Dispute Resolution Monthly Review

天同律师事务所
TIANTONG & PARTNERS

About Tiantong

Tiantong & Partners was founded in 2002. As one of the leading Chinese law firms, it is solely dedicated to complex civil and commercial dispute resolution. Headquartered in Beijing, Tiantong has approximately 150 people nationwide, many of whom had served as senior judges for years at different levels of Chinese courts, including the Supreme People's Court and high courts of China. In the recent years, it has established 6 branch offices in Shenzhen, Nanjing, Chongqing, Shenyang, Xi'an and Zhengzhou, where the 6 circuit courts and 2 international commercial courts under the auspice of the Supreme People's Court are seated.

In the past decade, Tiantong has been keeping one of the highest winning rates among all Chinese law firms before the Supreme People's Court and various high courts of China. Over 30 cases won by Tiantong have been publicized as landmark guiding cases for national trial work on some of the most authoritative law journals in China.

Tiantong advises on all types of commercial disputes, including but not limited to litigation, arbitration, contentious bankruptcy and enforcement proceedings with its most impressive achievements in banking and finance, construction and engineering, corporate and M&A disputes etc. Its clients range from foreign governments such as the US Department of Justice, multinational corporations such as RBS to large Chinese companies such as Bank of China, China Construction Bank, Agriculture Bank of China, Sinopec, Sinochem, China Datang Corporation and Ping An Insurance etc.

In addition to its traditional advantages in litigation before Chinese courts, Tiantong has extensive experience in representing clients before domestic and international commercial arbitration proceedings. Tiantong lawyers previously worked for leading arbitration institutions as case manager (e.g. the Permanent Court of Arbitration in Hague, Netherland and Hong Kong International Arbitration Centre in Hong Kong) or clerked with the Justice of the UN International Court of Justice in Hague, Netherland. Some of them once worked at leading international law firms on international arbitration matters conducted before CIETAC, HKIAC, SIAC, ICC, SCC and LCIA, where the seats of arbitration include Beijing, Shanghai, Hong Kong, Singapore, Stockholm and London.

Tiantong is also specialized in advising clients for recognition and enforcement of foreign arbitral awards and judgments before Chinese courts, and is capable of effectively working together with leading international law firms and local counsel overseas to handle multi-jurisdiction disputes.

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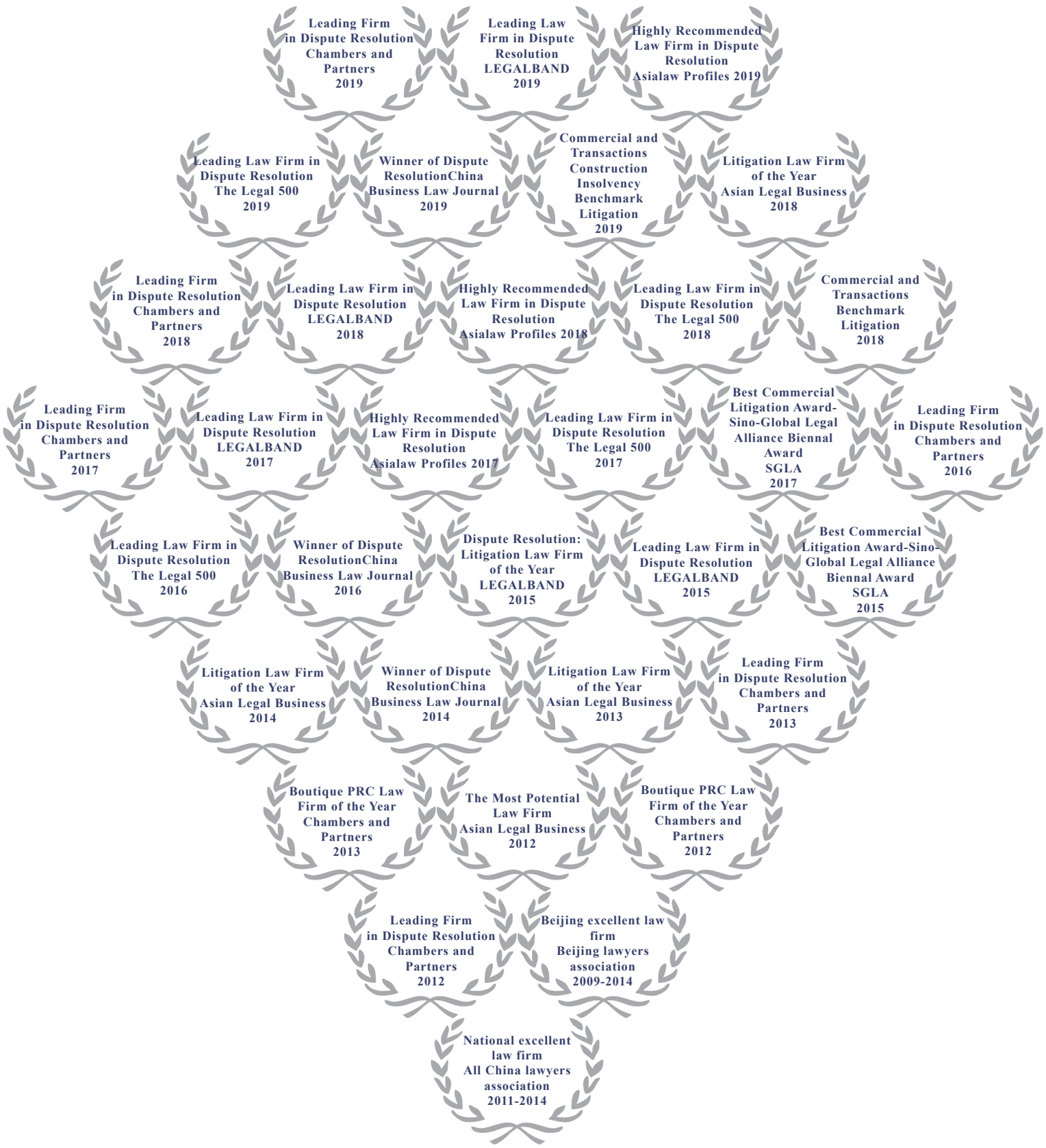
Accolades & Awards



Featured Article

The Scope of Judicial Review of the Validity of Arbitration Agreements under Article 20 of the PRC Arbitration Law

Introduction

An arbitration agreement is the cornerstone of arbitration, reflecting the contracting parties' mutual consent to submit a dispute arising from the contract to arbitration. Accordingly, the validity of an arbitration agreement is a critical issue: when an arbitration agreement stands, an arbitral tribunal would be able to exercise jurisdiction to hear the dispute; otherwise, the tribunal's jurisdiction would be challenged, and any award it renders would be subject to judicial review by a court at the seat of arbitration for setting aside or one in the jurisdiction where the award is taken for recognition and enforcement.

In China, either the domestic arbitration institution or the Chinese court is conferred upon with powers to determine the validity of arbitration agreements, with the court's jurisdiction taking precedence.[1] Article 20 of the PRC Arbitration Law provides: *"if a party challenges the validity of an arbitration agreement, he may request the arbitration commission or apply to the people's court for a decision. If one party requests the arbitration commission to decide and the other party applies to the people's court, the people's court shall hear the dispute".*

The plain language of Article 20, in a strict sense, seemingly suggests that the validity of arbitration agreements is purely a legal issue for the court to examine, and such issue would arise only when a party challenges the validity of the arbitration agreement. In practice, however, two questions related to Article 20 of the PRC Arbitration Law frequently come up before Chinese courts and remain unsettled: (i) can the Chinese court adjudicate whether an arbitration agreement is duly formed in determining the validity of the arbitration agreement? and (ii) can the court hear a dispute, where a party asks the court to confirm the arbitration agreement is valid, rather than challenges its validity?

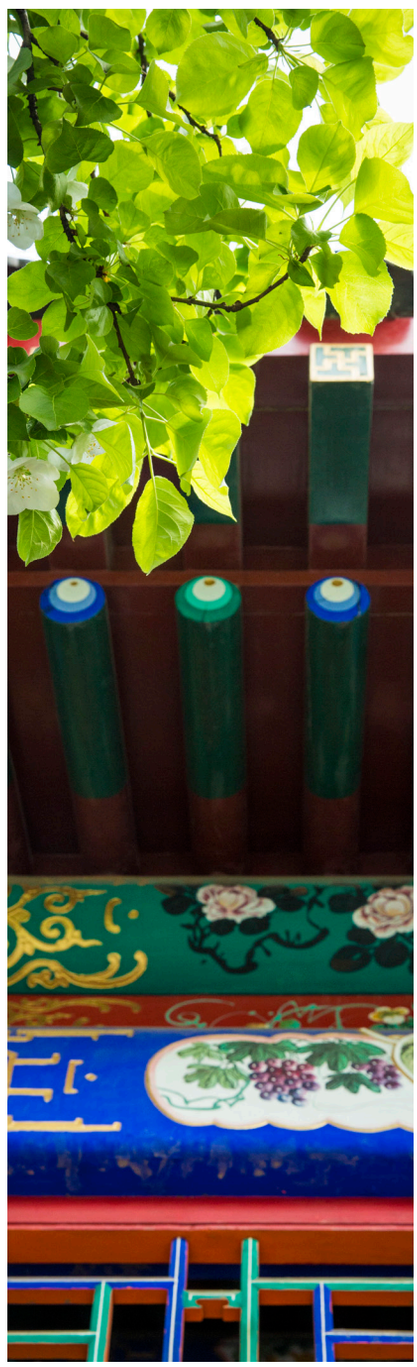
This article is derived from *A Practical Observation Report of PRC Courts Judicial Review on Arbitration in 2018 (Chinese version)* prepared by Tiantong & Partners, and summarizes the differing Chinese courts' positions on these two questions.

Can the Court Consider the Formation of an Arbitration Agreement According to Article 20 of the PRC Arbitration Law?

Among Chinese courts, some are of the view that under Article 20 of the PRC Arbitration Law, the Chinese court cannot adjudicate whether an arbitration agreement is duly formed as it is a matter of fact which should not be subject to the judicial review of the validity of arbitration agreements.

[1] Although the language of the PRC Arbitration Law does not recognise the competence-competence rule, the major PRC arbitration commissions (e.g. CIETAC, BIAC) usually delegate their power to decide the existence and validity of an arbitration agreement to the arbitral tribunals. Therefore, in practice, the power of arbitration commissions under Article 20 is usually exercised de facto by the arbitral tribunals.

Some other courts differ in holding that the formation of an arbitration agreement is a prerequisite for a decision on its validity, and therefore must be considered by the Chinese court as part of its judicial review on the issue.



Majority View

Based on unofficial statistics of published judicial decisions till the end of 2018, the majority of Chinese courts do not consider the formation of an arbitration agreement falls within the ambit of judicial review under Article 20[2], mainly because:

(1) The formation of an arbitration agreement is a factual issue whilst its validity is a legal one. The term "validity of an arbitration agreement" under Article 20 limits the Chinese court's powers to rule on the legal issue only;
(2) whether an arbitration agreement is duly formed and therefore exists must be determined by the arbitration commission (and an arbitral tribunal once constituted) as a substantive issue; should the court decide such issue, the arbitration commission's powers (and the arbitral tribunal's jurisdictions) would be inappropriately intervened; and
(3) "no arbitration agreement is formed or exists" is a ground for setting aside or not enforcing an arbitral award. As such, even if the court does not rule on this issue under Article 20, the parties could have another opportunity to subsequently raise it in the setting aside or enforcement proceedings.

It bears emphasis that China is a civil law jurisdiction and its court decisions do not carry strict precedential weight. Therefore, the "majority view" on the issue indicates the number of court decisions endorsing this view, rather than its authority.

Minority View

Some other courts hold different views though. These courts opine that when the court determines the validity of an arbitration agreement, it should determine whether it is duly formed first, as such issue is a prerequisite for a decision on its validity[3].

[2] For decisions representing the majority view, please see 重庆高院（2018）渝民终 568 号 (Chongqing Higher People's Court (2018) Yu Min Zhong No. 568); 安徽高院（2018）皖民特 1 号 (Anhui Higher People's Court (2018) Wan Min Te No. 1); 北京四中院（2018）京 04 民特 344-346 号 (Beijing Fourth Intermediate People's Court (2018) Jing 04 Min Te No. 344-346); 重庆一中院（2018）渝 01 民特 474 号 (Chongqing First Intermediate People's Court (2018) Yu 01 Min Te No. 474); 广州中院（2017）粤 01 民特 1328 号 (Guangzhou Intermediate People's Court (2017) Yue 01 Min Te No. 1328); 广州中院（2018）粤 01 民特 622 号 (Guangzhou Intermediate People's Court (2018) Yue 01Min Te No. 622); 成都中院（2018）川 01 民特 43 号、78 号 (Chengdu Intermediate People's Court (2018) Chuan 01 Min Te No. 43 & No. 78); 浙江绍兴中院（2017）浙 06 民特 26 号 (Shaoxing Intermediate People's Court (2017) Zhe 06 Min Te No. 26). As most of these decisions are in Chinese only, we include both English and Chinese citations to readers enabling them to identify judicial decisions in Chinese through legal research.

Set out below are some illustrative cases where the existence of an arbitration agreement is put into question through the judicial review mechanism under Article 20 of the PRC Arbitration Law:

Can the claimant request a forensic test on the authenticity of the signature on an arbitration agreement?

One court permitted a forensic test, the result of which shows that the signature on the arbitration agreement was not the claimant's signature. Based on the test result, the court held that no arbitration agreement existed between the parties[4]. Another court, however, refused to have a similar test conducted, on the ground that the request should instead be lodged with the arbitration commission, as the authenticity of the signature is a substantive issue which should not be heard by the court under Article 20[5].

[3] For decisions representing the minority view, please see 天津高院（2018）津民终 213 号 (Tianjin Higher People's Court (2018) Jin Min Zhong No. 213); 昆明中院（2017）云 01 民特 147 号 (Kunming Intermediate People's Court (2017) Yun 01 Min Te No. 147); 武汉海事法院（2018）鄂 72 民特 29 号 (Wuhan Maritime Court (2018) E 72 Min Te No. 29); 晋城中院（2018）晋 05 民特 71 号 (Jincheng Intermediate People's Court (2018) Jin 05 Min Te No. 71); 滨州中院（2018）鲁 16 民特 38 号 (Binzhou Intermediate People's Court (2018) Lu 16 Min Te No. 38); 广东东莞中院（2018）粤 19 民特 204 号 (Dongguan Intermediate People's Court (2018) Yue 19 Min Te No. 204).

[4] 昆明中院（2017）云 01 民特 147 号 (Kunming Intermediate People's Court (2017) Yun 01 Min Te No. 147).

[5] 广州中院（2018）粤 01 民特 719 号 (Guangzhou Intermediate People's Court (2018) Yue 01 Min Te No. 719).

Does an arbitration agreement exist if its form is unusual?

A court found no arbitration agreement existed between the parties where the arbitration agreement was added to the contract by way of a seal, the text of which stated "any dispute shall be submitted to Binzhou Arbitration Commission to be resolved by arbitration"[6].

In this case, whilst the respondent submitted the dispute to arbitration relying on this statement, the claimant, which challenged the validity of the arbitration agreement, presented a copy of the contract without the seal and contended that the respondent chopped the seal on the contract subsequently without the claimant's knowledge, resulting in the arbitration agreement unduly executed.

Having examined the evidence before it, the court cast doubt on the formality of the arbitration agreement because the other parts of the contract was either handwritten or in print. The court held that since the respondent failed to meet its burden of proving that an arbitration agreement existed, the claimant's challenge was upheld.

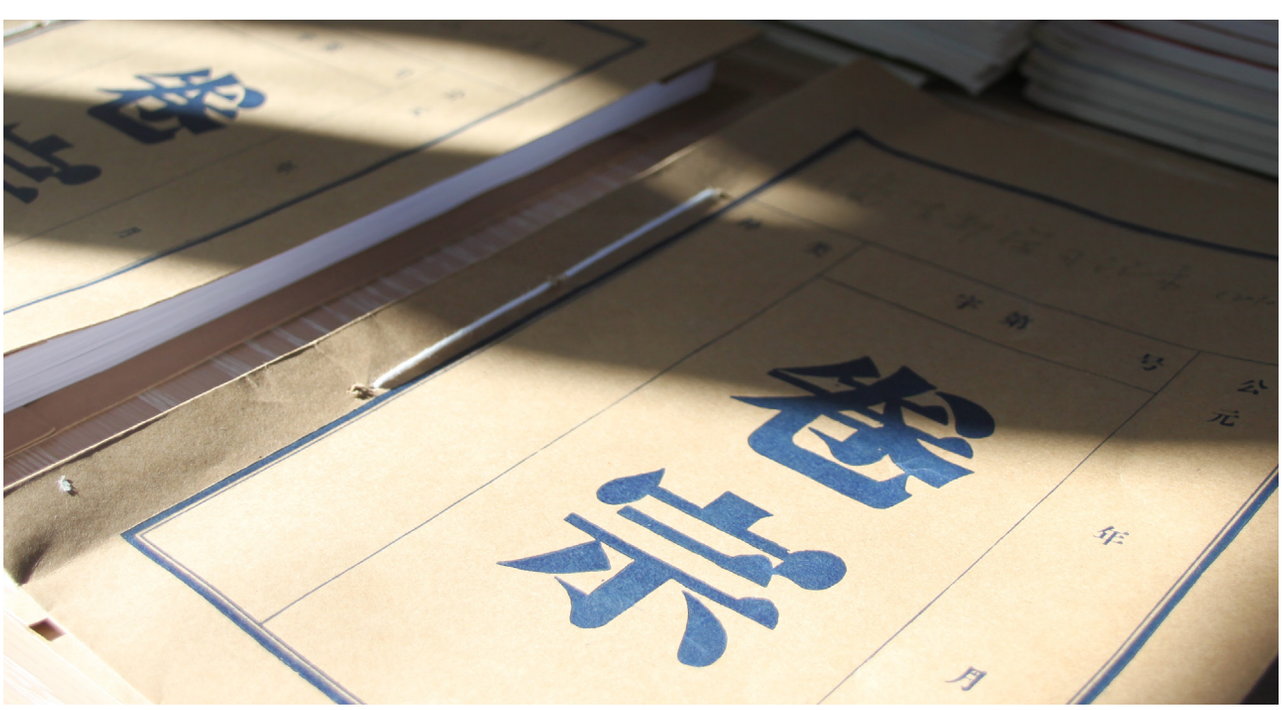
[6] 滨州中院（2018）鲁 16 民特 38 号 (Binzhou Intermediate People's Court (2018) Lu 16 Min Te No. 38).
[7] 湖北十堰中院（2018）鄂 03 民特 8 号 (Hubei Shiyan Intermediate People's Court (2018) E 03 Min Te No.8).
[8] Please see 北京四中院（2018）京 04 民特 137 号、299 号 (Beijing Fourth Intermediate People's Court (2018) Jing 04 Min Te No. 137 & No. 299); 广州中院（2018）粤 01 民特 137 号 (Guangzhou Intermediate People's Court (2018) Yue 01 Min Te 137).

Can the Court Hear a Dispute where the Party Asks to Confirm the Validity of an Arbitration Agreement According to Article 20?

According to the text of Article 20 of the PRC Arbitration Law, an application to the court can be made when a party "challenges the validity of an arbitration agreement". The usual scenario is for one party to ask the court to declare an arbitration agreement invalid when the dispute is referred to arbitration by the other. But can a party ask the court to declare an arbitration agreement valid under Article 20? Once again, this is a controversial issue with different courts expressing different views.

Some courts answered in the affirmative. For example, in a case where the claimant commenced an arbitration relying on an arbitration agreement challenged by the respondent before the arbitration commission, the claimant resorted to the Hubei Shiyan Intermediate People's Court under Article 20, seeking a declaration from the court confirming the arbitration agreement was valid. The Hubei Shiyan Intermediate People's Court accepted the application, and upheld its validity upon examining the evidence before it[7].

A couple of other courts, however, found the prerequisite for an application under Article 20 unsatisfied as the claimant did not "challenge" the validity of the arbitration agreement.[8] For example, in a case where the main contract contained an arbitration agreement whilst the supplemental contract provided any dispute to be resolved by litigation, the Beijing Fourth Intermediate People's Court found that the material difference between the parties did not lie in the validity of the arbitration agreement of the main contract, but in the relationship between the two contracts. As such, the court rejected the application for confirming the validity of the arbitration agreement, on the ground that the relationship between the contracts was a substantive issue, and such issue did not fall within the parameter of judicial review under Article 20.



Chinese Law Updates

SPC Expanded Jurisdiction of the Intermediate People`s Courts to Cover Cases Where the Value Involved Is Under CNY 5 Billion

The Supreme People's Court ("SPC") has recently issued the *Notice on Adjusting Criteria for Jurisdiction of Higher People's Courts and Intermediate People's Courts Over Civil Cases of First Instance* ("Notice"), which replaces all previous provisions with respect to hierarchical jurisdiction over civil cases of first instance.

The Notice provides that Intermediate People's Courts shall in principle have jurisdiction over civil cases of first instance in which the amount in controversy is less than CNY 5 billion whereas civil cases of first instance where the value of subject matters involved is CNY 5 billion or less fall into the jurisdiction of Higher People's Courts. This new benchmark represents a significant increase from earlier years when Intermediate People's Courts could only hear civil cases of first instance in which the value involved was below CNY 500 million.

The new criteria apply to foreign-related civil cases and maritime cases, as well as intellectual property cases subject to reservations regarding civil appeals with respect to complex intellectual property issues set out in Article 2 of the Provisions of the Supreme People's Court on Several Issues Regarding Intellectual Property Tribunal. The Notice has come into effect since 1 May 2019.

SPC Established the Intellectual Property Tribunal in Beijing

The Intellectual Property Tribunal ("Tribunal") was established in Beijing on 1 January 2019 as a permanent division of the Supreme People's Court ("SPC") according to Article 1 of the *Provisions of the Supreme People's Court on Several Issues Regarding Intellectual Property Tribunal* ("Provisions"). The Tribunal primarily hears appeals from judgments or decisions of Higher People's Courts, Intermediate People's Courts and Intellectual Property Courts on civil and administrative cases of first instance. In particular, these appeals cover matters related to complex intellectual property issues, e.g., invention patent, utility model patent, new variety of plants, computer software, technical secrets, and monopoly.

Pursuant to the Provisions, the Tribunal adopts various technological tools to improve efficiency in litigation, enabling evidence exchange, document service and prehearing conference to be conducted through the digital litigation platform. Application for retrial with respect to judgments, decisions and mediation documents issued by the Tribunal must be filed with the SPC.

Mainland and Hong Kong Signed Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings

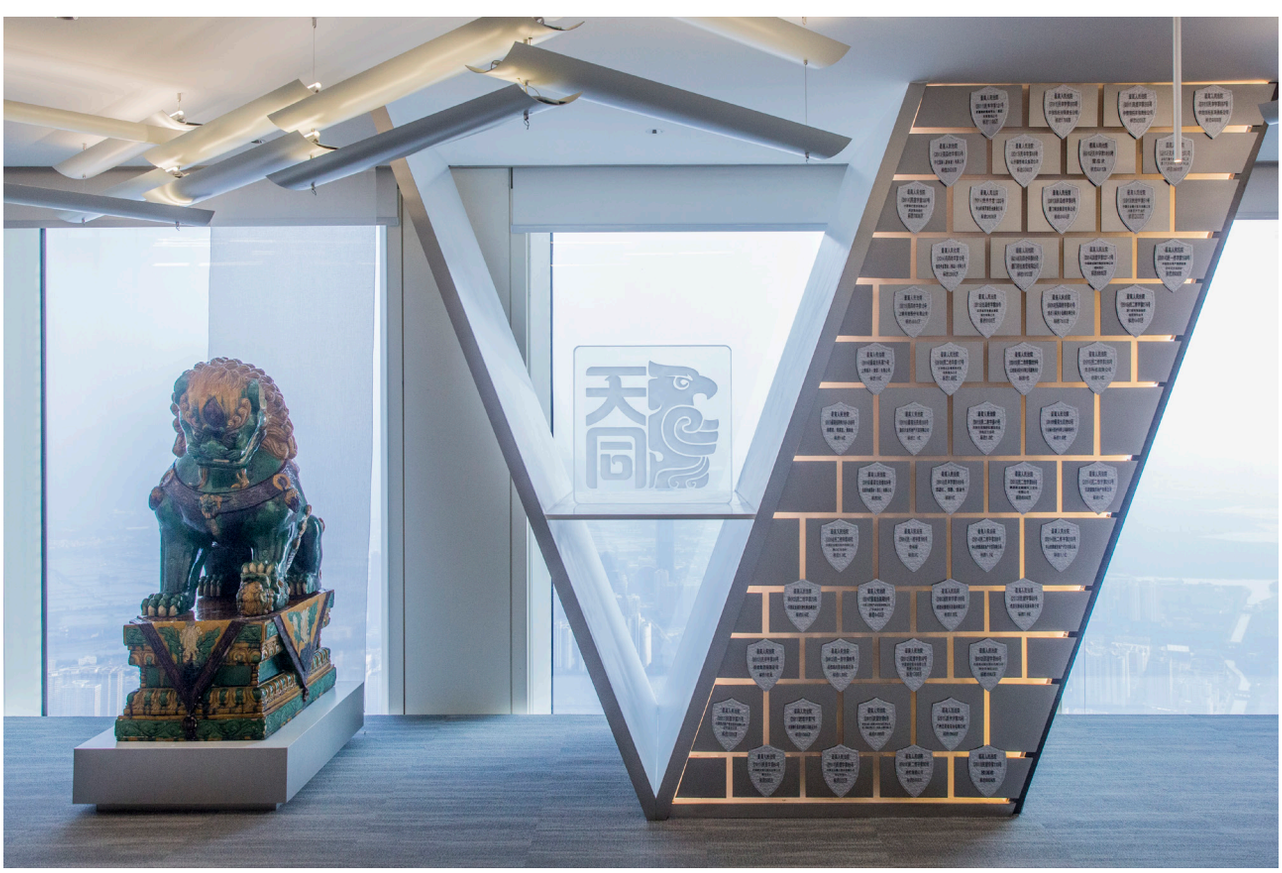
On 2 April 2019, the Supreme People's Court ("SPC") of China and the Government of the Hong Kong Special Administration Region ("HKSAR") signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the

Hong Kong Special Administrative Region ("Arrangement") in Hong Kong. The Arrangement is yet to come into force, pending the promulgation of a judicial interpretation by the SPC and the completion of relevant procedures in the HKSAR.

The Arrangement allows parties to an arbitral proceeding in Hong Kong to apply for interim measure, which, in the case of the Mainland, includes preservation of property and evidence as well as injunction, to an Intermediate People's Court before the arbitral award is made. The application shall be made to either the court of the place of residence of the party against whom the interim measure is sought or the court of the place where the relevant property or evidence is situated.

Pursuant to Article 2 of the Arrangement, "arbitral proceeding in Hong Kong" under this Arrangement refers to an arbitration seated in Hong Kong and administered by an arbitral institution. The list of arbitral institutions referred to will be provided by the HKSAR with the SPC and confirmed by both sides.

To date, seven arrangements on mutual judicial assistance for cross-boundary civil and commercial disputes have been executed between the Mainland and the HKSAR. Set out below is a table of these seven arrangements.



	Matter	Arrangement	Effective Date
1	Service of judicial documents in civil and commercial proceedings	Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts	30 March 1999
2	Enforcement of arbitral awards	Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region	1 February 2000
3	Enforcement of judgments under choice of court arrangements	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 Pursuant to Choice of Court Agreements between Parties Concerned	1 August 2008
4	Taking of evidence in civil and commercial matters	Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region	1 March 2017
5	Enforcement of judgments in matrimonial and family cases	Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region	Yet to come into force
6	Enforcement of judgments in civil and commercial matters	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	Yet to come into force
7	Assistance in court-ordered interim relief	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	Yet to come into force

Chinese Trademark Law Was Amended to Combat Bad Faith Registration and Trademark Counterfeiting

On 23 April 2019, the 13th National People's Congress announced the adoption of the amended Trademark Law ("Amendment") at the Tenth Meeting of the Standing Committee, which will take effect on 1 November 2019. The Amendment primarily intends to prevent bad faith trademark registration and trademark counterfeiting.

Article 4 of the Amendment states that any application for trademark registration which is malicious and is not filed for the purpose of use must be rejected. The bad faith registration application becomes a ground for the third party opposing a trademark registration during the three-month challenge period as well as applying to declare a registered trademark void by the Trademark Review and Adjudication Board. Trademark agencies, when knowingly act on behalf of an applicant whose application for registration of a trademark can be recognised as "malicious and not filed for the purpose of use" under Article 4, are subject to administrative sanctions or even criminal penalties if the act of such agencies amounts to a criminal offense.

Another highlight of the Amendment is Article 63, which expands the scope of relief available to trademark proprietors who have suffered loss and damages resulting from trademark counterfeiting. According to Article 63, a trademark proprietor may ask the court to order destruction of the very product which infringes the trademark he or she owns, and, under certain circumstances, to destroy the materials and tools used for manufacturing such product. Under the Amendment such product is prohibited from flowing into the market even if the counterfeit trademark is removed therefrom.

The Revised Anti-Unfair Competition Law Enhances the Significance of Protecting Trade Secrets

On 23 April 2019, the 13th National People's Congress Standing Committee announced to adopt the revised Anti-Unfair Competition Law ("Revision") to coordinate with the newly-promulgated Foreign Investment Law. The Revision aims at strengthening the protection of trade secrets, which is reflected in five aspects set out below.

First, the scope of "trade secret" has been expanded to cover all types of "trade information", including but not limited to technical information and business information. Second, Article 9 of the Revision adds two new types of misappropriation regarding trade secrect: (i) to acquire trade secrets through "hacking" (电子侵入) and (ii) to "instigate, induce, or assist in" breach of duty of confidentiality by others to "acquire, disclose, use or allow others to use trade secrets". Third, Article 9 broadens the scope of infringers of trade secrets to include all individuals and entities aside from the business operator. Fourth, the Revision increases the maximum statutory damages from CNY 3 million to 5 million. Fifth, Article 32 shifts the burden of proof in a civil suit of trade secret infringement to the defendant when the plaintiff has established a prima facie case.

The Revison has taken effect since 23 April 2019.

Methods for Identifying Unlawful Collection and Use of Personal Information by Applications (Apps) Was Published for Public Comments

Since January 2019, the Office of the Central Cyberspace Affairs Commission, the Ministry of Industry and Information Technology, the Ministry of Public Security and the State Administration for Market Regulation have jointly established a task force on the unlawful collection and use of personal information by Applications ("Task Force"). The Task Force issued a Guidance on Self-Evaluation of Unlawful Collection and Use of Personal Information ("Guidance") in March 2019.

On 5 May 2019, aligned with the Guidance, the Task Force published the draft of Methods for Identifying Unlawful Collection and Use of Personal Information by Applications (Apps) ("draft") and sought for public comments.

The draft intends to clarify the boundary of unlawful collection and use of personal information by Apps and hopefully to provide guidance to App operators for internal reviews, as well as to law enforcement for evaluation of Apps. The draft enumerates seven types of situations involving unlawful collection and use of personal information: (i) rules of collection and use are not published; (ii) the purpose, method and scope of collection and use are not expressly indicated; (iii) personal information is collected and used without users' prior permission; (iv) personal information irrelevant to services the App operator provides is collected and used; (v) personal information is provided with third parties without users' prior permission; (vi) options to delete and change personal information are not available to users as the law requires; and (vii) the App infringes upon minors' rights in cyber space.