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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Featured Article

Recognition and Enforcement of Foreign Civil Judgments in China

A. Introduction

On 2 July 2019, with the conclusion of the Diplomatic Conference in Hague, Netherlands, representatives of China and some other states signed on the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.* Although the execution of the Convention signals that China is determined to expand its network of recognising and enforcing foreign civil judgments, it would take years to eventually witness China to ratify the Convention.

Before the Convention is given effect, the existing regime of recognising and enforcing foreign civil judgments in China is twofold: a foreign civil judgment would not be enforced by the Chinese court unless (a) there is a treaty in support of enforcement or (b) under Chinese law, the reciprocity principle allows the court to do so.[1]

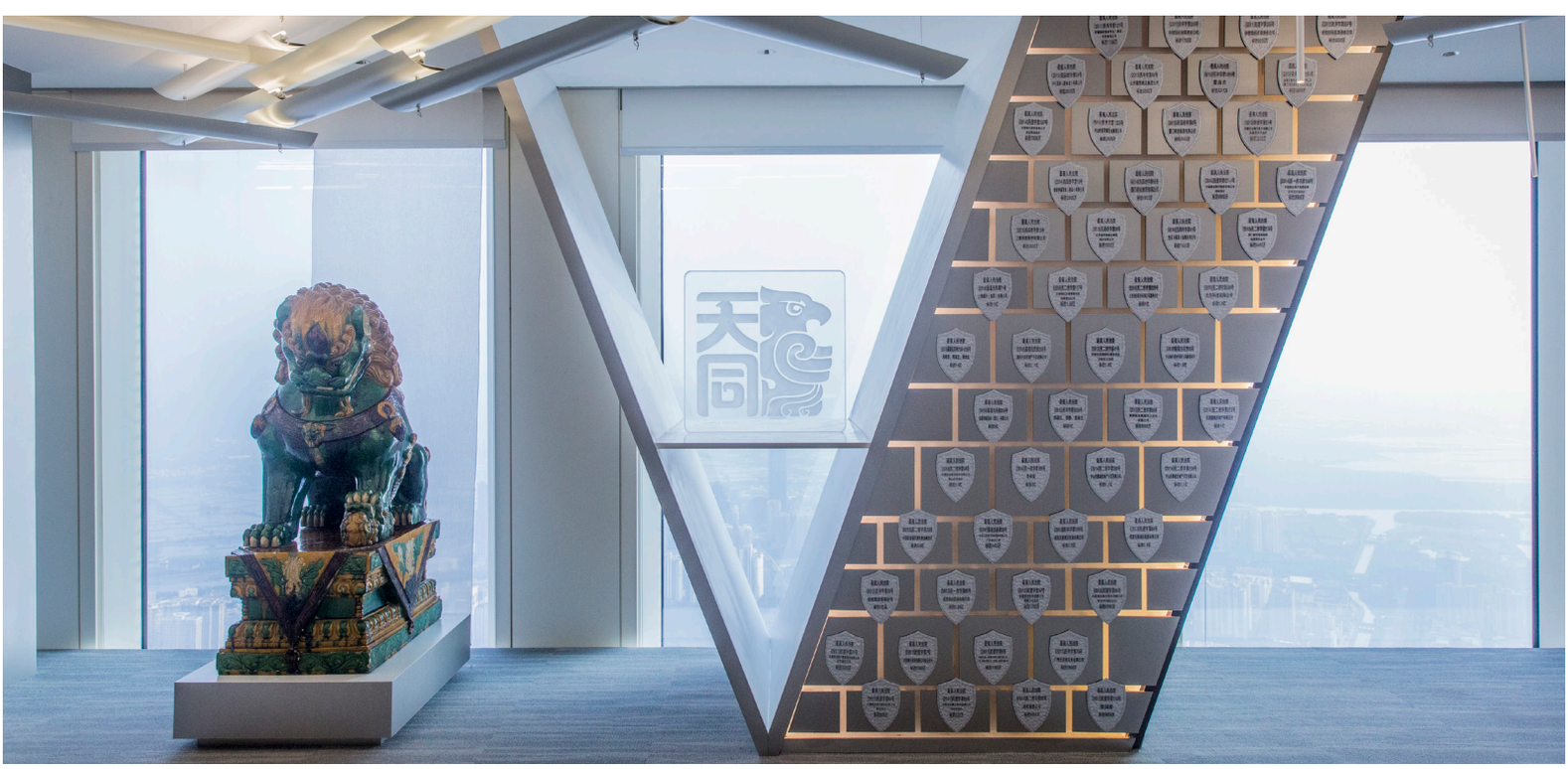
[1] Article 281 of the PRC Civil Procedures provides, "Where an effective judgment or ruling of a foreign court requires recognition and enforcement by a people's court of the People's Republic of China, a party may apply directly to the intermediate people's court of the People's Republic of China having jurisdiction for recognition and enforcement or apply to the foreign court for the foreign court to request recognition and enforcement by the people's court in accordance with the provisions of an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity."

B. Treaties

To date, China has entered into 39 bilateral treaties with foreign states concerning mutual legal assistance on civil or commercial matters. Out of them, 34 bilateral treaties concern recognition and enforcement of civil judgments:

Asia	Mongolia; Kazakhstan; Kyrgyzstan; Uzbekistan; Tajikistan; Vietnam; Laos; North Korea; UAE; Kuwait
Europe	France; Russia; Italy; Spain; Turkey; Poland; Romania; Ukraine; Greece; Bulgaria; Hungary; Cyprus; Lithuania; Bosnia and Herzegovina; Belarus
Africa	Egypt; Morocco; Tunisia; Algeria; Ethiopia
America	Brazil; Argentina; Cuba; Peru

According to the public information, the civil and/or commercial judgments of Italy, Poland, France and UAE had been enforced in China according to the bilateral treaties with China.[2]



[2] Cases for Chinese courts to recognise and enforce foreign civil judgments concerning family law were not included.

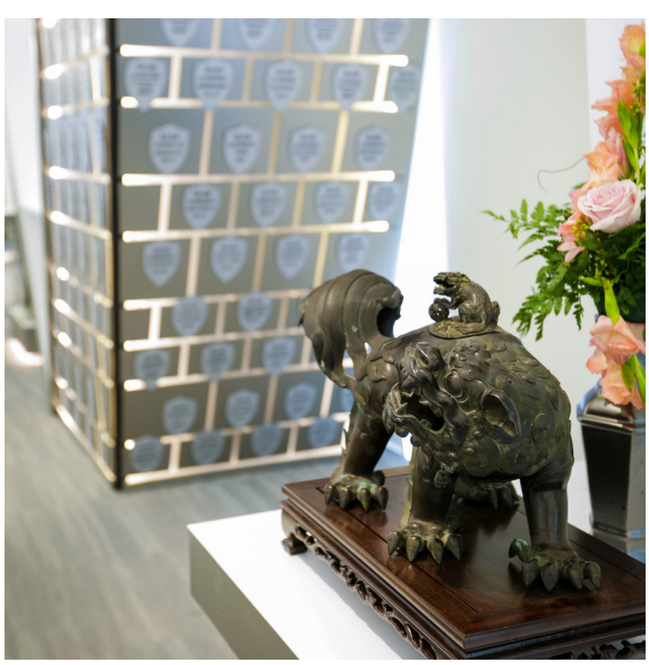
1. Italian court judgment

On 18 December 2000, B&T Ceramic Group s.r.l., an Italian company applied to Foshan Intermediate People's Court for recognising and enforcing a civil judgment made by the Milan court and a civil ruling made by the Milan Civil/Criminal Tribunal. The Milan Court held that E.N. Group s.p.a went bankrupt and the Milan Civil/Criminal Tribunal ruled that the administrator of E.N. Group must hand over the assets of E.N. Group to the applicant, which had purchased E.N. Group in its entirety. The applicant asked the Chinese court to enforce against 98% shares of a Chinese company, which was assets of E.N. Group.[3]

In January 2003, the Chinese court rendered a ruling, ordering to recognise the Milan court judgment and the Milan Civil/Criminal Tribunal ruling in accordance with *Treaty on Civil Judicial Assistance between People's Republic of China and Republic of Italy* (effective as from 1 January 1995). However, since E.N. Group had sold its 98% shares of the Chinese company to a HK company, the Chinese court did not enforce the Milan Civil/Criminal Tribunal ruling.

2. Polish court judgment

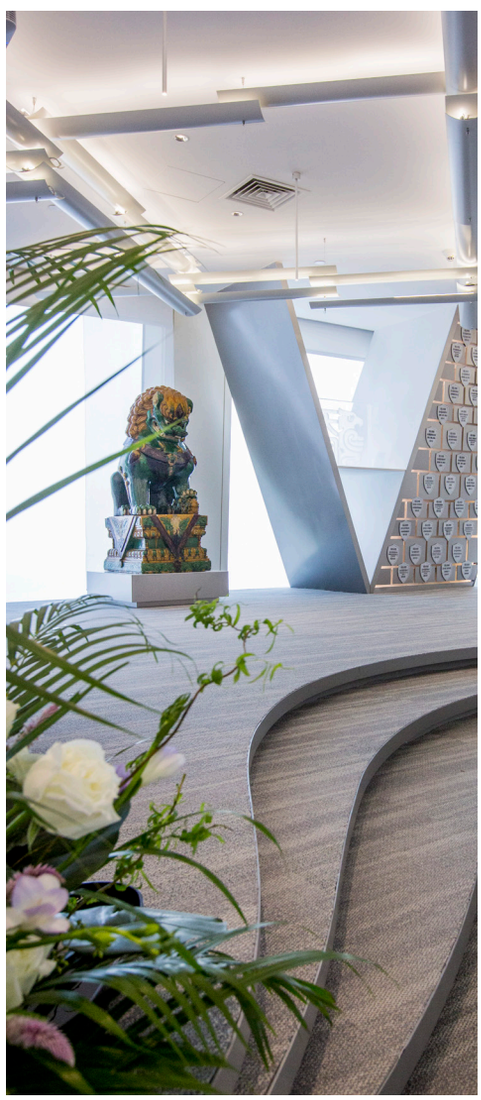
In 2004 and 2006, a Chinese company (Ningbo Changyong) filed lawsuits against a Polish company (Friegupol) for breach of a sale of goods contract before two Polish courts. Although the Polish appellate court rendered a decision in favor of the Chinese company, it was reversed by the Polish Supreme Court and the case was remanded to the appellate court. In 2009, the appellate court made a final decision, ordering to dismiss the Chinese company's claims, and ordering the Chinese company to return the



[3] No court citation was provided.

monetary damages and litigation costs which had been paid to it, to the Polish company.[4]

In 2011, the Polish company applied to Ningbo Intermediate People's Court to recognise and enforce the Polish court judgment (I Aca 231/9) and in 2013, it supplemented further materials in support of its application. The Chinese company contended that the time limit for enforcement had elapsed and its Polish counsel was unauthorised to act on the case before the Polish courts.



In 2013, the Chinese court ordered to recognise and enforce the Polish court judgment in accordance with *Treaty on Civil and Criminal Judicial Assistance between People's Republic of China and Republic of Poland* (effective as from 5 June 1987).

3. French court judgment

In November 2016, three Chinese plaintiffs requested that Fushun Intermediate People's court recognise and enforce a French district court judgment (RG No. 2015058668), against a Chinese defendant who was ordered to pay Euros 5,000 plus interest to the two Chinese plaintiffs, convene a special meeting among partners, revoke the cancellation of the cheque and pay legal costs etc.[5]

The Chinese plaintiffs submitted the original copy of the French court judgment, documents evidencing proper service of the summons and judgment as well as the Chinese translations of the aforesaid documents.

The Court ordered to recognise and enforce the French court judgment and ordered the defendant to pay the court fees in September 2017.

4. UAE court judgment

In September 2012, Mr He (a Chinese individual)

[4] *Przedsiębiorstwo Przemysłu Chłodniczego Fritar S.A., Ningbo Yongchang Industrial & Trading Co., Ltd., et al.,* (2013) Zhe Yong Min Que Zi No.1.

[5] *Zhujing, Ding Changhong, Zhu Guofen v. Pei Yanju,* (2016) Liao 04 Xie Wai Ren No 6.

entered into a Shares Purchase Agreement with Mr Gao (a Chinese individual), agreeing to sell 45% shares of a quarry located in UAE he owned to Mr Gao, in exchange for Mr Gao's investment in purchasing for and transporting to a new assembly line of the quarry. Although Mr Gao fulfilled his promise, Mr He breached the SPA in refusing to transfer the shares to Mr Gao. Having negotiated with Mr He with no avail, Mr Gao brought lawsuit in a district court of UAE. The district court upheld Mr Gao's claims in 2016 and the appellate court reaffirmed it in 2018, holding that Mr He was liable for damages to Mr Gao, equal to RMB 31.5 million (inclusive principal, interest, court costs and attorney fees etc.). Subsequently, Mr He refused to honor the UAE judgment though.

In September 2018, Mr Gao applied to the Shanghai First Intermediate People's Court for recognising and enforcing the UAE court decision. In accordance with *Treaty on Civil and Commercial Judicial Assistance between the People's Republic of China and United Arab Emirates* (effective as from 12 April 2005), the Chinese court held that (a) Mr He was holding assets located within the district where the Court was empowered to exercise jurisdiction; (b) the Court examined the original copies of the two UAE court judgments and their translations in Chinese, and found that the formality requirements were satisfied; Mr He instructed a UAE counsel to participate in the UAE

court proceedings and raised relevant defences; and the appellate court judgment had come into force; and (c) it would not contravene with the fundamental principles under PRC law, nor harm the sovereignty, security and public interests of the PRC to recognise and enforce the UAE judgment.[6]

C. Reciprocity

Except for treaties, the Chinese court may recognise and enforce a foreign civil court judgment when the reciprocity is established. Under PRC law, the principle of reciprocity is not defined. That said, the previous judicial practice indicates that the Chinese court has adopted a very conservative approach: the Chinese court must find that a particular foreign state court has previously recognised and enforced a Chinese court judgment to establish reciprocity with the foreign state. This practice has been gradually changed though.

On 16 June 2015, the PRC Supreme People's Court issued *Several Opinions concerning People's Courts Services and Preservation for the Construction of "One Belt and One Road"*, and pointed out that Chinese courts might grant judicial assistance in the first place to One Belt and One Road countries which have shown their willingness to develop a mutual judicial assistance mechanism with China.

On 8 June 2017, Nanning Declaration was resolved to pass between China and ASEAN states. Amongst others, Article 7 provides "Cross-border transactions and investments in the region require the mechanism of mutually recognising and enforcing appropriate judgments as judicial guarantees. Within the scope permitted by the law in China, courts from participating countries will interpret their own laws to reduce unnecessary parallel litigation and consider the appropriate promotion of mutual recognition and enforcement of civil and commercial judgments in different nations. In countries that have not yet concluded international treaties of recognising and enforcing foreign civil and commercial

[6] The *PRC Civil Procedures* provides, "Article 282 After examining an application or request for recognition and enforcement of an effective judgment or ruling of a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall issue a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law if the people's court deems that the judgment or ruling does not violate the basic principles of the laws of the People's Republic of China and the sovereignty, security and public interest of the People's Republic of China. If the judgment or ruling violates the basic principles of the laws of the People's Republic of China or the sovereignty, security or public interest of the People's Republic of China, the people's court shall not grant recognition and enforcement."

judgments, if there is no precedent for refusing to recognise and enforce civil and commercial judgments on the grounds of reciprocity in the judicial process of recognising and enforcing the country's civil and commercial judgments, within the scope permitted by the laws of China, it can be presumed that there is a reciprocal relationship between each other." Such presumption was a breakthrough to the principle of reciprocity under PRC law.

There were two landmark cases where Chinese courts recognised and enforced foreign civil judgments on the basis of reciprocity.

1. Singapore court judgment

On 8 December 2016, Nanjing Intermediate People's Court applied the principle of reciprocity and ordered that the Singapore High Court judgment [2014] SGHC16 should be recognised and enforced.[7]

The Court found that between China and Singapore there were no treaty on mutual recognition and enforcement of civil/commercial judgments. The Court further found that the Singapore High Court had recognised and enforced a Suzhou court civil judgment since January 2014.

Therefore, the Court decided to uphold the application on the ground of actual reciprocity precedent, i.e. the Singaporean court aided on enforcing the Chinse court judgment previously.

It should be noted that on 31 August, 2018, China and Singapore executed *Memorandum of Guidance Between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases.* This is the first memorandum made between the Chinese highest court with its foreign counterpart concerning enforcement of money judgments. However, this memorandum is not legally binding and does not constitute a treaty or convention between the two states.

2. American court judgment

On 30 July 2017, Wuhan Intermediate People's Court recognised and enforced a civil judgment EC062608 of Los Angeles County Court, USA, because the Court found out the precedent that the US court had recognised and enforced a Chinese civil judgment.[8]

The precedent referred to the fact that in 2009, according to *Uniform Foreign-Country Money Judgments Recognition Act*, the US Federal District Court of the Central California recognised and enforced a Hubei High People's Court civil judgment, in which the American defendant was ordered to pay monetary damages and interest to the two Chinese plaintiffs who suffered from a helicopter crash accident in China.

[7] *Gao Er Group's application,* (2016) Su 01 Xie Wai Ren No.3.
[8] *Liu Li v. Tao Li & Tong Wushen,* E Wuhan Zhong Min Shang Wai Chu Zi No 00026.

Chinese Law Updates

BAC Announces New Arbitration Rules and Fee Schedules

On 15 July 2019, The Beijing Arbitration Commission **("BAC")** announced their updated arbitration rules and the annexed arbitration fee schedules **("new rules")**. The new rules will come into effect on 1 September 2019.

The new rules reflect the latest trend of arbitration practices in China, especially concerning expedited procedure and the emergency arbitrator procedure. Specifically, the new rules raise the default amount in dispute where the expedited procedure may be applied. According to Article 53 of the BAC arbitration rules currently in effect, the expedited procedure shall apply to cases where the amount in dispute does not exceed RMB 1,000,000 unless the parties otherwise agree. The new rules raise this amount to RMB 5,000,000 responding to the constantly growing case values. Moreover, the new rules further clarify the emergency arbitrator procedure in Article 63, providing guidance on information required to be specified in the application, including parties' information, the reasons of applying for an emergency arbitrator and interim measures, the specific interim measures to be requested and other necessary information. The new rules also confirm that in an emergency arbitrator procedure, the documents to parties can be served electronically, unless the parties otherwise agree.

With respect to consolidation, Article 8 of the new rules allow the parties to apply for consolidation of cases (1) where the arbitration agreements are identical or compatible; (2) some of the underlying contracts are supplementary to the others, or where the parties to the contracts are identical and the subject matters of the disputes are same in kind or related. The BAC will decide whether to consolidate multiple cases based on relevant circumstances.

Meanwhile, BAC also made several changes on the fee schedules annexed to its arbitration rules. First, to improve transparency, the new rules change the charging method from "case acceptance fee plus case handling fee" to "administration fee plus arbitrator's fee" for all cases, where the latter method was applicable in international commercial arbitration only under the current arbitration rules.

Second, to improve BAC's service, the new rules raise the minimum amount of arbitration fees from RMB 14,550 to RMB 17,000 (with RMB 12,000 for arbitrator's fee and RMB 5,000 for administration fee) for cases valued below RMB 250,000.

Additionally, the new rules add a cap on the arbitration fees for the purpose of costs reduction, under which the total maximum arbitrators' fee for a three-arbitrator tribunal is RMB 18,000,000 while the maximum administrative fee is RMB 8,671,000. By adding the cap, the arbitration fees in high-value cases can be significantly diminished, e.g., in cases where the value exceeds RMB 5,000,000,000, the arbitration fees calculated under the new rules is reduced by approximately RMB 15,000,000 compared to that under the current fee schedules.

Third, in line with international practice, the new rules allow the arbitrator's fee to be charged on an hourly rate basis through parties' agreement, subject to a cap of RMB 5,000 per hour.

CAC Releases the Draft Measures on the Security Assessment for Outbound Transfer of Personal Information for Public Consultation

On 13 June 2019, the Cyberspace Administration of China **("CAC")** released the draft *Measures on the Security Assessment for Outbound Transfer of Personal Information*, open for public consultation until 13 July 2019.

The purpose of these measures is to ensure the safety of personal information in cross-border data transfers. It is required that network operators who transfer personal information collected in their domestic operations out of China shall conduct security assessments in accordance with these measures. If the security assessment indicates that the outbound transfer of personal information may affect national security or harm the public interest, or that it is difficult to protect personal information effectively, such transfer shall not be permitted.

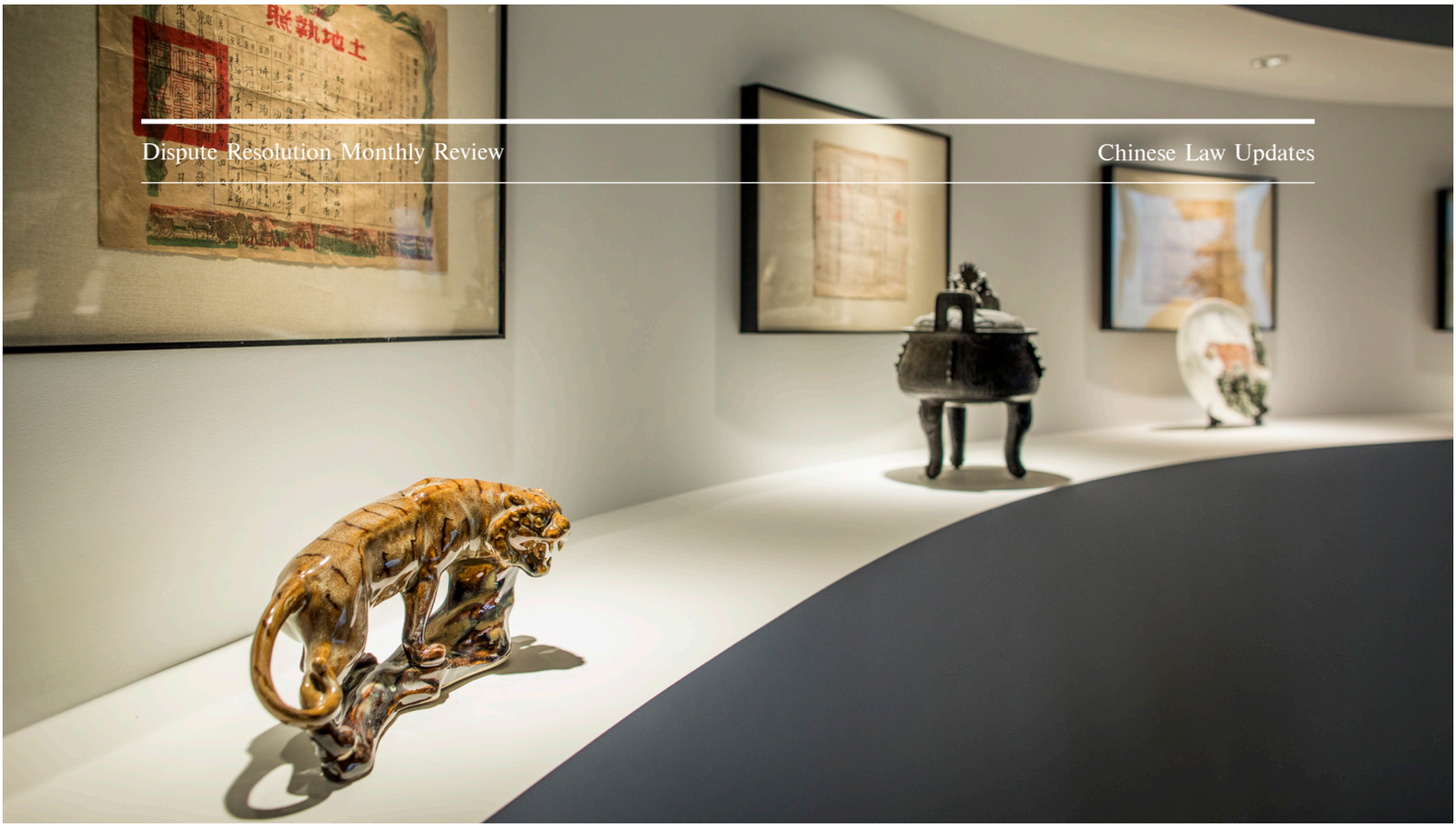
The draft makes it clear that prior to any outbound transfer of personal information, the network operators shall file for a security assessment to the provincial-level cybersecurity department where it is located. The draft also provides detailed requirements for the contract between the network operator and the recipient.

The security assessment should focus on the following factors: (1) whether the transfer complies with relevant laws, regulations and policies; (2) whether the terms of the contract between the network operator and the recipient can adequately safeguard the legitimate rights and interests of the individual whose personal information is to be transferred; (3) whether the contract can be effectively carried out; (4) whether the network operator or recipient has in the past infringed an individual's rights over her personal information or has caused serious cybersecurity incidents; (5) whether the network operator has obtained personal information legally and appropriately; and (6) other matters necessary to be assessed.

SAMR Releases Provisions to Implement the Anti-Monopoly Law

The State Administration for Market Regulation **("SAMR")** has recently issued three regulations to facilitate the implementation of the *Anti-Monopoly Law, i.e.,* the *Interim Provisions on Prohibition of Monopoly Agreements,* the *Interim Provisions on Prohibition of Abuse of Market Dominance* and the *Interim Provisions on Restraint on Abuse of Administrative Power to Exclude or Restrict Competition*. All three will come into effect on 1 September 2019.

In particular, the *Interim Provisions on Prohibition of Monopoly Agreements* includes the following features: (1) enumerating six typical monopoly agreements (i.e., the agreement between competing businesses on price restriction, on quantity restriction, on market division, on technology



restriction and on boycott of transactions, and the agreement between transaction counterparties on price restriction) and promulgating a "catch-all" article clarifying factors which shall be taken into consideration by the law enforcement in determining the existence of a monopoly agreement, including whether there is meeting of minds between the contracting parties, whether there are justifiable reasons for the monopoly agreements and whether the contracting parties' market conduct is consistent with that of each other; (2) excluding the eligibility of cases involving hard core cartels (agreement on price restriction, on quality restriction and on market division) from making an application of suspension of investigation; (3) refining the procedure for granting an exemption of monopoly agreements under the Anti-Monopoly Law; and (4) providing for situations where the punishment imposed on persons involved in a monopoly agreement may be mitigated or even exempted, *e.g.*, where such persons could proffer key evidence to detect the relevant monopoly agreement.

The *Interim Provisions on Prohibition of Abuse of Market Dominance* identifies (1) the scope of market dominance, especially in cases related to internet and intellectual property, *e.g.*, to decide whether the market position of an internet company is dominant, the law enforcement is required to consider the company's business model, the number of users, the extent of market innovation, the company's data process capacity, the company's impacts in related market as well as other relevant factors; and (2) the scope of abuse of market dominance, including but not limited to trading at unfair prices, unreasonable refusal to deal, tying and disparate treatment. This regulation also provides for exceptions that might justify the apparent abuse of market dominance, such as *force majeure*.

The *Interim Provisions on Restraint on Abuse of Administrative Power to Exclude or Restrict Competition* further elaborates the patterns of abuse of administrative powers set out in Articles 32 to 37 of the Anti-

Monopoly Law, including restrictions on transactions, interference with the free movement of goods, restrictions on bidding and investment as well as other activities that may exclude or restrict competition.

The NDRC and MOC Releases the 2019 Negative List for Access of Foreign Investment

The National Development and Reform Commission and the Ministry of Commerce have recently released the *Special Administrative Measures for Access of Foreign Investment (2019)* together with the *Special Administrative Measures for Access of Foreign Investment in Free Trade Zones (2019)* **("2019 negative list")**.

The 2019 negative list further eliminates the restrictions on foreign investment's access to Chinese market. Compared to the list of 2018 version, the number of constrained industries in the general negative list is decreased from 48 to 40 while such number for Free Trade Zone is cut down to 37, lifting the restrictions on transportation industry, cultural industry, mining industry, manufacturing industry and environmental industry. The 2019 negative list will come into force on 30 July 2019 and will supersede the 2018 version.

According to sources from the National Development and Reform Commission, the Chinese government is planning to ease other restrictions on foreign investment's access into the Chinese market in addition to those specified in the negative list by the end of 2019.