



China Arbitration and Disputes Bulletin

Welcome to White & Case's monthly China Arbitration and Disputes Bulletin. This month's bulletin provides updates on international arbitration and litigation in the PRC and Hong Kong.

PRC

Supreme People's Court's interpretation regarding enforcement of judgments

On January 1, 2009, the Interpretation of the Supreme People's Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China 《最高人民法院关于适用〈中华人民共和国民事诉讼法〉执行程序若干问题的解释》 (the "Interpretation") came into effect.

The Interpretation gives further details on several areas of enforcement of judgments under the Civil Procedure Law (as revised in 2007) (the "CPL").

The main areas covered by the Interpretation are as follows:

1. Application for enforcement:
 - (1) Article 1 of the Interpretation provides that when making an enforcement application to a Court at the place where the property for enforcement is located, the applicant must provide materials certifying the presence of property available for enforcement (within that Court's jurisdiction).
2. Jurisdiction of Courts for enforcement:
 - (1) Articles 2 to 4 of the Interpretation contain provisions regarding:
 - (a) What Courts should do when more than one Court has jurisdiction over an enforcement action (including the transfer of preserved or seized property). Generally speaking, a Court will refuse to take an enforcement action where another Court is already involved;
 - (b) The procedure for challenging the jurisdiction of a Court after an enforcement application has been made.
3. Objection to enforcement action as being illegal:
 - (1) Under Article 202 of the CPL, if a party or any interested party thinks that an enforcement action is illegal, it can make a written objection to the Court. There is a time limit of 15 days within which the Court must give a ruling, and application can be made to a higher Court for reconsideration;

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If you have questions or comments regarding this bulletin, please contact:

Kim Rooney
Partner
+ 852 2822 8776
krooney@whitecase.com

Christopher Corr
Partner
+ 86 10 5912 9618
ccorr@whitecase.com

Xiaoming Li
Partner
+86 10 5912 9601
xli@whitecase.com

- (2) Articles 5 to 10 of the Interpretation gives further details about this procedure. In particular:
 - (a) The enforcement will continue pending the examination or reconsideration of an objection;
 - (b) If the objecting party provides sufficient and effective security, the Court may stop the seized property being disposed of. However, if the enforcing party provides sufficient and effective security (to support its request to continue enforcement), the Court must continue the enforcement.
- 4. Enforcing Court fails to make enforcement within six months:
 - (1) Under Article 203 of the CPL, if a Court fails to carry out enforcement within six months of an application, the enforcing party may apply to a higher Court. The higher Court may order the lower Court to carry out enforcement within a certain time period, or may do so itself or direct another Court to do so;
 - (2) Articles 11 to 14 of the Interpretation provide further details of this procedure. In particular, Article 11 sets out four situations in which Article 203 of the CPL may be invoked. In essence, these are where enforcement is possible (e.g. property is available for enforcement) but not completed within six months.
- 5. Objection by non-party claiming to own subject matter of enforcement action:
 - (1) Article 204 of the CPL allows a non-party to raise an objection in respect of the *subject matter* of an enforcement action. In this regard, Article 15 of the Interpretation provides that a non-party who claims to own or have any other substantial right to such subject matter may make a written objection;
 - (2) Articles 16 to 24 set out details of the procedures for such an objection. In particular:
 - (a) Pending the Court's examination of the objection, it must not dispose of the subject matter;
 - (b) If the objecting party provides sufficient and effective security, the Court may discharge the seizure of the subject matter. However, if the enforcing party provides sufficient and effective security (to support its request to continue enforcement), the Court *must* continue the enforcement;
 - (c) If a discharge of seizure turns out to be wrong, the Court will enforce against the security. Conversely, if a continuation of enforcement is wrong, the Court will order the enforcing party to compensate the objecting party for the loss suffered.
- 6. Property distribution plan:
 - (1) Where more than one creditor applies for enforcement against the same party or to participate in the distribution of property for enforcement, Article 25 of the Interpretation requires the enforcement Court to work out a property distribution plan. This Article and Article 26 also allow a creditor or the party enforced against to object to such a plan.
- 7. Time limit for making enforcement application:
 - (1) Articles 27 to 29 of the Interpretation deal with the time limit for making an enforcement application, including its suspension/interruption, e.g. due to force majeure.
- 8. Report of property:
 - (1) Under Article 217 of the CPL, if a party fails to comply with the Court's enforcement notice, the Court may order it to provide a report of the state of its property starting from one year before the enforcement notice. Sanctions such as a fine and detention can be imposed if the party fails to provide such a report or makes a false report;
 - (2) Articles 31 to 35 of the Interpretation clarify the Court's power in this regard. In particular, Article 32 lists the types of property to be included in the report, including income, bank deposits, cash, securities, land use rights, immovable property, vehicles, equipment, debts and intellectual property rights;

- (3) There is also provision for:
- (a) The report procedure to be terminated if the party enforced against pays off all of its debts;
 - (b) A supplementary report to be provided if there is any change in the property in question;
 - (c) The Court to investigate and verify the contents of the report;
 - (d) Information in the report being released to the enforcing party.
9. Other enforcement measures:
- (1) Under Article 231 of the CPL, the Court also has the power to stop a defaulting party from leaving the PRC, make appropriate records on the credit system, and publish (including in the public media) information about the defaulting party;
 - (2) Articles 36 to 39 of the Interpretation sets out further details of these powers, including the following:
 - (a) Article 37 clarifies the persons who may be stopped from leaving the PRC where the party enforced against is not an individual. These persons include the party's legal representative, 'major person in charge' or a 'directly liable person who may affect the performance of a debt';
 - (b) Article 38 provides for the above restriction to be discharged upon full payment of the debt in question (or the provision of sufficient and effective security) by the defaulting party;
 - (c) Article 39 clarifies that the publication of information about the defaulting party may be in media such as newspapers, radio, television and the internet.

Hong Kong

HKIAC adopts new Administered Arbitration Rules

On September 1, 2008 the Hong Kong International Arbitration Centre (the "HKIAC") adopted the Hong Kong International Centre Administered Arbitration Rules (the "HKIAC Rules").

The HKIAC Rules supersede the HKIAC Procedures for the Administration of International Arbitration in accordance with the UNCITRAL Arbitration Rules (the "HKIAC Procedures").

The HKIAC Rules set out a more detailed framework for HKIAC administered arbitration than the HKIAC Procedures and it is the HKIAC's intention that all parties wishing to agree to arbitration administered by the HKIAC should submit to the HKIAC Rules. This is evidenced by Article 1.3 of the HKIAC Rules which states:

"...1.3 These Rules supersede the HKIAC Procedures for the Administration of International Arbitration adopted with effect from 31st March 2005 (the "Procedures") save to the extent that the parties have agreed to adopt the Procedures in an agreement made prior to 1st September 2008. Where an agreement to arbitrate made after these Rules have come into effect provides for arbitration under the UNCITRAL Rules administered by the HKIAC, the HKIAC shall be the appointing authority and the HKIAC Secretariat shall invite the parties in such a case to agree to the application of these Rules...."

The HKIAC Rules are designed for use by parties who seek the formality and convenience of an administered arbitration and are based on the UNCITRAL Arbitration Rules. The HKIAC have stated that they were inspired by the "light touch" administered approach of the Swiss International Rules of Arbitration and that during the drafting process of the HKIAC Rules references were made to the arbitration rules of different institutions around the world.

Certain key differences between the HKIAC Rules and the HKIAC Procedures include:

- The choice of more user-friendly language;
- The allowance of more party autonomy in individual cases;
- The HKIAC Rules are designed especially with Chinese-foreign disputes in mind and are issued in Chinese and English versions;
- All appointments of arbitrators are subject to confirmation by the HKIAC;
- The parties can choose whether arbitrators shall be compensated on the basis of agreed rates or in accordance with a fee schedule;

- If the parties to an arbitration are of different nationalities, neither the sole arbitrator nor the chairman of a three-member arbitral tribunal shall have the same nationality as any party unless specifically agreed otherwise by all parties in writing;
- The arbitral tribunal is given a broad discretion as to how to conduct the proceedings;
- The arbitral tribunal have the power to, upon the application of a party, allow one or more third persons to be joined in the arbitration as a party, provided that such third person or persons and the applicant party have consented to such joinder in writing;
- The arbitral tribunal is to prepare a provisional timetable for the proceedings at an early stage; and
- If there is no majority, the award shall be made by the presiding arbitrator alone.

If parties choose the fee schedule, rather than proceed on the basis of agreed rates, the arbitrators' fees will be fixed by the HKIAC Council in accordance with the schedule, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

Hong Kong courts' statutory power to grant interim relief in aid of foreign arbitrations

Effective April 2, 2009, the Arbitration Ordinance (Cap. 341, Laws of Hong Kong), as amended by the Civil Justice (Miscellaneous Amendments) Ordinance 2008, empowers the Hong Kong courts to grant interim relief in relation to foreign arbitrations if the foreign arbitration proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong. The types of interim relief that may be sought include:

1. An order directing an amount in dispute to be secured;
2. In relation to a relevant property (i.e. a property (i) that is owned by or is in the possession of a party to the arbitration proceedings concerned; and (ii) that is subject to the proceedings, or in relation to which any question has arisen in those proceedings):
 - a) An order directing the inspection, photographing, preservation, custody, detention or sale of the property by the tribunal, a party to the proceedings or an expert; or
 - b) An order directing samples to be taken from, observations to be made of, or experiments to be conducted on the property;

3. An interim injunction or direct any other interim measure to be taken.

The amended Arbitration Ordinance confers upon the Hong Kong courts an express statutory power to grant interim relief in aid of foreign arbitration proceedings that have been or are to be commenced, notwithstanding that:

1. The subject matter of the arbitration proceedings would not give rise to a cause of action over which the Hong Kong courts would have jurisdiction; or
2. The order sought, the interim injunction or other interim measure is not ancillary or incidental to any arbitration proceedings in Hong Kong.

Nonetheless, in exercising such a power, the Hong Kong courts shall have regard to the fact that the power is:

1. Ancillary to arbitration proceedings outside Hong Kong; and
2. For the purpose of facilitating the process of a court or arbitral tribunal outside Hong Kong that has primary jurisdiction over the arbitration proceedings.

The Hong Kong courts also have the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of interim relief granted in relation to foreign arbitration proceedings as if the interim relief were granted in relation to arbitration proceedings in Hong Kong.

Prior to this amendment to the Arbitration Ordinance, there was not any statutory provision concerning the Hong Kong courts' power to grant interim relief in aid of foreign arbitrations, although it appears from the Hong Kong case law that the Hong Kong courts had limited inherent jurisdiction to do so.

The amended Arbitration Ordinance has removed doubt about the Hong Kong courts having the power to grant interim relief in aid of foreign arbitrations. This further confirms the status of Hong Kong as an arbitration-friendly jurisdiction.

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Our dispute resolution lawyers successfully represent our clients in a wide range of matters, including complex, cross-border and precedent-setting arbitrations and litigations, regulatory actions and white collar crime matters on behalf of the world's largest corporations, leading financial institutions, multinational companies and sovereign governments/state-owned enterprises.

Our international clients include government ministries, governmental agencies, multilateral agencies and shareholders of, investors in, lenders to, and joint venture participants in the oil and gas, nuclear power, telecommunications, cement production, construction, finance, investment banking, manufacturing, infrastructure and fund management sectors throughout Asia. Our expansive capabilities across all major industry sectors, insight from our highly experienced, attentive and accessible lawyers and our commitment to client service combine to offer you everything you need to handle complicated, multi-jurisdictional disputes.

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- One of the Top Ten Antitrust Law Firms 2007—*Global Competition Review*
- Top International Law Firm 2008 Vault Guide to the—*Top 100 Law Firms*
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