On 25 March 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 (the “Arrangement”) was discussed and approved at the 1763rd plenary meeting of the Adjudicative Committee of the Supreme People’s Court. On 2 April 2019, Mr. Yang Wanming, Vice-President of the Supreme People’s Court, and Ms. Teresa Cheng, Secretary for Justice of the Government of the Hong Kong Special Administrative Region, signed the Arrangement in Hong Kong. Following discussions between the two sides, the Arrangement was scheduled to come into force on 1 October 2020 in both places and will be promulgated in the form of judicial interpretation on the Mainland. This is the seventh arrangement on judicial assistance signed by the Mainland and Hong Kong and the first document signed by the Mainland with another jurisdiction in respect of preservation measures in arbitration. The Arrangement signifies closer judicial assistance between the Mainland and Hong Kong under the “One Country, Two Systems” policy.

I. Background of Discussing and Signing the Arrangement

First, the "One Country, Two Systems" policy and the Basic Law of Hong Kong provide the primary basis for discussing and signing judicial assistance arrangements between the two places. Article 95 of the Basic Law provides that Hong Kong may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country, and they may render assistance to each other. This provides the legal basis for the discussion and conclusion of the relevant judicial assistance arrangements between the Supreme People’s Court and the Department of Justice of Hong Kong. Since the return of Hong Kong, the Supreme People’s Court has signed six civil and commercial judicial assistance arrangements with the relevant authorities of Hong Kong, covering mutual entrustment regarding the service of judicial documents, mutual entrustment in the taking of evidence, mutual enforcement of arbitral awards, and mutual recognition and enforcement of judgments in civil and commercial matters. These arrangements have largely covered all aspects of civil and commercial judicial assistance and played an important role in reducing litigation costs, easing the parties’ burden of dispute resolution and improving the quality and effectiveness of adjudication. The Arrangement is the seventh judicial assistance arrangement between the Mainland and Hong Kong in civil and commercial matters. It is also an important measure to implement the “One Country, Two Systems” policy in judicial matters.

Second, the social and economic developments of the Mainland and Hong Kong have given rise to a real demand for mutual assistance in preservation measures in respect of arbitral proceedings. At present, the Mainland, Hong Kong and Macao are facilitating the establishment of the Guangdong-Hong Kong-Macao Greater Bay Area (the “GBA”). The uniqueness of the “One Country, Two Systems, Three Jurisdictions” of the GBA will have the following consequences during the process of its establishment: (i) interrelated legal disputes will be inevitable; (ii) inter-regional conflict of laws issues will exist; and (iii) inter-regional judicial assistance will need to be strengthened, including the mutual recognition and enforcement of arbitral awards and mutual assistance in preservation measures in respect of arbitration. The signing of the Arrangement on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the “Mutual Enforcement Arrangement”) in 1999 resolved
the issue of mutual recognition and enforcement of arbitral awards between the Mainland and Hong Kong. The Mutual Enforcement Arrangement has been working well and played an important role in facilitating the cross-border implementation of arbitral awards and supporting Hong Kong as an international hub for legal and dispute resolution services in the Asia-Pacific region. However, this arrangement applies only to the mutual enforcement of final awards between the Mainland and Hong Kong and does not cover preservation measures during an arbitration. Based on our research, the provision of assistance of preservation measures in arbitration can help to ensure the enforcement of final awards through preventive remedies, to fully enable arbitration to play an important role among multiple dispute resolution mechanisms, and to provide greater support for the development of Hong Kong as an international centre for legal and dispute resolution services in the Asia-Pacific region.

Third, the “One Country” principle and the cooperation between the judicial and legal communities of the Mainland and Hong Kong have created a favourable basis for closer mutual assistance. Pursuant to Hong Kong’s Arbitration Ordinance and High Court Ordinance, Hong Kong may provide assistance in preservation in relation to arbitral proceedings seated outside of Hong Kong including those seated in Mainland China. However, there is currently no corresponding legal provision in relation to arbitration preservation assistance on the Mainland. Following our research, the Supreme People’s Court decided to commence discussions on the Arrangement in order to provide closer assistance to Hong Kong than any other country or region, provided that this would not violate any existing law. This was intended to provide greater support for the development of Hong Kong as an international centre for legal and dispute resolution services in the Asia-Pacific region.

II. Main Contents of the Arrangement

The Arrangement includes a total of 11 articles, dealing with issues including the avenues of providing mutual assistance in preservation measures between the Mainland and Hong Kong, the scope of application for preservation measures, the application procedure, and the review and determination of an application.

(1) Types of Preservation Measures

“Preservation measures” are a concept in civil law and “interim measures” are a concept in common law. Both concepts are essentially preventive remedies to ensure the enforcement of final awards and to safeguard parties’ legitimate rights. The Arrangement adopts the term “preservation measures” and sets out the types of preservation measures that can be applied for under the laws of the Mainland and Hong Kong, respectively.

1. Preservation measures that may be applied for before the Mainland courts. Arbitration Law of the People’s Republic of China provides for the preservation of assets and evidence. Civil Procedure Law of the People’s Republic of China included the preservation of conduct in its 2012 amendments. The Arrangement was intended to provide the same rights to parties to Hong Kong arbitrations as those to parties to Mainland arbitrations. For that reason, the preservation of assets, evidence and conduct have all been included in the Arrangement.

2. Preservation measures that may be applied for before the Hong Kong courts. In Hong Kong, preservation measures are known as “interim measures”, namely interim measures in relation to arbitral proceedings commenced or to be commenced in or outside of Hong Kong, ordered by the Hong Kong
courts to facilitate the conduct of arbitral proceedings and to prevent irreparable harm, etc. These measures include ordering a party to maintain or restore the status quo; taking actions that would prevent, or refraining from taking actions that are likely to cause, current or imminent harm or prejudice to the arbitral process itself; providing a means to preserve assets; preserving evidence that may be relevant and material to the resolution of the dispute; ordering injunctions to prohibit a party from dissipation or disposing of assets through other means, or to prevent damage or infringing acts; and issuing orders to appoint a receiver. For example, in 2017, a party to a CIETAC arbitration concerning a shareholding dispute requested a Hong Kong court to appoint a provisional receiver and to issue an injunction to prohibit the respondent from transferring shares. The Hong Kong court granted the application (HCMP962/2017).

(2) **The definition of “arbitral proceedings in Hong Kong”**

Article 2(1) of the Arrangement provides the definition of “arbitral proceedings in Hong Kong”, which involves two requirements:

1. **The seat of arbitration shall be Hong Kong.** This is the primary requirement for determining “arbitral proceedings in Hong Kong”. This is also the standard adopted by Hong Kong and the Mutual Enforcement Arrangement in determining the nationality of arbitral proceedings. There are two types of situations where the seat of arbitration is Hong Kong: (1) the parties agree in the arbitration agreement that Hong Kong is the seat; (2) where the parties have not agreed, the arbitral tribunal decides that Hong Kong is the seat and records that in the arbitral award pursuant to the arbitration rules or certain standard.

2. **The arbitral proceedings shall be administered by a relevant institution or permanent office.** Article 2(1) of the Arrangement enumerates the requirements for a relevant institution or permanent office. A list of relevant institutions and permanent offices shall be determined by the Government of Hong Kong and confirmed by the Supreme People’s Court. The primary consideration is that, compared to assistance in the enforcement of arbitral awards, assistance in arbitration preservation measures is a type of assistance in interlocutory measures. In order to avoid abuse by the applicant and prevent loss to the respondent, a more cautious approach should be taken. 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. The list has been confirmed by the Supreme People’s Court and the Department of Justice of Hong Kong. The list currently includes the Hong Kong International Arbitration Centre, the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, the International Court of Arbitration of the International Chamber of Commerce - Asia Office, the Hong Kong Maritime Arbitration Group, the South China International Arbitration Center (HK), and the eBRAM International Online Dispute Resolution Centre.

In addition, the Mainland and Hong Kong have reached a consensus that “arbitral proceedings in Hong Kong” refers only to commercial arbitrations between parties of equal footing and does not include investment arbitrations between an investor and the host State.

(3) **The definition of Mainland arbitral proceedings**

Article 6 of the Arrangement defines “Mainland arbitral proceedings” (in which a party may apply for preservation measures to the Hong Kong courts) as arbitral proceedings administered by a Mainland arbitral institution, irrespective of whether the seat of arbitration is in the Mainland. The primary
consideration is that, pursuant to Hong Kong’s Arbitration Ordinance and High Court Ordinance, the Hong Kong courts can issue preservation measures in relation to arbitral proceedings commenced or to be commenced outside of Hong Kong upon application, irrespective of where the seat of arbitration is. Parties to arbitrations administered by a Mainland arbitral institution and seated outside of the Mainland may also apply for preservation measures before the Hong Kong courts. The Arrangement should not restrict Mainland arbitral institutions in that respect. Therefore, there are no restrictions on the seat of arbitration in the definition of “Mainland arbitral proceedings”.

(4) The courts that have jurisdiction to accept applications for preservation measures

1. Mainland courts that accept applications for preservation measures. Pursuant to Article 3(1) of the Arrangement, the competent Mainland courts are the Intermediate People’s Court in the place of residence of the respondent, or the place where the asset or evidence is situated. Since the purpose of the taking of arbitration preservation measures is to ensure the enforcement of final awards, the courts that accept applications for preservation measures should be the same courts that accept applications for the enforcement of arbitral awards, in order to fully fulfill the role of preservation measures. Having regard to the Mutual Enforcement Arrangement and Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region, (the “Arrangement on Enforcement of Judgments”) etc, Article 3 of the Arrangement provides that “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.” The primary consideration is to avoid the situation of excessive preservation etc, caused by applications to multiple People’s Courts. In practice, the court that has accepted an application for preservation measures shall review the application in accordance with law. In particular, where an application is made to a court in respect of assets or evidence located outside of the jurisdiction of the court, the court shall review the application in accordance with law and take preservation measures promptly. Where necessary, the court may request assistance from the courts in the place of the asset or evidence.

2. Hong Kong courts that accept applications for preservation measures. Pursuant to Hong Kong’s Arbitration Ordinance and High Court Ordinance, Article 6 of the Arrangement provides that the competent Hong Kong court is the High Court of Hong Kong. This is the same court that accepts applications for the enforcement of arbitral awards.

(5) Time and procedure for applying for preservation measures

Articles 3(2) and 3(3) of the Arrangement stipulate the procedure for applying for preservation measures before the Mainland courts during and before an arbitration.

1. Procedure for applying for preservation measures during the arbitration. Article 3(2) of the Arrangement provides for the procedure for an arbitral institution or a permanent office to transfer an application. With respect to the relevant procedure, reference is made to Article 272 of Civil Procedure Law of the People’s Republic of China, namely, where a party applies for a preservation measure, the application shall be submitted to a People’s Court through the arbitral institution or permanent office. It should be noted that, given that the relevant Hong Kong arbitral institution or permanent office is located in Hong Kong, if in practice the application and the transfer letter are required to be submitted by the
relevant arbitral institution or permanent office in Hong Kong to the Mainland courts, the process could be long, which is inconsistent with the urgency of preservation measures and does not make full use of its function. Parties to Hong Kong arbitral proceedings should be allowed to submit the application together with the arbitral institution or permanent office’s letter of transfer to the Mainland courts. The Mainland courts may verify the information with the relevant arbitral institution or permanent office based on the contact details provided by the Department of Justice of Hong Kong.

2. Procedure for applying for preservation measures before the arbitration. Article 3(3) of the Arrangement stipulates the procedure for applying for pre-arbitration preservation measures, having regard to Article 101 of Civil Procedure Law of the People’s Republic of China. In addition, the Arrangement adds requirements regarding letters of certification, namely, where an application for preservation measures is made pursuant to the Arrangement before the relevant institution or permanent office accepts the application for arbitration, the relevant institution or permanent office in Hong Kong shall issue a relevant letter of certification to the Mainland court after the institution or permanent office accepts the application for arbitration. Consistent with the “procedure for applying for preservation measures during the arbitration” above, in practice, a party is allowed to submit the letter of certification to the Mainland courts. Article 3(3) of the Arrangement provides that, the calculation of the 30-day time limit shall be determined based on the date when the Mainland court receives the letter of certification. This time limit involves several steps including the party’s submission of an application for arbitration, the acceptance of the arbitration by the relevant institution or permanent office, the issuance and transfer of the letter of certification by the institution or permanent office, etc. Each step shall be taken as soon as possible.

Pursuant to Article 6 of the Arrangement, where parties to arbitral proceedings administered by a Mainland arbitral institution apply for preservation measures before the Hong Kong courts, these measures include preservation during and before the arbitration.

(6) The required application documents and their contents

1. Documents and contents required to be submitted when applying for preservation measures before the Mainland courts. Article 4(1) of the Arrangement sets out the documents required to be submitted where a party to arbitral proceedings in Hong Kong submits an application for preservation measures to a Mainland court: (1) the application for preservation measures; (2) the arbitration agreement, to allow the Mainland court to identify the legal relationship between the parties; this is a prima facie review and does not determine the validity of the arbitration agreement; (3) documents of identity; (4) the application for arbitration and relevant letter of certification; (5) any other documents required by the Mainland court given the circumstances of the case. Article 4(2) of the Arrangement follows the Arrangement on Enforcement of Judgments and relaxes the requirement for “notarization and certification”. It provides that only documents of identity that are created outside of the Mainland need to be notarized and certified, and the specific procedure shall be completed pursuant to the laws of the Mainland.

Article 5 of the Arrangement stipulates the contents that need to be specified in an application for preservation measures. They include: (1) the basic information of the parties; (2) the relief sought, including the amount of the assets sought to be preserved, the details of the conduct sought to be preserved and the requested time period of preservation, etc; the relief sought should be clear and specific; (3) the facts, reasons and relevant evidence on which the application is based, including an
explanation of the urgency of the circumstances so that if the preservation measure is not taken immediately, the legitimate right and interest of the applicant may suffer irreparable harm or the enforcement of the arbitral award may become difficult, etc; this is to facilitate the review of the necessity of the preservation measure requested; (4) clear information and specific clue of the asset or evidence sought to be preserved; (5) information regarding the Mainland asset to be provided as security or certificate of creditworthiness; (6) whether any application has been made to any other court, relevant arbitral institution or permanent office under the Arrangement and the status of any such application; (7) any other matters that need to be specified.

2. Documents and contents required to be submitted when applying for interim measures before the Hong Kong courts. Pursuant to Hong Kong law, Article 7 of the Arrangement lists the documents required to be submitted and the contents that need to be specified when applying for preservation measures before the Hong Kong courts. Unlike the Mainland, pursuant to the relevant laws of Hong Kong, the contents required to be specified under this article shall be written in different documents rather than in the application only (the Department of Justice of Hong Kong has provided the Supreme People’s Court with the template documents for applying for interim measures before the Hong Kong courts; see the relevant reports of 26 September 2019 on the official website and Weibo of the Supreme People’s Court).

(7) Review of applications for preservation measures and remedies

Article 8 of the Arrangement provides that, a court shall review an application for preservation measures, decide the type of security, undertaking or promise to be provided by the applicant, decide whether to issue a preservation decision or order, in accordance with the law of the place of the respondent. (1) The application shall be reviewed expeditiously. Given the urgency of preservation measures, delays in the review process will render these measures pointless. The Mainland courts shall review and decide whether to issue a preservation order within the time limit specified under Mainland law. For example, an application for pre-arbitration preservation measures shall be determined within 48 hours in accordance with Civil Procedure Law of the People’s Republic of China. Hong Kong law does not provide for a time limit for the review of an application. The Arrangement stresses that an application shall be reviewed, and a relevant order or direction shall be issued as soon as possible. (2) Where an application for preservation measures is made to the Mainland courts, the applicant shall provide security pursuant to the laws and judicial interpretations of the Mainland; where an application is made to the Hong Kong courts, the applicant shall provide undertaking and promises pursuant to Hong Kong law, including undertakings to compensate losses, security for costs and other reasonable expenses of the respondent, and undertakings to commence an arbitration promptly when applying for a pre-arbitration preservation measure.

Article 9 of the Arrangement provides that, where a party is not satisfied with a decision or an order, it may, pursuant to the laws of the place of the respondent, apply for reconsideration on the Mainland or termination or modification in Hong Kong.

(8) Entry into force of the Arrangement

Other than arbitral proceedings that commence after the entry into force of the Arrangement, the Arrangement applies also to arbitral proceedings that have already commenced and have not yet concluded. For example, parties to arbitral proceedings that commenced before 1 October 2019 and have
not yet concluded may apply for preservation measures to the Mainland or Hong Kong courts pursuant to the Arrangement.

(9) **Interplay between the Arrangement and existing laws and judicial interpretations**

1. **The interplay between this Arrangement and the Mutual Enforcement Arrangement.** The matters regulated by the two arrangements are different. First, the Arrangement deals with assistance before the arbitral award is made; the Mutual Enforcement Arrangement deals with the mutual recognition and enforcement of final awards between the Mainland and Hong Kong. Second, the two arrangements provide different types of assistance. Pursuant to the Arrangement, a party applies to the courts of the place of the respondent for preservation measures, and a preservation decision or order will be made by the courts of the place of the respondent; pursuant to the Mutual Enforcement Arrangement, the courts of the place of the respondent directly recognize and enforce arbitral awards of the courts of the other side.

It should be noted that the Arrangement does not deal with applications for preservation measures after the arbitral award is made and before the commencement of enforcement proceedings. It is hoped that these types of preservation measures will be addressed through amendments to the Mutual Enforcement Arrangement. In judicial practice, these types of preservation measures may be taken in light of the circumstances of each case.

2. **Interplay between the existing laws of the Mainland and Hong Kong.** This Arrangement does not prejudice any rights enjoyed by parties of a place under the laws of the other place. Any rights enjoyed by Mainland arbitral institutions, arbitral tribunals and parties under Hong Kong’s Arbitration Ordinance and High Court Ordinance that existed before the entry into force of the Arrangement shall not be prejudiced by the Arrangement.

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