

# The issuance and enforcement of interim measures in international arbitration under Chinese law

Jian'an Wu<sup>\*</sup>, Shicong Qin<sup>†</sup>, and Xuetong Wang<sup>‡</sup>

## ABSTRACT

The issuance and enforcement of interim measures in international arbitration play a critical role for the parties to resolve the dispute and realize the final arbitral award. For arbitration seated in China, the power to issue interim measures traditionally vests exclusively in the Chinese Courts under the current *Arbitration Law* and *Civil Procedure Law of PRC*, except for limited types of arbitration. Aiming to align the Chinese arbitration law with international practices, the Ministry of Justice of China introduced the *Arbitration Law of the People's Republic of China (Amendment) (Draft for Comments)* in July 2021 which for the first time empowers the arbitral institutions at the legislative level to issue interim measures. This paper provides a comprehensive overview of the current as well as the newly introduced legal framework in China for the issuance and enforcement of interim measures in foreign-related arbitrations. Although the Amendment recognises the power of arbitral tribunals to issue interim measures in arbitrations seated in China, whether measures issued in arbitrations seated outside of China could be enforced in China remains unclear and the existing *Civil Procedure Law of PRC* would need to be further clarified to synchronise with the latest reform in Arbitration law.

In international arbitration, interim relief, also known as preliminary rulings or conservatory measures in Civil Law system, and prejudgement attachment or preliminary injunction in Common Law system, generally refers to a series of orders and decisions made by a court or arbitral tribunal before or during arbitration proceedings, aiming to 'preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the [tribunal] having

<sup>\*</sup> Jian'an Wu, Senior legal counsellor at DeHeng Law Offices Beijing. Previously obtained his PhD law degree *Sum Cum Laude* from Aix-Marseille Université France, Dr Wu specializes in international arbitration and cross-border M&A.

<sup>†</sup> Shicong Qin, Associate at DeHeng Law Offices specializes in cross-border dispute resolution and M&A. Before practising at DeHeng Law Offices Beijing, Shicong was awarded his J.D. degree at Monash University and admitted to the Victorian Supreme Court as an Australian lawyer.

<sup>‡</sup> Xuetong Wang, LLM candidate at the Renmin University of China. Her research mainly focuses on international commercial dispute prevention and settlement.

jurisdiction as to the substance of the case.<sup>1</sup> However, in the process of applying for the issuance and enforcement of interim relief, the arbitral parties need to consider not only the terms and the applicable law of the arbitration agreement, the rules of the arbitral institution, but also the law of the place of enforcement of the interim relief. The latter is likely to be overlooked when the parties enter into the arbitration agreement, yet may directly affect whether the interim relief can be enforced and consequently impact the enforcement of the final award.<sup>2</sup> As one of the largest trading power, China is gradually increasing its openness to the world and is currently experiencing a shift in its attitude towards interim relief in international arbitration under domestic law from conservative to supportive.

On 30 July 2021, the Ministry of Justice of the People's Republic of China issued *the Arbitration Law of the People's Republic of China (Amendment) (Draft for Comments)* (hereinafter referred to as the 'Amendment'), which significantly modified the current *Arbitration Law of the People's Republic of China* (hereinafter referred to as the 'Arbitration Law'). With regard to interim relief in arbitration, the Amendment takes into account the problems encountered in judicial practice and makes a major breakthrough in the existing rules by recognizing the power of the arbitral tribunal to issue interim relief for the first time. Therefore, in combination with the current laws, precedent cases and the Amendment, this article will first introduce the rules on the issuance of interim relief in foreign-related arbitrations under the current Chinese law, and then discuss the implementation of interim reliefs issued in arbitrations administered outside Mainland China, notably in foreign countries or Hong Kong or Macau (hereinafter referred to as the 'foreign arbitrations'), and lastly, the direction regarding the development of interim measures in Chinese law context under the Amendment of the *Arbitration Law* will be examined.

## THE ISSUANCE OF INTERIM MEASURES IN FOREIGN-RELATED ARBITRATION ADMINISTERED BY DOMESTIC ARBITRAL INSTITUTIONS SEATED WITHIN MAINLAND CHINA UNDER CURRENT CHINESE LAW

Arbitration and relevant procedures in China are mainly governed by *Arbitration Law* and *Civil Procedure Law of P.R.C.* The Arbitration Law adopts the legislative form which distinguishes the rules between domestic and foreign-related arbitrations. In particular, a separate chapter with specific provisions focussing on foreign-related arbitration is established. For the contents not mentioned in the chapter of foreign-related arbitration, the general provisions on the application of domestic arbitration will be applied.<sup>3</sup> Moreover, it should be noted that although foreign-related arbitration is defined as arbitration of disputes arising from foreign economic cooperation and trade, transportation and maritime matters,<sup>4</sup> in the current Chinese legal context, it is nonetheless generally associated with Chinese foreign-related arbitral institutions. That is, in light of relevant precedent cases,<sup>5</sup> different from the concept of international arbitration which refers to arbitral proceedings seated outside of China that is currently not concerned with any specific provisions, foreign-related arbitration under current Chinese arbitration law represents

<sup>1</sup> *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line*, Case No. C-391/95, [1998] E.C.R. I-7091, 7133 (E.C.J.)

<sup>2</sup> Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International BV, 2021), 343.

<sup>3</sup> Please find the 2017 version of the *Arbitration Law of the People's Republic of China* article 65, which provides that 'the provisions of this Chapter shall apply to all arbitration of disputes arising from foreign economic, trade, transportation or maritime matters. In the absence of provisions in this Chapter, other relevant provisions of the Law shall apply'.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Property Preservation in the Arbitration Proceedings of DONGWON F&B*, Shanghai High People's Court (2014) Hu Gao Shou Zhong Zi No. 21 Civil Ruling of the Second Instance. In this case, the court cited Article 279 of the Civil Procedure Law, which provides that 'if a party applies for preservation, the arbitral institution of the People's Republic of China for foreign-related disputes shall submit the application to the intermediate people's court of the place where the domicile of the person against whom the application is made is located or where the property is located', holding that there was no legal basis for a party to an arbitration before a foreign arbitral institution to apply to a Chinese court for an interim measure to be issued.

arbitration with foreign elements conducted by foreign-related arbitral institutions in China. Therefore, in this section, we will focus on the rules governing the issuance of interim reliefs in arbitration cases with foreign elements administered by Chinese foreign-related arbitration institutions under current Chinese law.

### Exclusive jurisdiction of the Court in issuing interim measures

With regard to the issuance of interim relief in foreign-related cases, Article 68 of the Arbitration Law provides that ‘whereas the parties involved in a foreign arbitration case apply for the evidence preservation, the arbitral institution on foreign-related disputes shall submit the application to the intermediate people’s court at places where the evidence are produced. As for property preservation and act preservation in foreign-related arbitration, there are no special provisions and hence Article 28 of the Arbitration Law on interim relief in domestic arbitration, which provides that ‘whereas due to the acts of the other party or other reasons, the arbitration award cannot be or is hard to be executed, the parties concerned may apply for property attachment. Whereas a claimant has applied for property preservation, the arbitral institution shall, according to the relevant provisions of the Civil Procedure Law, submit the application of the claimant to the people’s court’. In this regard, Article 279 of the Civil Procedure Law provides that ‘if a party applies for preservation, the arbitral institution of the People’s Republic of China for foreign-related disputes shall submit the application to the intermediate people’s court of the place where the domicile of the person against whom the application is made is located or where the property is located’.

Taking the aforementioned legislation into account, under the existing Chinese legal framework, the power of issuing interim relief in foreign-related arbitration cases is exclusively conferred on the courts. More specifically, the issuance of interim relief generally requires the parties to apply to the arbitral tribunal, which then transfers the application to a court of competent jurisdiction. Nonetheless, with the development and improvement of international arbitration rules, this approach which effectively excluded the arbitral tribunals’ power to issue interim measures is somewhat controversial, especially considering that the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as ‘the Model Law’) and the laws in different countries, as well as most arbitration rules, expressly empowers such right to the arbitral tribunal. Given that the jurisdiction of the arbitral tribunal in arbitration cases arises from the arbitration agreement voluntarily entered by the parties, it may be contrary to the principles of autonomy in arbitration, if the arbitral tribunal is excluded from the jurisdiction over interim relief. On the other hand, although the current exclusive jurisdiction of the courts guarantees the enforceability of the interim measures which could be directly executed in case of non-compliance by the parties, yet the burdensome procedures which require the application to be transferred through the arbitral institution could result in the court not able to provide prompt reactions to the parties’ need. Such delay due to the procedure requirement could be regarded as diametrically opposed to the purpose of interim measures which is to provide urgent safeguard to the parties. For example, in the arbitration between Yingrui Cayman Co., Ltd and Rugao Glass Fibre Factory,<sup>6</sup> during the proceeding in which the parties applied for interim measure, Rugao Glass Fibre Factory filed an application for preservation of evidence with the arbitral institution on 30 August 2011. The arbitral institution submitted the application to the Nantong People’s Court of Jiangsu Province on 6 September 2011, and the court made the ruling of evidence preservation on 6 February 2012 which was more than four

<sup>6</sup> Fuzhou Arbitration Commission, ‘An Analysis of an Arbitration Evidence Preservation Case - Also on the Inadequacy of the Existing Legal Provisions on Arbitration Evidence Preservation’ (26 Jan 2018). <[http://www.fuzhou.gov.cn/zgfbzt/szdw/zcw/yh/zcyj/zcalsw/201704/t20170420\\_405400.htm](http://www.fuzhou.gov.cn/zgfbzt/szdw/zcw/yh/zcyj/zcalsw/201704/t20170420_405400.htm)> accessed 2 February 2022.

months from the date of application. From the perspective of preserving the evidence, the long period for transferring the application could be prejudicial and hence contrary to the purpose of interim measures.

Meanwhile, the current Arbitration Law only provides for the preservation of evidence and property and does not mention other interim reliefs such as the preservation of conduct. In terms of the types and scope of interim relief, the current Chinese law still needs further improvement.

### Breakthrough in the arbitration rules on the issuance of interim measures by arbitral institutions

Under the current legal framework in China, neither the *Arbitration Law* nor the *Civil Procedure Law* authorizes arbitral tribunals to issue interim relief. However, with the emergence of commercial arbitration, China's major arbitral institutions have taken the lead in bringing breakthroughs in the rules on the issuance of interim reliefs by amending their respective arbitration rules. Particularly, the 2008 version of the *Beijing Arbitration Commission/Beijing International Arbitration Center Arbitration Rules* (hereinafter referred to as the 'BAC Arbitration Rules'), in line with the Arbitration Law, provides that if a party applies for the preservation of property or evidence, the arbitral tribunal will submit their application to the people's court of the place where the property or evidence is located. However, since 2015, the 2015, 2019 and 2022 versions of the BAC Arbitration Rules have all provided that 'at the request of the parties, the Arbitral Tribunal may order any interim measures it deems appropriate in accordance with the applicable law, and 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'. Similarly, the 2015 version of the *Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone* provides that the institution will decide whether the interim measures will be issued by the arbitral tribunal or to transfer the application to the court with competent jurisdiction in accordance with the application of the parties together with the relevant laws in the jurisdiction where the interim measures are sought.<sup>7</sup> It follows that if the interim relief is enforced within the territory of China, the Chinese arbitral institution will generally transmit the party's application for preservation to the Chinese court. But in circumstances where the place of enforcement of the interim measure is outside China or where Chinese arbitration procedural law is not applicable, the Chinese arbitral tribunal may also issue the relevant interim relief.

## THE ENFORCEMENT OF INTERIM MEASURES IN INTERNATIONAL ARBITRATION ADMINISTERED BY FOREIGN ARBITRAL INSTITUTIONS SEATED OUTSIDE OF MAINLAND CHINA UNDER CURRENT CHINESE LAW

### Possibility for interim measures issued in foreign arbitration to be recognised and enforced in China

As a contracting state of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (also known as 'New York Convention'), the *Civil Procedure Law of PRC* explicitly states that an arbitral award made by a foreign arbitral institution could be recognised and enforced

<sup>7</sup> See the 2015 version of *Arbitration Rules of the China (Shanghai) Pilot Free Trade Zone* article 20 Interim Measures in Arbitration, which provides 'SHIAC will transfer the application for interim measures, in accordance with the relevant laws in the jurisdiction where the interim measure(s) is sought together with these Rules, to the court with the competent jurisdiction for a ruling, or to the tribunal for a decision, or to the emergency tribunal constituted pursuant to Article 21 of these Rules for a decision'. <[http://www.shiac.org/upload\\_files/file/2020/20200813142126\\_1384.pdf](http://www.shiac.org/upload_files/file/2020/20200813142126_1384.pdf)> accessed 2 February 2022.

in accordance with the *New York Convention* or the principle of reciprocity.<sup>8</sup> Despite the fact that the *New York Convention* does not expressly address the enforcement of interim measures, several cases in the USA, France and etc. have provided precedents for courts to recognise and enforce interim reliefs made in international arbitrations with reference to the rules of *New York Convention* for recognising and enforcing arbitral awards. However, with regard to the recognition and enforcement of interim measures made by foreign arbitral institutions in China, the question remains unclear under the existing *Arbitration Law* or *Civil Procedures* and there was no precedent from the court practice in this regard.

Additionally, under existing Chinese law, an interim relief could not be issued by an arbitral institution, regardless it is a Chinese or foreign institution.<sup>9</sup> The power to issue interim measures is limited to the Chinese Courts and the arbitral institutions are only allowed to transfer the request from the parties to the Court. As such, notwithstanding the intention of the parties of international arbitration to apply directly to the Chinese Courts for implementing any interim measures, the Chinese Courts are presumably to be reluctant to issue interim measures upon requests by the parties. In the *Dongwon F&B v Shanghai Lehan Commercial Co Ltd* case, the applicant Dongwon F&B was involved in an arbitration against the respondent Shanghai Lehan Commercial Co., Ltd for dispute over a product purchase agreement. The arbitration was administered by Korean Commercial Arbitration Board International ('KCAB International') in South Korea. After the arbitration was initiated and the arbitral tribunal was constituted, the applicant Dongwon F&B applied to Shanghai Intermediate People's Court for property attachment against the defendant. The court ruled that the application was not supported by proper legal basis as the arbitration was not administered within the territory of China and hence was inadmissible. The applicant appealed the decision but was ultimately rejected at the Shanghai High Court.<sup>10</sup>

Therefore, based on the current legal framework and precedent in China, for arbitration administered in the foreign arbitral institution, the interim measures involved would be hardly recognised or enforced by Chinese Courts, regardless of whether the interim relief is issued by the foreign institution or applied directly to Chinese Courts by the parties. Nonetheless, despite the strict restriction on the issuance and enforcement of interim measures in international arbitrations, there are some exceptions. In particular, for maritime arbitration and arbitration administered in regions where specific arrangements are entered with China, there are special regulations and cases existed in relation to interim measures from international arbitrations.

### Procedures under the special Maritime Procedure Law of the People's Republic of China

In addressing the special procedures in litigations involving maritime matters, the *Maritime Procedure Law of the People's Republic of China* ('Maritime Procedure') was introduced and took effect on 1 July 2000. Compare to the standard civil procedures, the Maritime Procedure is considerably more open to recognising attachment in international maritime arbitration and less restrictive on the direct application of interim measures by the parties. More specifically, provisions in the Maritime Procedure state that interim measures, including evidence preservation, property attachment, injunction etc., shall not be restrained by

<sup>8</sup> Please find the *Civil Procedure law of the People's Republic of China* article 290 which states 'Where an arbitral award of an overseas arbitration organization requires ratification and enforcement by a People's Court of the People's Republic of China, the parties concerned shall submit an application directly to an intermediate People's Court at the location of the enforcee's residence or the location of the enforcee's properties, the People's Court shall handle the matter pursuant to the international treaty concluded or participated by the People's Republic of China or in accordance with the principle of reciprocity'.

<sup>9</sup> See Article 68 of the *Arbitration Law of the People's Republic of China* (2017 version) which states 'Where the parties to a foreign arbitration case apply for evidence to be protected, the foreign arbitration commission shall submit the application to the intermediate People's Court at the place where the evidence is situated'.

<sup>10</sup> *Property Preservation in the Arbitration Proceedings of DONGWON F&B*, Shanghai High People's Court (2014) Hu Gao Shou Zhong Zi No. 21 Civil Ruling of the Second Instance.

the arbitration agreement between the parties.<sup>11</sup> In circumstances where guarantee is provided or in cases of urgency, the concerning party will be entitled to file a motion to the Chinese Courts for preservation before the arbitration being constituted.<sup>12</sup> In the *Judicial Interpretation from the Supreme People's Court on the application of the Maritime Procedure* introduced in 2008 ('Maritime Interpretation'), it is further elaborated that in cases where the dispute has been submitted for arbitration, if the applicant is capable of tender evidence in relation to the concerning property or evidence, the Chinese Maritime Courts shall admit the application of interim measures.<sup>13</sup>

As a result, those provisions have been fully applied in practice in assisting the applicants' requests in maritime arbitrations. In the dispute arising from a vessel purchase contract involving the applicant a Zhoushan shipping company and the respondent Han, the applicant brought the dispute for maritime arbitration seated in London. To ensure the fulfilment of its claim, the applicant applied to Ningbo Maritime Court for attachment on the respondent's property on 5 February 2010 and in support of its application, the Shipping company also provided a guarantee for the property attachment. Accordingly, Ningbo Maritime Court ruled to seize a total amount of 4 million RMB from the respondent in the same month.

As such, although the Chinese Court does not recognise the request for interim measures in standard international arbitration administered in foreign institutions, for maritime arbitrations, the parties could apply and enforce interim measures directly with the Chinese Maritime Courts before or during the arbitration process based on existing Maritime Procedures and relevant judicial interpretations.

### Special procedure under regional assistance arrangement

On 1 October 2019, the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* ('HK Arrangement') comes into effect which signifies the mutual recognition and enforcement of interim measures in arbitrations between Mainland China and Hong Kong. Under the HK Arrangement, parties to the arbitral proceedings in Mainland China and Hong Kong will be entitled to apply and enforce interim measures with the Courts in both jurisdictions. In particular, prior to the issuance of arbitral award, any party to arbitral proceedings administered by a Mainland arbitral institution may apply to the High Court of Hong Kong for interim measures in accordance with relevant *Hong Kong Arbitration Ordinance and the Hong Kong High Court Ordinance*.<sup>14</sup> And vice versa, as part of the mutual recognition arrangement, the parties to arbitral proceedings seated in Hong Kong and administered by a qualified arbitral institution may apply to the Intermediate People's Court of the place of residence of the party

<sup>11</sup> See the *Special Maritime Procedure Law of the People's Republic of China* article 14 which provides 'The security for a maritime claim is not bound by an agreement on jurisdiction or an arbitration agreement about the maritime claim as between the litigants'. Article 53 which states 'Maritime injunctions are not bound by an agreement on jurisdiction or an arbitration agreement in respect of the maritime claim made between the relevant parties' and article 64 which states 'Maritime claimants applying for a maritime injunction shall submit an application in writing to the maritime court. The application shall clearly state the reasons for the application. Relevant evidence shall also be attached'.

<sup>12</sup> *Ibid.*, for example, in article 12 states that 'Security for a maritime claim refers to the coercive measures taken by a maritime court against the property of the person against whom the claim is made on the basis of an application by a maritime claimant in order to guarantee the fulfilment of the maritime claim'.

<sup>13</sup> See the *Judicial Interpretation from the Supreme People's Court on the Application of the Maritime Procedure Law of the People's Republic of China* article 21, 41, and 47, which set out the application procedures for maritime property preservation, maritime injunction and maritime evidence preservation respectively.

<sup>14</sup> See 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* article 6 which states 'Before the arbitral 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'.

against whom the application is made or the place where the property or evidence is situated, for interim measures in accordance with *Civil Procedure Law and Arbitration Law of P.R.C.*<sup>15</sup>

Therefore, based on the HK Arrangement and existing civil procedure in Mainland China, the parties to an arbitration seated in Hong Kong could apply for interim measures to a Mainland Court prior to the arbitral proceeding or during the proceeding which would require the Hong Kong arbitral institution to transfer the application of interim measure to relevant Mainland Courts. This approach under the HK Arrangement has been exercised in practice since its introduction. In the *Singapore Branch of UBS Group AG v. Shanghai Sinoil Energy Holding Corporation*,<sup>16</sup> the parties were involved in an arbitration administered by HKIAC and the applicant sought to preserve the property of the respondent which was located in Mainland China. As the application was made during the arbitral proceeding, HKIAC transferred the application to the Shanghai Financial Court which ultimately ordered the seizure of a total amount of 370,325,094.84 USD from the respondent.

The regional mutual assistance of interim measures demonstrates the efforts of Chinese Courts to support commercial arbitrations across different regions and jurisdictions as well as reflecting the direction and attitude towards a more open and internationalized environment for arbitration. Additionally, the *Arrangement of the Supreme People's Court Concerning Mutual Assistance in Preservation in Arbitration Proceedings between the Mainland and the Macao Special Administrative Region* came into effect on 25 March 2022 which further broadened the scope of assistance for interim measures available to Chinese Courts.

## NEW RULES ON INTERIM MEASURES UNDER THE AMENDMENT OF ARBITRATION LAW OF P.R.C.

The Amendment maintains the legislative form of distinguishing between domestic arbitration and foreign-related arbitration rules. Similar to the current Arbitration law in force, the Amendment provides that arbitration with foreign-related elements shall be subject to the special provisions of Chapter VII concerning foreign-related arbitration.<sup>17</sup> Otherwise, other relevant provisions of this Law shall apply. At the same time, as there is no specific provision in Chapter VII concerning interim relief in foreign-related arbitrations, the rules for domestic arbitrations regarding interim measures shall be applicable to foreign-related arbitrations. More specifically, in Chapter IV, the New rules on interim measures under the amendment of arbitration law of P.R.C. section of the Amendment on Interim Measures, the number of rules on the preservation of property and evidence has been expanded to from the current two rules to seven, which set out in detail the meaning and scope of interim measures, the authority for issuing interim measures, the modification, suspension and termination of interim measures, the domestic and extraterritorial enforcement of interim measures, and the system of emergency arbitrators. As for the purpose of this article, we will mainly focus on the new rules in relation to the issuance and enforcement of interim measures.

<sup>15</sup> Ibid, article 3 provides 'Before the arbitral award is made, a party to arbitral proceedings in Hong Kong may, by reference to the provisions of the Civil Procedure Law of the People's Republic of China, the Arbitration Law of the People's Republic of China and relevant judicial interpretations, make an application for interim measure to the Intermediate People's Court of the place of residence of the party against whom the application is made ('respondent') or the place where the property or evidence is situated. If the place of residence of the respondent or the place where the property or evidence is situated fall within the jurisdiction of different people's courts, the applicant shall make an application to any one of those people's courts but shall not make Separate applications to two or more people's courts.'

<sup>16</sup> *Singapore Branch of UBS Group AG v. Shanghai Sinoil Energy Holding Corporation*, Shanghai Financial Court (2020) Hu 74 Cai Bao No.7 Civil Ruling of First Instance.

<sup>17</sup> See the *Arbitration Law of the People's Republic of China (Amendment) (Draft for Comments)* article 88.

### A more liberal mechanism of issuing interim measures

First, in terms of the types of interim relief, the Amendment specifies that interim relief includes preservation of property, evidence, conduct and other short-term measures deemed necessary by arbitral tribunal.<sup>18</sup> The scope of interim relief is expanded through the form of both enumerated and descriptive definitions, giving the arbitral tribunal broad discretion to issue the most appropriate interim measures on the merits of the cases. Second, regarding the authority for issuing interim relief, the Amendment not only recognizes the power of domestic arbitral tribunals to issue the measures in foreign-related arbitration cases, but also introduced the concept of emergency arbitrator.<sup>19</sup>

Under the Amendment, the parties to an arbitration will be entitled to interim measures both before and after the constitution of the arbitral tribunal. Prior to the constitution of the arbitral tribunal, the parties could either apply to the Courts for interim relief or to the arbitral institution for the appointment of an emergency arbitrator to seek urgent relief. Similarly, after the constitution of the arbitral tribunal, the parties will have the option to apply to the court or the arbitral tribunal for interim measures. It is worth noting that, different from the rules stipulated in the *French Code of Civil Procedure*, which reserves the power of attachment and judicial guarantees to the judicial authorities,<sup>20</sup> the Amendment does not differ the types of interim relief that can be issued by different authorities. The lack of difference between the Court and the arbitral institution in relation to the types of interim relief enables the parties for applying more detailed arbitration agreements or arbitration rules for the spirit of the principle of autonomy in arbitration. Nonetheless, considering that an arbitral institution is not a judicial body authorized by the state, instead, it is a private institution chosen by the parties for resolving disputes and could issue interim reliefs, including payment orders and injunctions, expecting the parties to perform voluntarily. However, if interim reliefs such as seizure, attachment or freezing of the parties' property are to be issued by an arbitral institution, given the fact that it is not empowered to enforce such order, the interim measures can only be fulfilled with the assistance of the courts. Therefore, whether the Amendment will open up the power to issue all interim relief to arbitral institutions remains to be further examined in practice.

Lastly, the Amendment substitutes the previous model which requires the arbitral tribunal to transfer the application of interim measures filed by the parties to the courts. Rather, under the rules established in the Amendment, the parties to an arbitration can apply for interim relief directly to the court or the arbitral tribunal in accordance with relevant civil procedure or arbitration rules. The reform has significantly simplified the steps for parties to apply for interim measures and enabled the interim relief to better fulfil its role in the arbitration by maintaining the status quo and protecting the rights of the parties.

### A more accessible mechanism of implementing interim measures

With the granting of the power to issue interim measures to the arbitral institution, the implementation of the measures issued by an arbitral tribunal need to be addressed as the existing Arbitration Law is not concerned with such issue because of the previous exclusive jurisdiction of the courts in issuing interim measures. To address this, in addition to authorizing the arbitral institution for issuing interim measures, Article 48 of the Amendment further provides that if a decision on interim measures requires the assistance of the Court, the parties may apply to the Court for assistance in enforcement. Although the requirements for enforcement are yet to be

<sup>18</sup> Ibid., article 43.

<sup>19</sup> Ibid., article 49.

<sup>20</sup> Jian'an Wu, Shicong Qin and Xuetong Wang, 'The Issuance and Enforcement of Interim Measures in International Arbitration Cases from the Perspective of French Law' (21 Jun 2022) <<http://www.dhl.com.cn/CN/tansuocontent/0008/025675/7.aspx?MID=0902>> accessed on 4 Sep 2022.



clarified, the mechanism for the arbitration institutions to issue interim relief and the parties to apply to the court for enforcement has been aligned with the UNCITRAL Model Law.<sup>21</sup>

Regarding the question of whether interim measures in international arbitrations seated outside of China can be recognized and enforced in Chinese courts, instead of addressed in the Amendment, the answer should be considered within the scope of the *Civil Procedure Law*. Nevertheless, Article 49 of the Amendment provides that where interim measures need to be implemented outside the territory of the People's Republic of China, the parties may apply directly to a competent foreign court for enforcement. Although this new provision only indicates a unilateral way of realizing interim measures in foreign arbitrations, it also indicates that Chinese law has started to recognize the cross-border enforcement of interim reliefs issued by arbitral tribunals in different regions.

Moreover, considering that the Amendment is still in the stage of requesting comments, the detailed legislation could be further refined and its interaction with the *Civil Procedure Law* needs to be further clarified. For example, the current *Civil Procedure Law* expressly stipulates that a Chinese foreign-related arbitration institution shall submit the parties' application for preservation to the intermediate people's court of the respondent's domicile or the place of the property,<sup>22</sup> whereas the provisions in the Amendment exceed this rule by authorizing domestic arbitration institutions to issue interim relief directly. In order for the Amendment to take full effect as expected, it is necessary to clarify the relevant provisions of the *Civil Procedure Law* while revising the *Arbitration Law*. With reference to the Ministry of Justice of China's notion for the Chinese *Arbitration Law* to be increasingly in line with international standards,<sup>23</sup> we suggest that the *Civil Procedure Law* could be clarified on the basis of the revision of the *Arbitration Law*, and expand the interpretation of the 'award of a foreign arbitral institution' in Article 290 of the *Civil Procedure Law* potentially with a judicial interpretation from the Supreme Court of P.R.C by taking into account the judicial practice in the USA and France. That is, the 'arbitral award' in the aforementioned legislation could be expanded to include interim reliefs which will provide legal basis for parties to arbitrations seated outside of China to apply for the enforcement of interim reliefs in Chinese courts. However, whether this issue will actually be upheld by the courts ultimately needs to be determined in accordance with the specific provisions in the officially published law.

Overall, the Amendment has made significant additions to the original rules in respect of interim reliefs, which significantly protect the rights of parties to seek redress and are more consistent with international arbitration rules. However, there are still some details requiring further clarification and the latest legislative developments need to be closely monitored.

## CONCLUSION

In conclusion, under existing Chinese *Arbitration Law* and *civil procedure*, it would be hardly possible for parties to an international arbitration seated in foreign territory to be supported by Chinese courts with regard to the interim reliefs. First and foremost, the current *Arbitration Law* and *Civil Procedure of PRC* provides that the Chinese Courts are the sole authority allowed to issue interim relief and consequently interim measures imposed by foreign arbitration centres will not be able to be recognised or executed by Chinese Courts. Second, given the lack

<sup>21</sup> See the *UNCITRAL Model Law on International Commercial Arbitration* article 17H, which provides that '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'.

<sup>22</sup> Please find the *Civil Procedure Law of the People's Republic of China* article 279 which states 'Where a party concerned applies for preservation, the foreign-related arbitration organisation of the People's Republic of China shall forward the application of the party concerned to an intermediate People's Court at the location of the respondent's residence or the location of the properties for ruling'.

<sup>23</sup> See Part II of the *Notes on Arbitration Law of the People's Republic of China (Amendment) (Draft for Comments)* for the basic notions of the amendment.

of specific provisions in the existing Chinese law authorizing the concerning parties of a foreign arbitration to apply directly to the Chinese Courts for interim measures, an immediate approach to this matter is not feasible either. It should be noted that the aforesaid circumstance would not include maritime cases or cases heard in arbitration institutions located in HK or Macau. Nonetheless, it is obvious that the existing Chinese Law is considerably conservative and reluctant to issue or enforce interim measures in international arbitrations.

With the introduction of *the Arbitration Law of the People's Republic of China (Amendment) (Draft for Comments)* the jurisdiction of issuing interim measures has been broadened which not only empowers the arbitration institutions in China to issue interim measures in addition to the traditional court-issued interim reliefs but also opened up possibilities for the implementation of the interim measures issued by foreign arbitration institutions by the Chinese Courts. Although the Amendment has yet to be finalized and a few details remained unanswered, it is obvious that the Chinese legislatures are leaning more towards finding solutions for practical issues in relation to the implementation of interim measures in international arbitrations in China and aiming to further align the Chinese and International arbitration practices. It is expected that with the Amendment coming into force in the near future, it will be more accessible for the parties to international arbitrations to apply for or enforce interim measures in China. The pro-arbitration legal environment will be further established and provide a solid foundation for China to become an international centre for commercial arbitration.