeding enhances the procedural efficiency of the application process.[305]

300. Interim Measures Arrangement, *supra* note 248, art. 3.

301. A "competent" Mainland court under the Arrangement refers to the intermediary court (rather than the district court) of the place where the respondent party (against whom the application is made) has residence or the place where the property or evidence is situated; if the former and the latter fall within the jurisdictions of different courts, the applicant may choose to make an application to any one of these courts, but shall not make separate applications to two or more of them. *Id.*; *see also* Jiang et al., *supra* note 293 (noting that this provision is to "avoid the situation of excessive preservation" caused by multiple applications of the same measures to different courts, and that in practice, where necessary, a competent court may request judicial assistance from other courts with concurrent jurisdictions).

302. *See* The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 28(2), 46, 68 (China) [https://perma.cc/P4CU-RCCQ]; The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012), art. 272 (China) [https://perma.cc/9ZLU-APRS].

303. Cheng, *supra* note 159; *see* Jiang et al., *supra* note 293 (noting that, in practice, the process can be long, because the application and the transfer letter must be submitted to the Mainland courts by the relevant arbitral institution situated in Hong Kong).

304. Cheng, *supra* note 159.

305. *See* Press Release, HKIAC, HKIAC Releases Statistics for 2020 (Feb. 9, 2021) [https://perma.cc/98WA-248P]. As of February 9, 2021, twenty-three out of a total of thirty-seven applications were made directly by the applicants, and the remaining fourteen were submitted by the HKIAC upon the applicants' request. *Id.*

As noted, a party may also directly apply for preservation measures from a competent Mainland court before the commencement of an arbitral proceeding in Hong Kong.[306] Within thirty days from the day the interim measure is granted, the applicant has to commence the arbitration at a designated Hong Kong arbitral institution, which must then submit to the Mainland court a letter certifying its acceptance of the case; otherwise, the court will rescind the interim measure granted *ex officio*.[307] This opens the door for a party to seek emergency relief under the Civil Procedure Law, as long as the underlying arbitral agreement referred to arbitration in Hong Kong at a designated arbitral institution.

Substantively, the PRC Civil Procedure Law, the Arbitration Law, and relevant judicial interpretations still govern the actual issuance of preservation measures.[308] Chinese law adopts a tiered approach for determining the grant of preservation measures.[309] To seek preservation measures after the commencement of an arbitral proceeding, the applicant must demonstrate (1) the party would suffer loss, damage or prejudice, or it may be difficult to enforce a future arbitral award, if measures of property preservation or conduct preservation are not ordered; or (2) without the evidence preservation measures, the evidence concerned may be destroyed or lost, or will be difficult to obtain at a later time.[310] However, a more stringent standard is applied to interim measures sought prior to the commencement of an arbitral proceeding: the applicant must demonstrate (1) the urgency of the circumstances, as well as (2) the "irreparable damage" to be caused to its legitimate rights and interests.[311] With respect to interim measures sought after the commencement of an arbitral proceeding, Mainland courts can choose whether or not to

306. Interim Measures Arrangement, *supra* note 248, art. 3(3).

307. *Id*.

308. *Id.* art. 3(1). For a discussion of the legal framework governing arbitral proceedings, see *supra* Section II.A.

309. For a discussion of the tiered approach to grants of preservation measures, see *supra* Section II.A.

310. The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 28(1), 46 (China) [https://perma.cc/P4CU-RCCQ]; The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012), arts. 81(1), 100(1) (China) [https://perma.cc/9ZLU-APRS]. *See supra* notes 106–107 and accompanying text.

311. Civil Procedure Law of the People's Republic of China (2012), arts. 81(2), 101(1).

require security, but for those sought prior to the initiation of arbitration, security is required.[312]

Additionally, under PRC law, Mainland courts must review the application for interim measures expeditiously. Pursuant to the Civil Procedure Law, Mainland courts must determine whether to issue pre-arbitral preservation measures within forty-eight hours of acceptance of the application and, if granted, must immediately enforce those measures.[313] Combined with the application of the Arrangement, this strict statutory time limit makes for greater procedural efficiency for Hong Kong-seated arbitrations.

B. Recent Arbitral and Judicial Practice Invoking the Arrangement

The Arrangement has been frequently invoked by parties in Hong Kong-seated institutional arbitrations—most notably those administered by the HKIAC—generating an impressive record of successful applications. As of February 9, 2021, the HKIAC has handled thirty-seven applications under the Arrangement, with thirty-four for preservation of assets, two for evidence, and one for conduct.[314] All applications were made on an *ex parte* basis and in arbitral proceedings that had already been commenced.[315] Approximately seventy-three percent were submitted by parties from offshore jurisdictions, including the British Virgin Islands, the Cayman Islands, Hong Kong, Samoa, Singapore, Switzerland and Taiwan, while about twenty-seven percent were made by parties from Mainland China.[316] Across all applications, approximately sixty percent concerned assets or evidence owned by Mainland Chinese parties, twenty-four percent concerned assets on the Mainland owned by non-Mainland parties, and sixteen percent concerned assets owned by both Mainland and non-Mainland parties.[317] According to the HKIAC, at least twenty-two applications for asset preservation have been granted upon the applicant's provision of security, with the as-

312. *Id.* arts. 100(2), 101(1). "Security" refers to security located in the Mainland.

313. *Id.* art. 101(2). *See supra* Section II.A; *see also* Jiang et al., *supra* note 293.

314. Press Release, HKIAC, *supra* note 305 (detailing the HKIAC's latest statistics).

315. *Id.*

316. *Id.*

317. *Id.*

sets successfully preserved totaling a value of approximately RMB 10 billion (approximately USD 1.6 billion).[318]

The first successful application under the Arrangement was in connection with the *Elim Spring Maritime* case—filed on October 8, 2019, the first business day that the Arrangement became effective in the Mainland.[319] The claimant in *Elim Spring Maritime*, a Hong Kong-incorporated shipping company, had initially commenced an ad hoc arbitration in Hong Kong against a Shanghai-domiciled company, in May 2018.[320] The dispute arose out of an international charter agreement, under which the respondent was required to fulfill a coal shipment from Indonesia to Shanghai. The respondent, however, cancelled the agreement, causing losses to the claimant.[321] The parties reached a settlement during the course of the first arbitral proceeding, pursuant to which the respondent was obligated to pay USD 180 thousand to the claimant.[322] In July 2019, after the respondent failed to make the required payment, the claimant started an HKIAC-administered arbitration in Hong Kong in accordance with the arbitral clause of the settlement agreement.[323] Pending the arbitral proceeding, the claimant applied for property preservation at the HKIAC, which transferred the application to the Shanghai Maritime Court.[324] The claimant's insurance company offered a bond to secure the application.[325] Pursuant to the Civil Procedure Law and the Arrangement, the court granted the request and ordered the seizure and freezing of the respondent's Mainland bank accounts and assets.[326]

318. *Id.* ("The total value of assets sought to be preserved across all [thirty-seven] applications was RMB 12.5 billion or approximately USD 1.9 billion.").

319. *Quanguo Shouli! Shanghai Haishi Fayuan Caiding Zhunxu Xianggang Zhongcai Chengxu Zhongde Baoquan Shenqing, (全国首例！上海海事法院裁定准许香港仲裁程序中的保全申请)* [*The First Case in the Country! The Shanghai Maritime Court Ruled to Approve the Application for Preservation in the Hong Kong Arbitration Proceedings*], SHANGHAI HAISHI FAYUAN XINWEN ZHONGXIN (海海事法院新闻中心) [SHANGHAI MAR. CT. NEWS CTR.] (Oct. 9, 2019) [https://perma.cc/Z7FJ-XYKU] [hereinafter *The First Case in the Country*]; Tamara Liu, *Interim Measures Arrangement Between Hong Kong and the PRC — An Update*, LEXOLOGY (Apr. 24, 2020) [https://perma.cc/P342-QGFY].

320. Paul Starr et al., *First Order Issued Under Interim Measures Arrangement Between China Mainland and Hong Kong SAR*, KING & WOOD MALLESONS INSIGHTS (Oct. 11, 2019) [https://perma.cc/Z9UM-HCX2].

321. *Id. See also The First Case in the Country*, *supra* note 319.

322. Starr et al., *supra* note 320.

323. *Id.*

324. *Id.*

325. Liu, *supra* note 319.

326. *The First Case in the Country*, *supra* note 319.

The whole process reportedly took eight days.[327] The ruling not only showed that Mainland courts can address applications under the Arrangement in an expeditious manner, but also established that the Arrangement —despite the text's silence on the matter— applies with equal force to arbitral proceedings that have already commenced but not yet concluded.[328]

Another high-profile application under the Arrangement concerned an HKIAC arbitration case: *Dickson Holding Enterprise Company Ltd. v. Dickson Valora Group (Holdings) Company Ltd*.[329] The arbitral proceeding arose from a shareholder agreement regarding a Mainland real estate project in Jiangsu Province.[330] Following the breakdown of the relationship between the parties, the claimant commenced an arbitral proceeding at the HKIAC, pursuant to an arbitration clause contained in the agreement.[331] During the pendency of the HKIAC arbitration, the claimant filed for an order of property preservation before the Lianyungang intermediate court, with its Chinese insurance company issuing a letter of guarantee as security for the request.[332] The court swiftly upheld the request, ordering the preservation of more than USD 20 million of respondent's assets.[333]

Given that these two court decisions are publicly unavailable and the details on the underlying arbitrations are confidential, it remains unclear exactly how the Mainland courts construed the substantive criteria. As Mainland judicial decisions ordering interim measures are typically cursory in their reasoning,[334] the Supreme People's Court may need to issue specific judicial interpretations to offer clearer guidance on how to apply the substantive criteria to determine the issuance of preservation measures, so as to provide better predictability and consistency.

---

327. Liu, *supra* note 319.

328. Starr et al., *supra* note 320; *see* Jiang et al., *supra* note 293.

329. Liu, *supra* note 319.

330. For a detailed background of the case, see a related court decision involving the same parties (among others): Dickson Holding Enter. Co. v. Moravia CV, [2019] H.K.C. 1424 (C.F.I.) [https://perma.cc/BQU4-NMZV].

331. *See* Liu, *supra* note 319; Leung, *supra* note 162.

332. Liu, *supra* note 319.

333. *Id*.

334. Zhang Wenliang (张文亮), *Shewai Linshi Jiuji de Sanchong Kunjing Ji Yingdui Fenxi (涉外临时救济的 重困境及应对分析) [Three Dilemmas Underlying Foreign-Related Interim Remedies and the Proposed Way Out]*, 39 XIANDAI FAXUE (现代法学) [MODERN LAW SCIENCE] 156, 165 (2017).

On balance, arbitral and judicial practice suggests immense need for judicial assistance on interim measures by Mainland courts to facilitate and support Hong Kong-seated arbitrations. Further, the recent decisions evince the pro-arbitration policy of the Mainland judiciary in aiding Hong Kong arbitrations through the expeditious review and processing of applications received. Given the substantial economic flows between the Mainland and Hong Kong, the Arrangement could play an indispensable role in providing preventative remedies to ensure effective cross-border dispute resolution.

C. Policy Implications and Limitations of the Arrangement

The Arrangement represents an impressive achievement in inter-regional judicial assistance on interim measures to support arbitration. The instrument constitutes a departure from the default rules disallowing court-ordered interim measures for offshore arbitrations, making Hong Kong the first and only non-Mainland jurisdiction where parties to an arbitration administered by designated arbitration institutions can request the implementation of interim measures by Mainland courts.[335] By providing a party in need with an institutional avenue to access justice in a timely and predictable manner, the mechanism serves a critical function in maintaining rule of law for cross-border dispute settlement.[336]

The Arrangement offers a new route for seeking preservation measures from the Mainland courts, which will generate practical benefits in both procedural and substantive ways.

Procedurally, the duration and costs of Mainland proceedings typically weigh much less heavily on litigants than does a Hong Kong arbitration proceeding.[337] The arbitral process to decide interim measures in Hong Kong involves an *inter parte* proceeding, which typically requires parties prepare multiple rounds of sophisticated legal submissions and witness testimony, and at times to participate in an in-person hearing.[338] Even though emergency arbitration procedures are generally shorter, the process is still burdensome for both parties and the ensuing costs are relatively high.[339] In contrast, under the Civil Procedure Law, court-ordered interim measures are

335. Cheng, *supra* note 159.

336. *Id*.

337. *See* Shi & Lin, *supra* note 23.

338. *Id*.

339. *Id*.

applied through an *ex parte* process and are determined primarily based on written submissions.[340] While Hong Kong law requires a party seeking *ex parte* interim measures to fully disclose the arguments that the respondent may raise, Mainland law contains no such obligation.[341] Compared with international arbitration, the submissions required in a Mainland judicial proceeding to order preservation measures are less burdensome, and witness testimony is rarely required.[342] Though most courts may require several rounds to decide whether to grant preservation measures, Mainland court procedure is likely to be more efficient in terms of duration, cost, and resources compared to arbitral proceedings in Hong Kong.[343]

Moreover, the procedural flexibility afforded by the Arrangement enables a party to an eligible Hong Kong arbitral proceeding to *directly* apply to a competent Mainland court.[344] In conjunction with the specific time frame provided under the Civil Procedure Law for the determination of pre-arbitral preservation measures,[345] this contributes to greater procedural efficiency and an overall speedier process.

From a substantive perspective, the legal threshold for property preservation orders under PRC law is arguably lower than that for *Mareva* injunctions under Hong Kong law. While Hong Kong law requires the court to find the balance of convenience in favor of granting the injunctive relief sought, the Arrangement and the PRC law contain no such requirement.[346] Anecdotal evidence suggests a relatively high likelihood that Mainland courts would grant interim measures where applicants demonstrate a *prima facie* case and pro-

340. *See* Wang, *supra* note 100; *see also* Shi & Lin, *supra* note 23.

341. Paul Starr, Xianhong Xu & Suraj Sajnani, *New Interim Measure Enforcement Arrangement Between Hong Kong and Mainland China Gives Hong Kong Arbitrations an Enforcement Advantage in the Mainland*, KING & WOOD MALLESONS INSIGHTS (Apr. 04, 2019) [https://perma.cc/S3D2-YYH8].

342. Shi & Lin, *supra* note 23.

343. *Id*.; *see, e.g.*, Press Release, HKIAC, *supra* note 305; *see also supra* Sections II.A. and IV.B.

344. *See supra* Section IV.A; *see also* Jiang et al., *supra* note 293.

345. *See supra* note 98 and accompanying text; *see also* The Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2008 & Aug. 31, 2012), art. 101(2) (China) [https://perma.cc/9ZLU-APRS].

346. *See supra* Section II.A. (comparing the substantive differences between PRC law and applicable standards in international commercial arbitration).

vide adequate security for the measures sought.[347] Further, unlike the typical *Mareva* test under Hong Kong law, which requires a showing of "a risk of irreparable harm" before granting freezing injunctions, a Mainland court can issue an interim measure if the applicant may suffer "irreparable harm," or alternatively, if *the enforcement of the arbitral award may become difficult*.[348] On its terms, the test for Mainland provisional relief appears to be less demanding and broader than the *Mareva* test.[349]

That said, a party might abuse this process. In such a situation, three factors may serve as important counterweights. First, where the opposing party objects to the preservation measures granted, under PRC law, it may apply for reconsideration of the matter before the Mainland courts.[350] In addition, in case of property preservation, had the opposing party provided a corresponding security, the court shall rescind the preservation measures ordered.[351] Second, to order preservatory measures for commercial disputes, Mainland courts in practice tend to require the applicants provide an adequate security,[352] which may serve as an *ex ante* disincentive to frivolous

347. Li, *supra* note 101.

348. *See* Civil Procedure Law of the People's Republic of China (2012), arts. 100(1), 101(1); The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 28(1) (China) [https://perma.cc/P4CU-RCCQ]; Interim Measures Arrangement, *supra* note 248, art. 5(3).

349. Starr et al., *supra* note 341.

350. Interim Measures Arrangement, *supra* note 248, art. 9; Civil Procedure Law of the People's Republic of China (2012), art. 108. But this process of reconsideration in itself does not affect the enforcement of preservation measures ordered. *See supra* notes 106–107 and accompanying text.

351. Civil Procedure Law of the People's Republic of China (2012), art. 104.

352. *Id.*; *see, e.g.*, Tony Dymond et al., *Hong Kong-Mainland China Interim Measures Arrangement: One Year On*, DEBEVOISE & PLIMPTON (Oct. 5, 2020) [https://perma.cc/56R7-29DU] ("Whil[e] the Arrangement does not [require] the provision of security by an applicant, reported decisions reveal that applicants who have successfully and expeditiously obtained interim measures under the Arrangement have provided appropriate security when filing their applications . . . ."); *see* Press Release, HKIAC, *supra* note 305 ("HKIAC is aware of [twenty-four] decisions issued by the [Mainland courts]. All [twenty-two] decisions granted the applications for preservation of assets upon the applicant's provision of security . . . ."); Zuigao Renmin Fayuan Guanyu Renmin Fayuan Banli Caichan Baoquan Anjian Ruogan Wenti de Guiding, Fashi [2016] Ershi Er Hao (最高人民法院关于人民法院办理财产保全案件若干问题的规定, 法释 [2016] 22 号) [Provisions on the Supreme People's Court on Several Issues Concerning the Handling of Property Preservation Cases by the People's Courts, Judicial Interpretation No. 22 [2016]] (promulgated by Sup. People's Ct., Nov. 7, 2016, effective Dec. 1, 2016), SUP. PEOPLE'S CT. GAZ., Dec. 2016, art. 5,

invocation. Finally, the Civil Procedure Law also provides an *ex post* remedy for vexatious or wrongful invocation: If an application for preservation measures subsequently turns out to be erroneous, the applicant must indemnify the opposing party for its loss incurred as a result of the measures granted.[353] Taken together, the due process right of the opposing party, the *ex ante* burden, and the *ex post* remedy alleviate the risk of abuse.

Additionally, the Arrangement offers a much needed tool for transnational disputes involving certain types of China-related equity investments, as in the Variable Interest Entity (VIE) disputes.[354] In China-related deals, sophisticated investment vehicles generally involve a target company incorporated in the Mainland, a Hong Kong intermediary entity, and a parent domiciled in the Cayman Islands or British Virgin Islands.[355] In such cases, Hong Kong is usually selected as the arbitral seat although the target generally is a Mainland company with an overseas parent company that is de facto controlled by a Mainland person or company.[356] Previously, parties had to rely on the "informal powers" of arbitral tribunals and emergency arbitrators to induce voluntary compliance with arbitral interim measures.[357] Under the Arrangement, however, investors can initiate arbitration proceedings in Hong Kong, and simultaneously or even preemptively, apply for property preservation measures against the target company and/or the actual controller in the Mainland. By providing teeth that really bite, the Arrangement may enhance the effectiveness of the arbitration process.

The benefits of the Arrangement may also extend more broadly to Hong Kong-seated transnational arbitrations in need of enforcement in the Mainland. By facilitating and supplementing Hong Kong-seated arbitrations, the mechanism can vindicate an aggravated

---

translated in Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Property Preservation Cases by the People's Courts, LAWINFOCHINA [https://perma.cc/7SVF-GLTX].

353. Civil Procedure Law of the People's Republic of China (2012), art. 105.

354. Shi & Lin, *supra* note 23.

355. *Id.*; *see also* Serena Y. Shi, Note, *Dragon's House of Cards: Perils of Investing in Variable Interest Entities Domiciled in the People's Republic of China and Listed in the United States*, 37 FORDHAM INT'L L.J. 1265, 1277 (2014); *see also* Li Guo, *Chinese Style VIEs: Continuing to Sneak Under Smog?*, 47 CORNELL INT'L L.J. 569, 574 (2014) (providing a figure depicting the offshore investment structure is commonly known as the VIE structure).

356. Shi & Lin, *supra* note 23.

357. *Id.*; see *supra* Section II.C.

party in urgent need of effective judicial intervention by Mainland courts, thereby bridging an access-to-justice gap for Mainland-Hong Kong commercial dispute resolution. Moreover, the new mechanism may substantially bolster the bargaining power of a party that strives to preserve status quo, allowing it to strategically exert pressure on the opposing party in negotiations. As such, the Arrangement may facilitate dispute resolution and encourage early settlements,[358] offering enhanced certainty and predictability to disputing parties, practitioners, and stakeholders in the international business community.

On a macro level, the Arrangement may make Hong Kong a more attractive seat of arbitration, especially for international disputes involving either Mainland assets or a Mainland party.[359] Thus far, as a regional hub of international arbitration, Hong Kong has been a popular arbitral seat, hosting a tremendous number of cases with large monetary amounts at stake.[360] Hong Kong benefits from highly professional arbitration bodies, institutions grounded in the rule of law (including both the legislative and judicial branches), and a myriad of distinguished international arbitration practitioners.[361] Additionally, by virtue of the Arrangement, Hong Kong arbitrations will "no longer be encumbered with the 'disadvantage'" of parties being unable to seek court-ordered preservation measures in the Mainland, and instead will possess a unique advantage vis-à-vis other foreign arbitral seats, such as Singapore.[362] This fact may further incentivize parties to select Hong Kong as their preferred arbitration seat.[363]

Finally, this trend illustrates Mainland China's growing willingness to modernize its domestic arbitration regime and shift away from a previous conservative approach to international arbitration.[364]

---

358. Shi & Lin, *supra* note 23; Press Release, Cheng, *supra* note 23 ("It is no exaggeration to say that, in some cases, successful application for interim measures (or otherwise) may make or break the whole arbitration, even leading at times to early settlement or abrupt end of the dispute.").

359. Dymond et al., *supra* note 352. *See also* Shi & Lin, *supra* note 23.

360. Press Release, Teresa Cheng, Sec'y, Hong Kong Dep't Justice, Hong Kong as an International Arbitration Hub (Dec. 18, 2019) [https://perma.cc/HV8G-3DJA]; *see also* Pramod, *supra* note 109, at 50; Shi & Lin, *supra* note 23.

361. *See* Shi & Lin, *supra* note 23; *see also* Pramod, *supra* note 109, at 50.

362. Shi & Lin, *supra* note 23.

363. *Id.*

364. *See* Monika Prusinowska, *China as a Global Arbitration Player? Recent Developments of Chinese Arbitration System and Directions for Further Changes*, 10 TSINGHUA CHINA L. REV. 33, 35, 37 (2017).

This new institutional framework may serve as a viable way for Mainland China to gradually improve its capacity in the international arbitration arena and grow "accustomed to the international practice laid down in the [UNCITRAL] Model Law regime . . . ."[365] This in turn may generate spill-over effects and create "a more inclusive and harmonized arbitration infrastructure for the international arbitration community as a whole."[366]

However, as discussed, the Arrangement has a limited scope of application. First, not every arbitral proceeding seated in Hong Kong is eligible to invoke this instrument. Indeed, the mechanism categorically excludes ad hoc arbitrations. This exclusion aligns with China's consistent position of not allowing ad hoc arbitration under Chinese law and the Arbitration Law's requirement that arbitration must be institutional.[367] Additionally, the Arrangement does not apply to proceedings administered by an arbitration institution (or its permanent office) established outside Hong Kong—even if those arbitrations are seated in Hong Kong.[368]

Moreover, under the Arrangement, a party is required to make an application for court-ordered interim measures *before* the arbitral award is awarded.[369] In other words, this mechanism does not address the application for interim measures *after* an arbitral award is rendered, whether before the commencement of or during enforcement proceedings.[370] Likewise, the Arrangement does not apply to

365. Press Release, Cheng, *supra* note 23.

366. *Id.*

367. *See* Zhang, *supra* note 135, at 365; The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 16, 18 (China) [https://perma.cc/P4CU-RCCQ] (providing that an arbitration agreement shall refer to an arbitration commission selected by the parties, and stipulating that where an arbitration agreement does not refer to an arbitration commission or where it is unclear which arbitration commission is referred to, the parties may come to a supplementary agreement to specify an arbitration commission, and that where the parties fail to do so, the arbitration agreement is invalid).

368. Interim Measures Arrangement, *supra* note 248, art. 2(1).

369. *Id.* art. 3.

370. *See* Jiang et al., *supra* note 293. This loophole was actually filled by a subsequent bilateral instrument between the Mainland and Hong Kong. *See* Guanyu Neidi Yu Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue de Buchong Anpai (关于内地与香港特别行政区相互执行仲裁裁决的补充安排) [Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region] (Nov. 27, 2020) [https://perma.cc/2R9X-Y3HG] ("The relevant court may, before or after accepting the application for enforcement of an

investment arbitrations between investors and sovereign states, including those arising under an international investment treaty, domestic laws, or an investment contract.[371] Rather, the Mainland and Hong Kong have come to a consensus that eligible arbitral proceedings in Hong Kong under the Arrangement only cover commercial arbitrations between private parties.[372]

Further, in line with PRC law that has yet to recognize the arbitral tribunal and emergency arbitrator's authority to order provisional relief, the Arrangement does not address the enforceability of arbitrator-granted interim measures from Hong Kong. This means that arbitral interim measures rendered in Hong Kong remain unenforceable in Mainland courts, which instead have to rely on the parties' voluntary compliance. Under the Arrangement's provisions on the application procedure for court-ordered interim measures in the Mainland, the role of designated Hong Kong arbitration institutions is reduced to delivering the application documents and issuing a letter certifying the acceptance of the case. In other words, neither the arbitral tribunal nor the arbitration institution enjoy meaningful decision-making authority in this process—given that Mainland courts are vested with near-exclusive powers to order preservation measures.

Equally important, for arbitrations seated in offshore jurisdictions other than Hong Kong, court-ordered interim measures in the Mainland are still unavailable. Additionally, provisional measures granted by a foreign-seated arbitral tribunal or an emergency arbitrator are also unenforceable in Mainland courts. But by conferring on eligible Hong Kong-seated arbitrations the "most favorable treatment" among all overseas jurisdictions, the Arrangement indeed creates a notable exception. Though it provides a "stop-gap" solution, the Arrangement falls short of fundamentally altering the default rules in the Mainland of "no-enforceable-interim-measures," whether court-ordered or arbitrator-granted, for offshore arbitrations. Indeed, such a change may require an amendment of the Arbitration Law it-

arbitral award, impose preservation or mandatory measures pursuant to an application by the party concerned and in accordance with the law of the place of enforcement.").

371. Dong Long & Suraj Sajnani, *Mainland China-Hong Kong Interim Measures Arrangement One Year On: Crossing the River by Feeling the Stones*, WOLTERS KLUWER: KLUWER ARB. BLOG (Aug. 10, 2020) [https://perma.cc/Z6HT-86KD].

372. *Id.*; Jiang et al., *supra* note 293.

self.[373] In other words, it is not so much that the Arrangement has transformed or revamped the default rules themselves. Rather, it has put a range of Hong Kong-seated arbitrations administered by designated institutions on an equal footing with Mainland arbitrations.

Overall, the Arrangement is indicative of a strong pro-arbitration policy. It is a crucial development in cross-border arbitration, further accommodating efficient and effective resolution of international commercial disputes. Albeit with its own limits, the Arrangement is significant in two major aspects. First, its mechanism opens new routes of provisional relief for parties in Mainland-Hong Kong arbitrations, thereby serving to bridge an access-to-justice gap for cross-border dispute settlement. Second, by establishing an institutional framework designed to normalize implementation of cross-border court-ordered interim measures, the Arrangement broadens and deepens inter-regional judicial assistance facilitating arbitration, thereby enabling arbitration to play a more prominent role in effectively serving transnational dispute resolution. In this sense, this institutional innovation may offer a new paradigm of institutionalized cross-border judicial assistance in support of transnational arbitration.

CONCLUSION

This Article analyzes an important issue—interim measures in arbitral proceedings under Chinese law. Under PRC law, the power to order interim measures is largely reserved to Mainland courts. While an arbitral tribunal and even an emergency arbitrator have recently been endowed with the authority to grant provisional relief under the revised arbitral rules, this alone hardly normalizes the use of arbitral interim measures in Mainland arbitrations due to the structural constraints imposed by Chinese law.

On the one hand, parties are bound by arbitral decisions on interim measures, by virtue of their general consent in the arbitration agreement to arbitrate their disputes pursuant to the arbitral rules. On the other hand, given the law's silence on the matter, arbitral provisional measures in general remain unenforceable under Chinese law. Consequently, the arbitral authority to grant interim measures under Chinese law is incomplete and substantially constricted. While arbitral interim measures remain substantially under-utilized in practice

373. *See* Press Release, Cheng, *supra* note 23 (commenting that "an ideal solution in the long run may be to gradually reform the national arbitration law to adopt the Model Law standards and practice").

by and large due to their "*binding-yet-unenforceable*" nature, the default option for parties in Mainland arbitrations has always been to apply for preservation measures from PRC courts, which provide direct enforceability.

As revealed by recent developments in arbitral and judicial practice, there is a notable exception to the default setting. Namely, interim measures issued by an arbitral tribunal or an emergency arbitrator seated in the Mainland may be recognized and enforced by the judiciary of Hong Kong. Alternatively, a party in a Mainland-seated arbitration may directly apply for interim measures or emergency relief from a Hong Kong court. Moreover, the same may also hold for other arbitration-friendly jurisdictions willing to afford judicial assistance in aid of offshore arbitrations, so long as the parties need to seek enforcement there. Through these alternative avenues, parties in Mainland arbitrations can effectively sidestep the enforcement gap for arbitral provisional measures under Chinese law. Further, parties in a typical Chinese arbitral proceeding can now access the arsenal of injunctions and other provisional measures available in a common law jurisdiction (and perhaps beyond), and thereby obtain a novel route to ensure access to justice for transnational dispute resolution.

For parties in arbitrations seated in a non-Mainland jurisdiction, it has long been the case that court-ordered interim measures from PRC courts were off-limits. Nevertheless, the status quo has been altered by a new institutional mechanism between the Mainland and Hong Kong. Requiring Mainland courts to review application for interim measures in aid of eligible Hong Kong-seated institutional arbitrations, the Arrangement is indispensable to bridging an access-to-justice gap for cross-border Chinese arbitrations. The Arrangement may also level the playing field for qualified institutional arbitrations seated in Hong Kong, and even give Hong Kong a unique edge against other international arbitration seats. Albeit subject to limitations, this mechanism could usher in a new normal of institutionalized inter-regional judicial assistance on interim measures between the Mainland and Hong Kong.

Evidencing a clear pro-arbitration stance, these recent developments help secure the effectiveness of cross-border arbitration, serving to better safeguard access to justice in China-related transnational dispute resolution. Though further research is needed to explore whether the same pattern of judicial assistance in aid of cross-border arbitration also manifests between other jurisdictions, Hong Kong may play a unique role in facilitating Mainland-seated arbitrations, and vice versa. This is so, given that the economic flows be-

tween Hong Kong and the Mainland are already gigantic in volume and scale.[374] More importantly, Hong Kong also positions itself as the offshore regional base for Chinese firms expanding their businesses into regional and international markets,[375] a role that will become more important as China's Belt and Road Initiative brings in opportunities for infrastructure investments, international sales, financing, and cross-border commerce.[376] In this context, the role of inter-regional judicial assistance may take a strategic importance in facilitating transnational dispute resolutions, serving stakeholders in the entire international business community.

374. *See Hong Kong and Mainland of China: Some Important Facts*, *supra* note 240.

375. *See* Wong Sze Wah, *The Role of Hong Kong in China's Investment in the ASEAN Market*, BANK OF CHINA ECON. REV., Sept. 2017, at 1 (commenting that "Hong Kong is well positioned to serve as the offshore regional base for Chinese enterprises in expanding and managing their businesses in the ASEAN market" and that "Hong Kong has always been the top destination for Chinese [outbound direct investments]").

376. *See, e.g.*, OECD, *The Belt and Road Initiative in the Global Trade, Investment and Finance Landscape*, *in* OECD BUSINESS AND FINANCE OUTLOOK 61, 62 (2018) (noting that under the Belt and Road Initiative the "investment projects are estimated to add over USD [one] trillion of outward funding for foreign infrastructure over the [ten]-year period from 2017 [on]").