

(Courtesy English translation)

**The Understanding 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**

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On 25 March 2019, the Adjudication Committee of the Supreme People’s Court in its 1763<sup>th</sup> plenary meeting discussed and passed 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* (hereinafter the “**Arrangement**”). On 2 April 2019, Vice President of the Supreme People’s Court, Mr. Yang Wanming, and the Secretary of Justice of Hong Kong SAR, Ms. Teresa Cheng SC, signed the Arrangement in Hong Kong on behalf of each jurisdiction. Upon mutual consultation, the Arrangement is scheduled to take effect in both jurisdictions on 1 October 2019 at the same time. In mainland China, the Arrangement will be published in the form of a judicial interpretation. This is the seventh mutual judicial assistance arrangement concluded between mainland China and Hong Kong since the handover of Hong Kong to China. This is also the first arrangement that mainland China has signed with another jurisdiction concerning mutual assistance in interim measures in aid of arbitration. This signals the advancement of a closer relationship in mutual judicial assistance between the two jurisdictions under the principle “One country, Two systems”.

**I . THE BACKGROUND TO THE CONCLUSION OF THE ARRANGEMENT**

First, the principle of “One country, Two systems” and the Basic Law of Hong Kong provide the basis for having mutual judicial assistance in the two jurisdictions. Article 95 of the Basic Law provides that Hong Kong SAR may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other. This lays down the legal basis for concluding relevant judicial assistance arrangement between the Supreme People’s Court and the Department of Justice of the Hong Kong SAR. Since Hong Kong’s handover, the Supreme People’s Court has signed six civil and commercial matters related arrangements on mutual assistance with Hong Kong, ranging from mutual service by mandate of court documents, mutual assistance by mandate on evidence gathering, mutual enforcement of arbitral awards, and mutual recognition and enforcement of civil and commercial matters related judgements etc. Together, these arrangements have basically covered all aspects of mutual assistance on civil and commercial law related matters. This reduces litigation costs and burden of the parties and improves the efficiency of dispute resolution. The Arrangement is the seventh civil and commercial matters related arrangement on judicial assistance between the two jurisdictions, and it is an important measure for implementing the principle of “One country, Two systems” in the judicial sector.

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<sup>1</sup> This is a courtesy English translation of the article published by People’s Courts Daily; the original article in Chinese is available at: [http://rmfyb.chinacourt.org/paper/html/2019-09/26/content\\_160433.htm?div=-1](http://rmfyb.chinacourt.org/paper/html/2019-09/26/content_160433.htm?div=-1)

Secondly, there is a demand in reality for mutual judicial assistance in aid of arbitral proceedings arising out of the social and economic development of the two jurisdictions. The Greater Bay Area is being implemented together by Mainland, Hong Kong SAR and Macau SAR. Given the uniqueness of “One country, two systems, three jurisdictions”, there will inevitably be legal disputes and conflicts of inter-jurisdictional laws. Thus, mutual inter-jurisdictional judicial assistance is pressingly needed, which includes the strengthening of mutual recognition and enforcement of arbitral awards and having mutual assistance in interim measures. The *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong* (hereinafter the “**Enforcement Arrangement**”), which was signed in 1999, resolved the issues on mutual recognition and enforcement of arbitral awards between the two jurisdictions, and has been functioning well. It has been supporting Hong Kong’s development as a hub for international legal and dispute resolution in Asia-Pacific region. However, its scope is limited to the recognition and enforcement of final arbitral awards and does not cover assistance in preservation measures at interim stages. Research reveals that assistance in preservation measures can ensure the smooth enforcement of the final arbitral awards through improving and perfecting preventive preservation measures. It will also help give full play to arbitration in the diversified dispute resolution mechanisms, which will give more support to Hong Kong for its development as an international legal and dispute resolution center.

Thirdly, the principle of “One country” and the close cooperation between the judiciary and legal professions in the two jurisdictions together provide a favorable foundation for a closer collaboration between the two jurisdictions. Pursuant to the Arbitration Ordinance and the High Court Ordinance of the Hong Kong SAR, Hong Kong can provide assistance in preservation measures for arbitral proceedings in various jurisdictions out of Hong Kong, including mainland China. However, the equivalent was not available in mainland China. After research, on the premise that the existing legal mechanisms shall not be violated and in further aid to support Hong Kong to become an international legal and dispute resolution center, the Supreme People’s Court decided to launch the consultation for the Arrangement and to provide Hong Kong with much closer assistance than other countries and jurisdictions under the principle of “One country”.

## **II. THE MAIN CONTENT OF THE ARRANGEMENT**

The Arrangement has in total 11 articles, which specifies the process for mutual juridical assistance between the Mainland and Hong Kong, the scope of the preservation measures that are available for application, the procedure of application, and the processing and examination of the applications etc.

### **(I) Types of preservation measures**

Known as “preservation” in civil law jurisdictions and “interim measures” in common law jurisdictions, these measures are, essentially, preventive reliefs to ensure the enforcement of final arbitration award, and to protect the parties’ legal rights. The Arrangement adopts the same term of “preservation”. Article 1 defines the respective types of preservation measures that are available under the laws of the two jurisdictions:

1. Applying for preservation before courts in mainland China: The PRC Arbitration Law provides for property preservation and evidence preservation, and the PRC Civil Procedure Law, when amended in 2012, further provides for conduct preservation. The intention of the Arrangement is to give the parties to the arbitral proceedings in Hong Kong the same rights as the parties to the arbitral proceedings in mainland China. Therefore, property preservation, evidence preservation and conduct preservation are all covered by the Arrangement.
2. Applying preservation measures before Hong Kong courts: "preservation" is referred to as "interim measures" in Hong Kong, i.e. Hong Kong courts grants interim measures for arbitral proceedings, which have commenced or are to commence in Hong Kong or outside Hong Kong, to facilitate progress of arbitral proceedings and to prevent irreparable harm. They mainly include maintaining status quo or restoring original status, taking action to prevent existing or forthcoming harm or damage to arbitral proceedings or prohibiting any such harmful or damaging conduct, preserving assets, preserving evidence that are relevant and important to resolving disputes, issuing injunctions in order to prevent parties from dissipating or dealing with their assets, causing damages or infringements, and issuing order to appoint an asset administrator. For example, in an arbitral proceeding on shareholders' dispute that was administered by China International Economic and Trade Arbitration Commission in 2017, the claimant applied to the Hong Kong court for the appointment of an interim administrator and an injunction to restrain the transfer of shares by the respondent. The Hong Kong court ordered accordingly in HCMP962/2017.

## **(II) The definition of "arbitral proceedings in Hong Kong"**

Article 2(1) of the Arrangement defines "arbitral proceedings in Hong Kong", according to which the following two conditions must be met at the same time:

1. The place of arbitration shall be Hong Kong. This is the primary condition for determining the "arbitral proceedings in Hong Kong " and the standard adopted by the Hong Kong SAR to confirm the nationality of arbitral proceedings. It is also the standard adopted by the Enforcement Arrangement. There are two ways that the place of arbitration could be Hong Kong: (1) the parties agree in the arbitration agreement that Hong Kong shall be the place of arbitration; or (2) absent such agreement, the arbitral tribunal determines that Hong Kong shall be the place of arbitration according to its arbitration rules or certain criteria, and has accordingly recorded such in its award.
2. The arbitration shall be administered by certain institutions or permanent offices. Article 2(1) of the Arrangement listed the criteria for such institutions or permanent offices, and stipulates that a list of qualified institutions or permanent offices shall be provided by the HKSAR Government to the Supreme People's Court and be confirmed by the Supreme People's Court. The main consideration behind this is that comparing to assistance in enforcement measures for final arbitral awards, the assistance in preservation in arbitration are interim and therefore should be treated with more caution in order to prevent applicants from abusive use thus causing harm to respondents. In accordance to Article 2(2) and upon releasing standard, accepting application and conducting review, the Department of Justice of the Hong Kong SAR has made

the decision on the list of certain institutions or permanent offices which comply with Article 2(2), and the list has been confirmed together by the Supreme People's Court and the Department of Justice of the Hong Kong SAR. The approved institutions include Hong Kong International Arbitration Centre, China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, International Court of Arbitration of the International Chamber of Commerce - Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Center (HK), and eBRAM International Online Dispute Resolution Centre.

In addition, “arbitral proceedings in Hong Kong” under the Arrangement would only apply to commercial arbitrations between equal parties, and do not include investment arbitrations between investors and host States.

### **(III) The definition of “arbitral proceedings in mainland China”**

Pursuant to Article 6, an “arbitral proceeding in mainland China” in which application of interim measures can be made before Hong Kong courts is defined as an arbitral proceeding administered by mainland Chinese arbitral institutions, irrespective of whether the place of arbitration is in mainland China. The main consideration behind this is that according to the Arbitration Ordinance and the High Court Ordinance of Hong Kong, Hong Kong courts can grant interim measures for arbitral proceedings that has or has not yet commenced outside Hong Kong, regardless of the place of arbitration. For arbitral proceedings that are administered by mainland Chinese arbitral institutions with a foreign place of arbitration, applications can also be made before Hong Kong courts for interim measures. The definition of “arbitral proceedings in mainland China” in this Arrangement should not take away such rights from mainland Chinese arbitral institutions. Accordingly, when defining “arbitral proceedings in mainland China”, the Arrangement does not restrict the place of arbitration.

### **(IV) The Courts that can accept applications for preservation measures**

1. The mainland Chinese courts that can accept applications for preservation measures: According to Article 3(1) of the Arrangement, courts in mainland China with jurisdiction to hear the preservation measure applications shall be the Intermediate People’s Court at either the place of residence of the respondent, or the place where the property or evidence is situated. Considering that the purpose of preservation measures is to safeguard the enforcement of the final arbitral awards, the court that hears the application for preservation measures should be consistent with the court that hears the application for enforcement of the arbitral awards, so as to better play the role of preservation measures. With reference to the Enforcement Arrangement and the Arrangement on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (hereinafter the "**Judgment Arrangement**"), Article 3 also provides that if the place of residence of the respondent and 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. The main consideration of such requirement is to avoid the occurrence

of over-standard preservation measures due to applications to multiple people's courts. In practice, the court should review the application, especially the ones that involves preservation of assets or evidence that falls out of the court's own jurisdiction. Assistance could be requested from the courts where the assets or evidence is located.

2. The Hong Kong courts that can accept applications for preservation measures: According to the Arbitration Ordinance and the High Court Ordinance, the High Court of Hong Kong shall have jurisdiction to order such measures. This is the same court that has jurisdiction to enforce arbitral awards.

#### **(V) Timing and procedures of the applications for preservation measures**

Articles 3(2) and 3(3) of the Arrangement respectively stipulate the procedures for applying for preservation measures before courts in mainland China for cases either during arbitral proceedings or before the acceptance of request for arbitration by arbitration institutions or permanent offices.

1. Preservation measure applications made during arbitral proceedings: Article 3(2) of the Arrangement, with reference to article 272 of the PRC Civil Procedure Law, provides that the party's application shall be transferred by the said institutions or permanent offices to the Court in mainland China. However, considering that the said arbitration institutions or permanent offices are located in Hong Kong, if in practice the application and the transfer letter are required to be submitted by the relevant arbitration institution or permanent office in Hong Kong to the courts in mainland China, the process could be long, which is inconsistent with the urgency of preservation measure and does not make full use of its function.

Therefore, the parties to the arbitration proceedings in Hong Kong shall be allowed to submit their application for preservation measures together with the transfer letter from the arbitration institution or permanent office directly to the court in mainland China; the court in mainland China may, in accordance with the contact information provided by the Department of Justice of the Hong Kong SAR, verify the information with the relevant arbitration institution or permanent office.

2. Pre-arbitration preservation measure applications: Article 3(3) of the Arrangement, with reference to article 101 of the PRC Civil Procedure Law, provides procedures of applying pre-arbitration preservation measures. In addition, the Arrangement also adds a provision on the letter of proof, i.e., if the application for preservation measures is submitted before the request of arbitration is accepted by relevant arbitration institution or permanent office, the arbitration institution or permanent office shall issue a letter of proof to the court in mainland China after it accepts the request for arbitration. In practice, in line with the "applications made during arbitral proceedings" above, the parties are allowed to directly submit the letter of proof to the court in mainland China. This article further clarifies that the expiry date of the 30-day period shall be the date of receipt of the letter of proof from the court in mainland China. This period includes the parties submitting the request for arbitration, the relevant arbitration institution or permanent office accepting such request, the relevant arbitration institution or permanent office

issuing and transmitting the letter of proof, etc., and each step shall be carried out as soon as possible.

According to Article 6 of the Arrangement, parties to arbitration proceedings administered by institutions in mainland China can apply for preservation measures before courts in Hong Kong either during arbitral proceedings or before their requests for arbitration are accepted.

## **(VI) Materials and information required for applications**

1. *The required materials for applying for preservation measures to the court in mainland China and the content of application.* Article 4(1) of the Arrangement stipulates the materials that should be submitted by the parties to arbitration proceedings in Hong Kong when applying to the court in mainland China for preservation measures: (1) the application for preservation measure; (2) the arbitration agreement, this is a *prima facie* review in order to facilitate the court in mainland China to determine the basic legal relationship between the parties, and is not a decision on the validity of the arbitration agreement; (3) identity documents; (4) request for arbitration together with the relevant evidential materials; and (5) any other materials required by the court in mainland China. Article 4(2) follows the Judgment Arrangement and relaxes the requirement on "notarization and verification", i.e. the identity documents will need to be notarized and verified only if they are formed outside mainland China, and details of notarization and verification shall follow laws and regulations in mainland China.

Article 5 of the Arrangement stipulates that the application for preservation measures shall include the following information: (1) particulars of the parties; (2) details of the application, including the amount applied to be preserved, the particulars of the action applied to be preserved and the time period etc., and the application shall be specific and detailed; (3) the facts and justifications on which the application is based, together with the relevant evidence, including an explanation of the urgency of the circumstances so that if preservation measure is not granted immediately, the legitimate rights and interests of the applicant may suffer irreparable damage or the enforcement of the arbitral award may become difficult, etc.; (4) clear particulars of the property and evidence to be preserved or concrete threads which may lead to a train of inquiry; (5) information about the property in the Mainland to be used as security or certification of financial standing; (6) whether any application under this Arrangement has been made in any other court, relevant institution or permanent office, and the status of such application; (7) any other matters as may be required to be specified.

2. *The required materials for applying for preservation measures to the court in Hong Kong.* Article 7 of the Arrangement stipulates in accordance with Hong Kong laws the materials and particulars to be specified that should be submitted by the parties when applying to the court in Hong Kong for interim measures. Under the laws of Hong Kong, which is different from the rules in mainland China, the materials required by this Article should not only be stated in the application but rather be provided in different documents. (The Department of Justice of the Hong Kong SAR provided a model application for interim measures to the Supreme People's Court. Please refer to the relevant reports on the official website and WeChat platform of the Supreme People's Court dated 26 September 2019).

## **(VII) Examination of the applications for preservation measures and remedies**

Article 8 of the Arrangement stipulates that the court shall examine the application for interim measures, require the applicant to provide security or to give an undertaking, and decide on whether to grant preservation measures, in accordance with the laws of the requested place. (1) The court shall examine expeditiously. Given the urgency of preservation measures, delayed examination may defeat the purpose of preservation measure. The courts in mainland China shall, in accordance with the time limit prescribed by the laws of the Mainland, conduct the examination and rule on whether to grant preservation measures. For example, in accordance with the provisions of the PRC Civil Procedure Law, the court shall rule on an application for pre-arbitration preservation measure within 48 hours. The laws in Hong Kong do not specify the examination period, the Arrangement emphasizes that the court shall examine expeditiously and issue relevant orders and instructions. (2) When applying to courts in mainland China, the applicants shall provide security in accordance with laws of mainland China and judicial interpretations. When applying to the Hong Kong courts, the applicant should give an undertaking and provide security in accordance with the laws of Hong Kong SAR, including the undertaking on damages, security for the costs and other reasonable expenses of the requested party, and the undertaking to initiate arbitration immediately, etc.

Article 9 of the Arrangement provides that where a party is aggrieved by a ruling or order of the requested court, the matter shall be dealt with in accordance with the provisions of the relevant laws of the requested place. In mainland China, the parties can request for review; in Hong Kong, the parties can request for withdrawal or amendment.

## **(VIII) Time effect of the Arrangement**

Apart from arbitral proceedings that are initiated after the entry into force of the Arrangement, the Arrangement also applies to arbitral proceedings that were initiated and have not yet been closed. For example, if an arbitral proceeding is initiated before 1 October 2019 and has not been closed, the parties could apply for preservation measures in accordance with the Arrangement.

## **(IX) Relationship between the Arrangement and existing laws and judicial interpretations**

1. *Relationship with the Enforcement Arrangement.* First, the targeted issues of the two Arrangements are different. The Arrangement concerns assistance for the arbitral proceedings of which the final award has not been rendered; whilst the Enforcement Arrangement addresses the mutual recognition and enforcement of the final arbitral awards between Hong Kong SAR and mainland China. Secondly, the two arrangements involve different ways of judicial assistance. The Arrangement provides that the applicant can apply to a court for the preservation measures and the requested court will issue a ruling or order on preservation measures. By contrast, the Enforcement Arrangement provides that the petitioned court can directly recognize and enforce the arbitral awards.

It is noteworthy that the Arrangement does not apply to preservation measures after a final award is rendered in one jurisdiction but before an application for enforcement is made to courts

in the other jurisdiction. In the future, the Enforcement Arrangement may be improved in order to provide further regulations on this matter. Such preservation measures can also be taken on a case by case basis in judicial practice.

2. *Relationship with existing laws in the two jurisdictions.* The Arrangement does not prejudice or diminish any rights already enjoyed by any party/entity of one jurisdiction in accordance with the laws of the other jurisdiction. Any rights already enjoyed by the arbitration institutions, arbitral tribunals, and the parties in mainland China under the Arbitration Ordinance and the High Court Ordinance of Hong Kong shall not be prejudiced or diminished by the Arrangement.