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2023: Hop-timistic Outlook for Offshore Support for Chinese Arbitrations

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2023 welcomes the Year of the Rabbit, a symbol of longevity and prosperity. The Year of the Rabbit marries kindly with the outlook for offshore related Hong Kong SAR (“**Hong Kong**”) and other People’s Republic of China (“**PRC**”) seated arbitrations. Over the last few years, the British Virgin Islands (“**BVI**”) and the Cayman Islands (“**Cayman**”) have topped the nationality of parties involved in Hong Kong International Arbitration Centre arbitrations (other than parties from Hong Kong or the PRC, who occupy the top two spots on the list). The Courts of Bermuda, Cayman and BVI are well equipped and experienced in dealing with matters ancillary to Asian-seated arbitrations and we have seen strong continued support. This article will provide a brief introductory summary to the key tools available in the offshore courts to assist parties to Chinese seated arbitrations as at the start of the Year of the Rabbit.

Interim Remedies

Often during an arbitration, protective measures against an offshore entity are required. This can sometimes be dealt with by the arbitrators in Hong Kong or the PRC alone, but often parties may need to rely on the relevant offshore Courts. This can be in situations where, for example time is of the essence and an arbitral tribunal has not yet been constituted, where relief is required against an offshore entity which is not party to the arbitration, or where there are concerns about enforcing an interim order obtained in Hong Kong/the PRC in the offshore jurisdiction.

In appropriate circumstances the offshore Courts have the power to order freezing injunctions restraining a respondent from disposing or dealing with its assets; this can be specific to assets in a specified jurisdiction or against a respondent’s

worldwide assets. This can be crucial to preserving assets while an arbitration in Hong Kong/the PRC is ongoing. As part of the core requirements, an applicant must typically show (i) that it has a good arguable case on the merits of its underlying claim against the respondent, (ii) that there is a real risk that unless restrained the respondent will take steps to dissipate its assets to avoid the enforcement of any arbitral award against it, and (iii) that it is just and convenient to grant the relief sought. These orders may also direct provision of information about the location of property or assets.

It is also possible to obtain relief against a third party who is not subject to the arbitration in Hong Kong/the PRC if the third party appears to hold assets on behalf of the defendant and if there is a reason to believe that the assets which are ostensibly those of the third party are, in truth, those of the defendant against whom the freezing order has been made. This is known as a Chabra injunction and is, in principle, available in BVI, Cayman and Bermuda.

As well as a freezing injunction and Chabra injunction, other injunctions that can sometimes be obtained offshore include prohibitory injunctions, restraining a respondent from acting in a particular way; proprietary injunctions, protecting property and trust assets where the applicant has a proprietary interest in the relevant asset; and anti-suit injunctions restraining proceedings.

An undertaking in damages will normally be required to compensate the respondent in the event that it is subsequently determined that the injunction was wrongly granted and the respondent has suffered loss as a result of the injunction which it should be compensated for. An undertaking in relation to losses suffered by third parties affected by the injunction may

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also be required. The Courts have a discretion to require fortification of the undertakings, for example, by a payment into Court.

The offshore Courts are used to dealing with applications for injunctive relief on an urgent basis and even during any court vacation period a judge will be available to hear matters certified as suitable for vacation or urgent business.

As a matter of principle, orders will not generally be made against a person or entity without them being given the opportunity to be heard. However, there are exceptions to this, including circumstances of extreme urgency where notice is not possible or where giving notice may defeat the purpose of the application. Given the nature of freezing orders and the requirement to prove a real risk of dissipation, these orders are commonly made without notice to the other side. In such situations there is a duty of full and frank disclosure which requires the applicant to disclose all matters that may be material to the court in deciding whether or not to grant the order.

As an alternative to an injunction, another protective measure available to those with a beneficial interest in shares who are concerned that those shares may be transferred before an enforcement action has completed, is to obtain a stop notice or stop order. A stop notice does not require a court hearing and does not prevent the transfer but requires notice to be given to the applicant prior to any transfer of shares or payment of dividends by the issuing company. A stop order is granted by the court but goes further than a stop notice as it prohibits any transfer of shares or payment of dividends by the issuing company. This is available in BVI and Cayman.

Obtaining interim relief offshore is a powerful tool in support of a Hong Kong/PRC arbitration. The consequences of failing to comply with the terms of an injunction may be contempt of court and a person held in contempt may be imprisoned, fined and/or have their assets seized. A company in contempt may be fined and/or have its assets seized and the directors of the company may also be imprisoned, fined and/or have their assets seized.

Disclosure Orders

Some information that could be useful in a Hong Kong/PRC arbitration may be available through a company search in the relevant offshore jurisdiction, such as a registered address and standing of a company or identity of directors in BVI, Cayman and Bermuda.

However, where the required information is not openly available, the offshore Courts both issue and honour requests for foreign judicial and arbitral assistance. When it comes to obtaining documents/information they are also well versed in the use of Norwich Pharmacal and Bankers Trust Orders.

Norwich Pharmacal Orders assist with asset tracing and enforcement of Hong Kong/PRC arbitral awards and judgments by compelling a third party (often a registered agent or bank) to disclose information which may be

unattainable or otherwise confidential. They are available against those who have become “mixed up” in the wrongdoing committed by another, and are a potentially powerful tool for identifying the wrongdoer and obtaining other information that might be vital to the success of an arbitration particularly where it involves a fraud claim.

In order to obtain a Norwich Pharmacal Order a party must demonstrate that (i) there has been wrongdoing; (ii) that the disclosure sought is necessary to enable the requesting party to seek redress for the wrongdoing, and; (iii) that the respondent is likely to be able to provide the information sought and is “mixed up” in the wrongdoing.

Disclosure may also be obtained from banks by obtaining a Bankers Trust Order to assist in the tracing and preservation of assets where there is a proprietary claim. In addition to all of the requirements that must be satisfied for a Norwich Pharmacal order, the applicant will also have to show that there is good reason to believe that the bank holds property misappropriated by fraud or breach of trust and to which the applicant has a proprietary claim. It must also be shown that the information will be used solely to trace the funds.

In appropriate circumstances, a Norwich Pharmacal Order or a Bankers Trust Order can be combined with a “gag and seal order” which prevents the subject of the order (the bank or the registered agent) from disclosing to its client that it has been ordered to provide information. This can be important, to avoid tipping off the wrongdoer and reduce the risk of the wrongdoer destroying evidence or dissipating assets.

Enforcement of the arbitral award

The offshore Courts typically distinguish between a New York Convention award and a non-New York Convention award. Both Hong Kong and the PRC are contracting states of the New York Convention. Where an award is a New York Convention award, it may be recognised and enforced more easily given that the court does not have a discretion to refuse permission to enforce.

Once the arbitral award has been recognised in the offshore jurisdiction, the ordinary method of enforcement against shares held by a judgment debtor is first by interim charging order followed by a final charging order.

When a final charging order is made, if the debtor fails to pay, then either the shares are to be sold or an equitable receiver may be appointed over the shares. In the latter scenario the equitable receiver may be able use their powers as receiver to replace the director(s) of the company and then use their powers to realise the assets of the company for the benefit of the creditor. The appointment of a receiver can be ordered for that limited and specified purpose. However, the appointment of equitable receivers by way of execution will not be granted unless there is some ‘hindrance or difficulty’ in using the normal processes of execution.

Continued

Conclusion

Offshore support for Chinese seated arbitrations is therefore greater than ever in the Year of the Rabbit and, with a full service office in central Hong Kong, Carey Olsen is well positioned to assist with any Hong Kong or PRC arbitration support you may require which includes an offshore nexus.



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This briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.
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FIND US

Carey Olsen Bermuda Limited
2nd Floor Atlantic House
11 Par-la-Ville Road
Hamilton HM11 Bermuda

T +1 441 542 4500

E bermuda@careyolsen.com

Carey Olsen (BVI) L.P.
Rodus Building PO Box 3093
Road Town Tortola VG110
British Virgin Islands

T +1 284 394 4030

E bvi@careyolsen.com

Carey Olsen
PO Box 10008 Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000

E cayman@careyolsen.com

Carey Olsen Hong Kong LLP
Suites 3610-13
Jardine House
1 Connaught Place
Central
Hong Kong SAR

T +852 3628 9000

E hongkong@careyolsen.com



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