Dispute Resolution Monthly Review

天同律师事务所
TIANTONG LAW FIRM

About Tiantong

TianTong Law Firm 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.

Contact Persons

Huafang Zhu
Senior Partner
zhuhuafang@tiantonglaw.com

David Gu
Partner
david.gu@tiantonglaw.com

Ying Wu
Of counsel
wuying@tiantonglaw.com

Featured Article

An Overview 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 HKSAR

I. Introduction

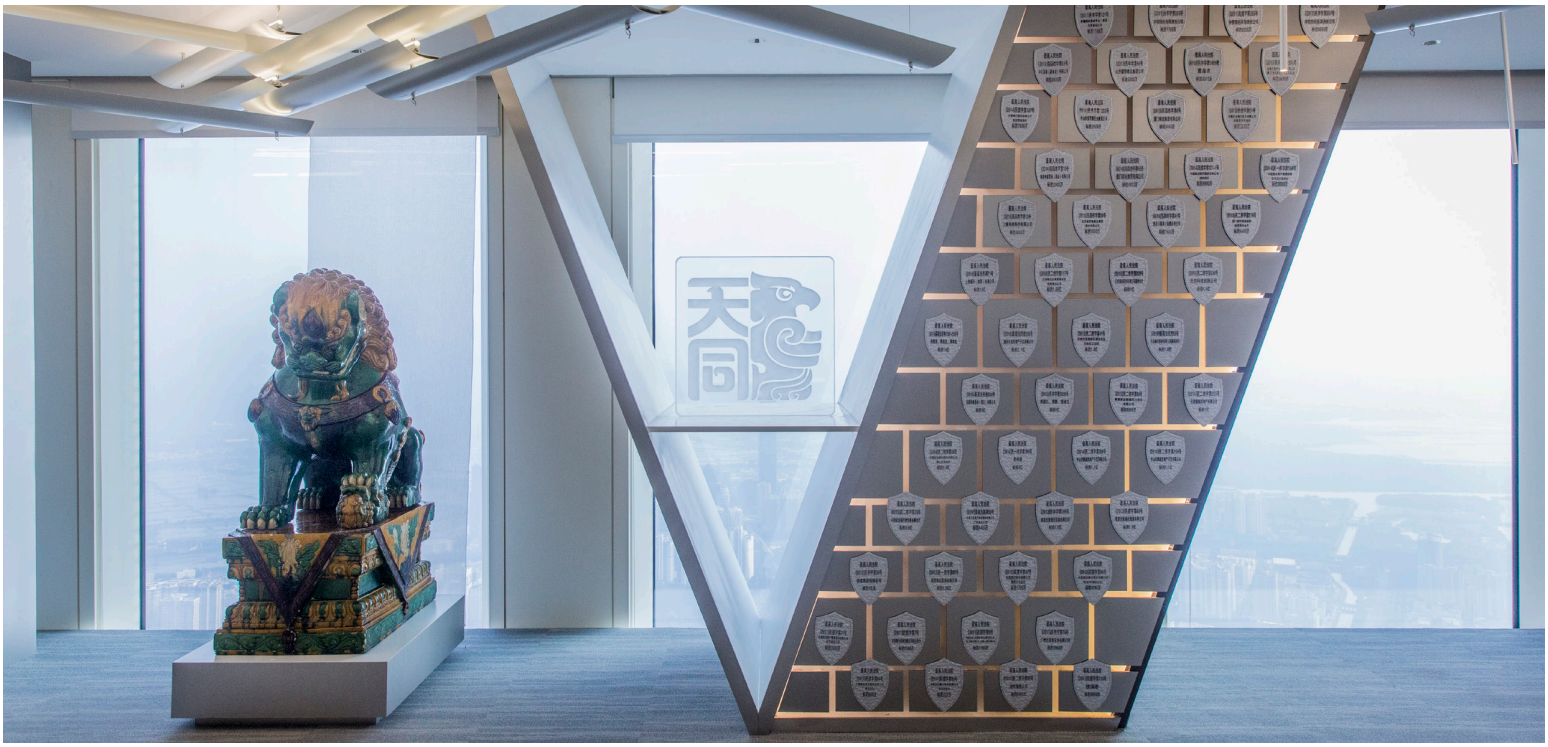
On 26 September 2019, the Supreme People's Court of China ("SPC") issued the Judicial Interpretation [2019] No. 14 *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (hereinafter referred to as the "**Arrangement**").

The Arrangement is the seventh mutual legal assistance arrangement signed between Mainland China and Hong Kong, and also the first on interim measure assistance signed by China and other jurisdictions. The Arrangement took effect in both Mainland and Hong Kong on 1 October 2019 and is applicable to applications for interim measures submitted to the people's courts of the Mainland ("**Chinese Courts**") from the effective date.

Before the coming into force of the Arrangement, such assistance with interim measures in arbitral proceedings is oneway only: Hong Kong courts grant interim measures in aid of arbitral proceedings seated in Mainland China under the Hong Kong Arbitration Ordinance and Hong Kong High Court Ordinance, whilst Chinese courts do not provide similar assistance to support Hong Kong seated arbitral proceedings. The Arrangement therefore provides the legal basis of applying for interim measures in Mainland China for Hong Kong arbitral proceedings. Undoubtedly, the entry into force of the Arrangement will greatly enhance the enforceability of Hong Kong arbitral awards in Mainland. This article will briefly address the mechanism under this Arrangement and some of its main features and highlights.

II. Interim Measures

The Arrangement has eleven articles, including provisions on (1) the types of interim measures available; (2) qualified arbitral proceedings; (3) the competent courts to entertain such applications; (4) the timeframe of an application; (5) the application materials required; (6) the review of the applications; (7) the scope of application of the Arrangement. Since Hong Kong's oneway assistance mechanism predates the introduction of the Arrangement, and the Arrangement does not seem to have altered to the Hong Kong assistance mechanism already existent under the applicable Hong Kong laws, this Article will focus



only on the newly introduced mechanism for the Chinese Courts to assist with applications for interim measures in aid of Hong Kong arbitral proceedings.

(1) Types of Interim Measures Available

Article 1 of the Arrangement provides that three types of interim measures[1] can be applied under the Arrangement, i.e., (i) property preservation, (ii) evidence preservation and (iii) conduct preservation, encompassing all three types of interim measures available in Mainland arbitral proceedings.[2] According to *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* (the "*Understanding*"), a guidance on the Arrangement authored by several SPC judges,[3] the thinking behind this is to afford the parties in Hong Kong arbitral proceedings with the same rights and remedies available for the parties in Mainland arbitral proceedings.

(2) Arbitral Proceedings in Hong Kong

The first paragraph of Article 2 of the Arrangement provides that "arbitral proceedings in Hong Kong" must satisfy two requirements at the same time: (1) the seat of the arbitral proceeding is Hong Kong; and (2) the arbitral proceeding is administered by the institutions or permanent offices on a list provided by

[1] Interim measure is a concept of common law system and preservation is its civil law counterpart. In essence, they denote the same types of mechanisms to guarantee the enforcement of arbitral awards and ultimately to protect the legitimate rights and interests of the parties. For the purpose of conciseness, this article uses both terms interchangeably depending on the specific context and semantics.

[2] Property preservation and evidence preservation are provided in *the Arbitration Law of the People's Republic of China*, and conduct preservation was incorporated in *the Civil Procedure Law of the People's Republic of China* when it was revised in 2012.

the Hong Kong Government to the SPC and confirmed by both sides.

The second requirement is a significant restriction on the scope of application of the Arrangement, which means that *ad hoc* arbitrations seated in Hong Kong are not eligible for the assistance under the Arrangement. According to the *Understanding*, the Arrangement adopts a more cautious approach to forestall potential abuse of the process from causing losses to the respondent, in light of the interim nature of the preservatory measures. Although not pointed out explicitly, this might come out of the concern over the lack of institutional regulation of *ad hoc* arbitral proceedings.

The Hong Kong Department of Justice released the list under Article 2 on 26 September 2019, which is reproduced at the end of this article for ease of reference. This list is subject to adjustments from time to time. The institutions and permanent offices currently on the list include: Hong Kong International Arbitration Centre, China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre, International Court of Arbitration of the International Chamber of Commerce – Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Centre (HK) and eBRAM International Online Dispute Resolution Centre.

(3) Competent Chinese Courts to Entertain An Application

The first paragraph of Article 3 provides that an application for interim measures shall be made to the Intermediate People's Court of (1) the place of the Respondent's residence or (2) the place where the property or evidence is situated. It also 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 one of those people's courts but shall not make separate

[3] Jiang Qibo, Zhou Jiahai, Si Yanli, Liu Kun, *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,* People's Court Daily, 26 September 2019. This publication is of highly persuasive value although it is arguably not an official interpretation of the Arrangment.

applications to two or more people's courts".

The *Understanding* highlights two considerations behind this provision. First, as the ultimate purpose of interim measures is to ensure the effective enforcement of any arbitral award, the courts competent to handle applications for interim measures under the Arrangement shall be the same courts with jurisdictions to hear enforcement applications. This is consistent with similar provisions of the SPC's previous mutual assistance arrangements with the Hong Kong Government on the enforcement of arbitral awards as well as commercial and civil judgments.

Second, concurrent filing is disallowed. Where there are several courts competent to hear an application, the applicant can submit its application to one of them only. This is to avoid the granting of excessive interim protections caused by application filing with multiple courts. In practice, this requires that the court which accepts the application for interim measures should review the application and take necessary actions in a timely manner. In particular, if the application contains request for preservation of property or evidence located in other court's jurisdiction, the court may seek the assistance of the court where the property or evidence is

located if necessary.

(4) The Timeframe of Applications

The second and third paragraphs of Article 3 of the Arrangement provides for the handling of an application under the Arrangement made at two different stages: (1) after the arbitral institution has accepted the arbitration case; or (2) before the arbitral institution has accepted the arbitration case.

A. Application made after the arbitral institution has accepted the arbitration case

Article 3 of the Arrangement expressly provides that if the application is submitted after the arbitral institution has accepted the arbitration case, the application materials shall be passed on to Chinese Court through the arbitral institution.

However, it is worth noting that the SPC's *Understanding* suggests a different, probably more feasible approach. Considering that the arbitral institutions are located in Hong Kong, requiring them to pass on the application may cause undue delay in the transmission process and undermine the effectiveness of any interim measures granted. As such, the parties in Hong Kong arbitral proceedings shall be allowed to submit the application for interim measure together with the transmittal letter directly to the Chinese Court on their own. To ensure the integrity of the process, the Chinese Court may verify with the relevant arbitral institution after having received the application from the applicant.

However, this discrepancy may cause difficulties in practice. It appears that the first application made under the Arrangement, discussed at section III below, was indeed transmitted to the Shanghai Maritime Court by the applicant directly. However, some Chinese Courts may well adopt a textual approach, insisting on the application being passed on by the arbitral institution as required by the explicit language of Article 3 of the Arrangement. Since the Arrangement has just taken effect, it remains to be seen how it fares in reality.

B. Application made before the arbitral institution has accepted the arbitration case

For applications made before the arbitral institution has accepted the arbitration case, within 30 days after the interim measure is taken, Chinese Court must be provided with the letter certifying the institution's acceptance of the arbitration case. Otherwise, the court shall discharge the interim measure.

(5) The materials that should be submitted to the court when applying for interim measure

According to Article 4 of the Arrangement, an application to the Chinese Court for interim measures shall include the following materials:

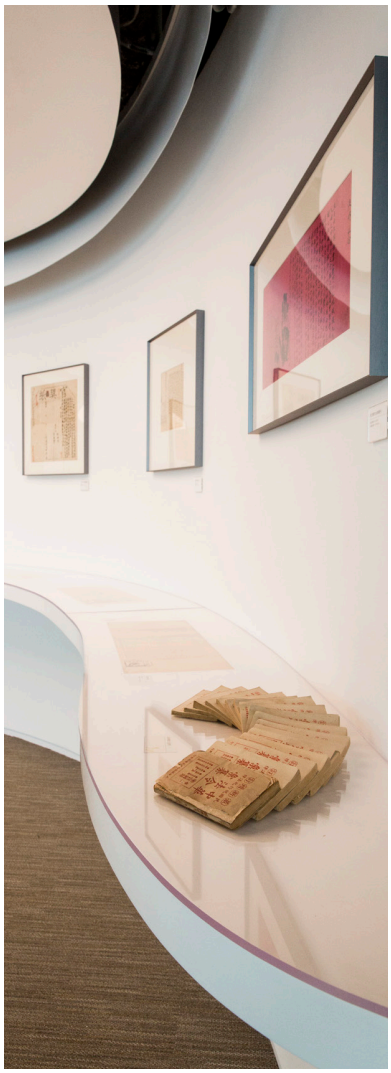
1) the written application for interim measure;
2) the arbitration agreement;
3) documents of identity;
4) the request for arbitration setting out the main claim of the arbitration and the facts and justifications on which the claim is based, together with the relevant evidential materials, as well as a letter from the relevant institution or permanent office certifying its acceptance of the relevant arbitration case; and
5) any other materials required by the Chinese Court.

In particular, the application for interim measure shall specify: (1) the particulars of the parties; (2) the details of the application; (3) the facts and justifications on which the application is based, together with the relevant evidence; (4) clear particulars of the property and evidence to be preserved;(5) information

about the property in the Mainland; and (6) whether any application under the Arrangement has been made in any other court.

(6) Examination of the Application

Article 8 of the Arrangement provides that the court shall examine the application for interim measure expeditiously. Owing to the urgency of interim measure, such examination should be undertaken as soon as possible. If the examination is delayed, the interim measure may become moot or meaningless. The Chinese Court shall, within the time limit prescribed by Chinese law, conduct examination and make a ruling on whether to grant the interim measure or not. For example, according to the provisions of the *Civil Procedure Law of the People's Republic of China*, the application for pre-arbitration preservation shall be ruled within 48 hours. Upon examination, the Chinese court may require the applicant to provide security or make a guarantee, etc.



(7) Scope of Application of the Arrangement

With respect to the temporal scope, Article 3 of the Arrangement specifies that an application under the Arrangement can be submitted before the arbitral award is made. This means that the Arrangement will be applicable to arbitral proceedings commenced but not concluded before 1 October 2019. The *Understanding* emphasises that the Arrangement does not cover an application for preservatory measures at the enforcement stage of a Hong Kong arbitral award after it is rendered. Such assistance might be included in future amendments to the Arrangement on the Mutual Enforcement of Arbitral Awards.

With respect to the subject matter, the *Understanding* indicates that it is the mutual understanding between both sides that the Arrangement only applies to commercial arbitrations, not including investment treaty arbitrations between investors and host states.

III. The First Application under the Arrangement for Interim Measure in Mainland China

On 8 October 2019, the Shanghai Maritime Court accepted an application for interim measure submitted by the Applicant in a Hong

Kong arbitration and granted the interim measure on the same day. This is the first Chinese Court's decision under the Arrangement since it came into effect on 1 October 2019. This case falls under the situation of Article 3(2) of the Arrangement, where the application for interim measure was submitted after the arbitration institution had accepted the arbitration case.

The Applicant is a Hong Kong shipping company, which entered into a voyage charter with the Respondent, a company in Shanghai. The voyage charter stipulates that the Applicant would provide a vessel to carry the coal of the Respondent from Indonesia to Shanghai. However, the Respondent cancelled the voyage charter and the Applicant suffered a loss therefrom. The parties subsequently reached a settlement agreement that the Respondent shall make a payment of $180,000 to the Applicant. However, the Respondent failed to honour the agreement and the Applicant commenced the arbitral proceeding with the Hong Kong International Arbitration Centre (HKIAC) as per the arbitration clause in the settlement agreement on 16 July 2019, prior to the coming into force of the Arrangement on 1 October 2019.

Having received the full set of application materials regarding the interim measure on 1 October 2019, HKIAC accepted the case and issued a letter of transmission to the Applicant on the following day, so that the Applicant could forward the Application to the Shanghai Maritime Court for the freezing of the Respondent's account and seizure of other properties. As mentioned above, the Shanghai Maritime Court accommodated the application on 8 October 2019.

IV. Conclusion

The signing and entry into force of the Arrangement highly complement the mutual legal assistance landscape between Hong Kong and Mainland China. It is expected to effectively improve the efficiency of the enforcement of Hong Kong arbitral awards in Mainland China, strengthen the close legal relationship between the two jurisdictions, and better protect the rights and interests of the parties involved in Hong Kong and Mainland arbitral proceedings.

Annex Institutions and Permanent Offices Qualified under Article 2 of the Arrangement

Hong Kong International Arbitration Centre
Ms. Sarah Grimmer, Secretary-General
Mr. Joe Liu, Deputy Secretary-General
Tel: (852) 2525 2381 Fax: (852) 2524 2171 Email: arbitration@hkiac.org
Dr. Ling Yang, Deputy Secretary-General & Chief Representative of Shanghai Office
Tel: (86) 21 5093 2963
Email: lyang@hkiac.org
Website: https://www.hkiac.org/

China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre
Deputy Secretary General
Mr. Brad Wang
Tel: (852) 2529 8066 Fax: (852) 2529 8266 Email: bradwang@cietac.org
Website: http://www.cietachk.org/

International Court of Arbitration of the International Chamber of Commerce – Asia Office
Counsel
Ms. Pui-Ki Emmanuelle Ta
Tel: (852) 3607 5600
Email: ica8@iccwbo.org

Hong Kong Maritime Arbitration Group
Chairman
Mr. Arthur Bowring
Tel: (852) 9499 2220
Email: arbowring@netvigator.com
Deputy Chairman
Mr. Danny Mok
Tel: (852) 9083 2854
Email: dannyskmok@yahoo.com.hk
Website: https://www.hkmag.org.hk

South China International Arbitration Centre (HK)
Secretary of the Board
Mr. Li Xiongfeng
Tel: (86) 15974210894
Email: lixiongfeng@scia.com.cn
Legal Counsel
Ms. Chi Wenhui
Tel: (86) 15813726533
Email: chiwenhui@scia.com.cn

eBRAM International Online Dispute Resolution Centre
Chief Executive Officer
Mr. Daniel Lam, SBS, JP
Email: daniel.lam@ebram.org
Office Manager
Ms. Eugenia Pang
Tel: (852) 2572 6512
Email: eugenia.pang@ebram.org, info@ebram.org

Chinese Law Updates

The First and the Second Foreign-related Civil and Commercial Courts of Hainan Were Established

On 26 September 2019, the First and Second Foreign-related Civil and Commercial Courts of Hainan were established in the First Intermediate People's Court of Hainan and the Intermediate People's Court of Sanya respectively.

This is the first time China sets up a provincial-level court specifically for foreign-related civil and commercial cases, namely cases involving a foreign party or the subject matter is located outside China, or the legal relationship between the parties is foreign. In particular, the two courts have jurisdictions on foreign-related civil and commercial cases where the value in dispute does not exceed RMB 5 billion. It is reported that the two foreign-related courts have adopted the Online Dispute Resolution mechanism including video mediation, to facilitate the resolution of disputes between the parties.

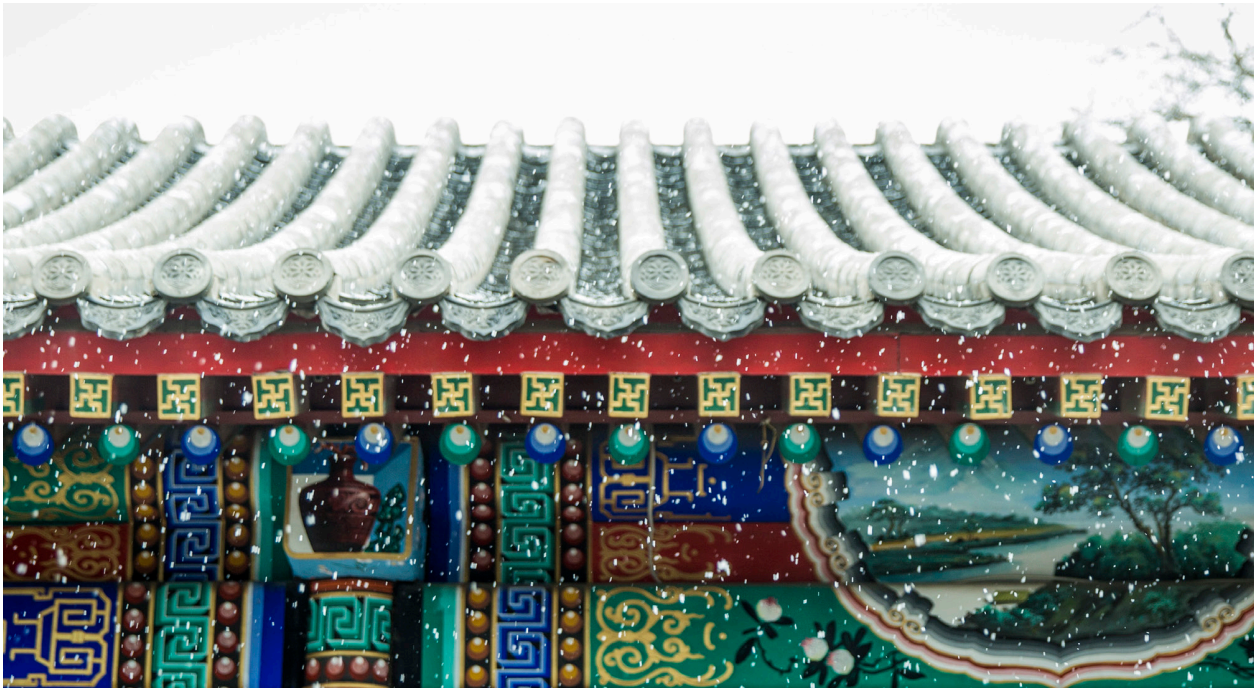
The establishment of the First and the Second Foreign-related Civil and Commercial Courts of Hainan is of great significance to the construction of the Hainan Free Trade Zone and Hainan Free Trade Port.

The SPC Released Award for the First Case of CICC

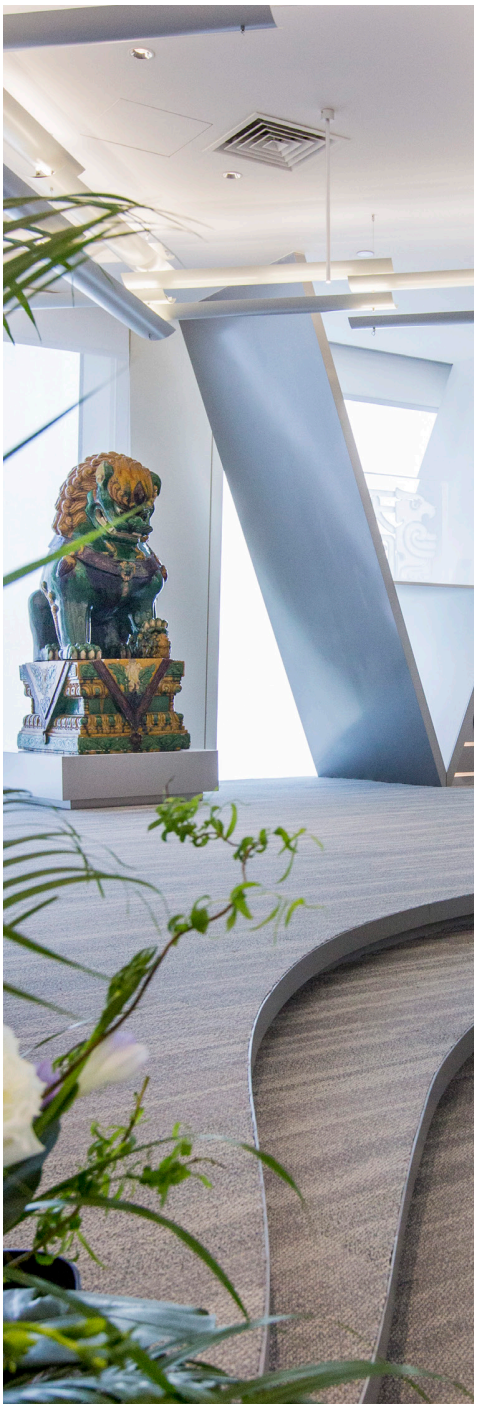
On 18 September 2019, the Supreme People's Court ("**SPC**") released an award of *Lucky Treat Limited v Zhong Yuan Cheng Commercial investment Holdings Co., Ltd* (2019) Supreme People's Court Min Te No.1. This is the first case accepted by the China International Commercial Court ("CICC"), in which Tiantong was the counsel for the applicant Lucky Treat Limited.

In *Lucky Treat v Zhong Yuan Cheng*, the parties had entered into negotiation about a contract that incorporated an arbitration clause to submit disputes to Shenzhen Court of International Arbitration. The applicant Lucky Treat, however, did not sign the contract eventually and applied to the CICC for confirming that the arbitration clause did not exist and thus was not binding upon the parties. Hence the issue before the CICC focused on whether an arbitration agreement existed where the underlying contract had not been effectively concluded. It held that the arbitration clause in dispute was valid because: (1) the parties had reached an agreement to submit their disputes for arbitration under the Chinese contract law, and that (2) an arbitration clause could be separated from the underlying contract according to Article 10(2) of the Chinese arbitration law, as such whether the underlying contract had been effectively entered into did not affect the validity of the arbitration clause.

This case sets a valuable precedent as to the issue of the existence of the arbitration agreement in two respects: first, it confirms that the courts have jurisdiction to hear the existence of the arbitration agreement even though the Chinese arbitration law does not explicitly provide so, and second, it clarifies that an arbitration agreement may stand alone even if the underlying contract has never come into



existence so long as the parties have reached an agreement to arbitrate.



The Regulations on Foreign Insurance Companies and Foreign Banks Were Revised

On 15 October 2019, the State Council of the PRC announced the revised *Regulation on the Administration of Foreign-invested Insurance Companies* and the *Regulation on the Administration of Foreign-invested Banks.* This revision broadened market access for foreign insurance companies and banks which reflected China's opening-up policy in its financial sector.

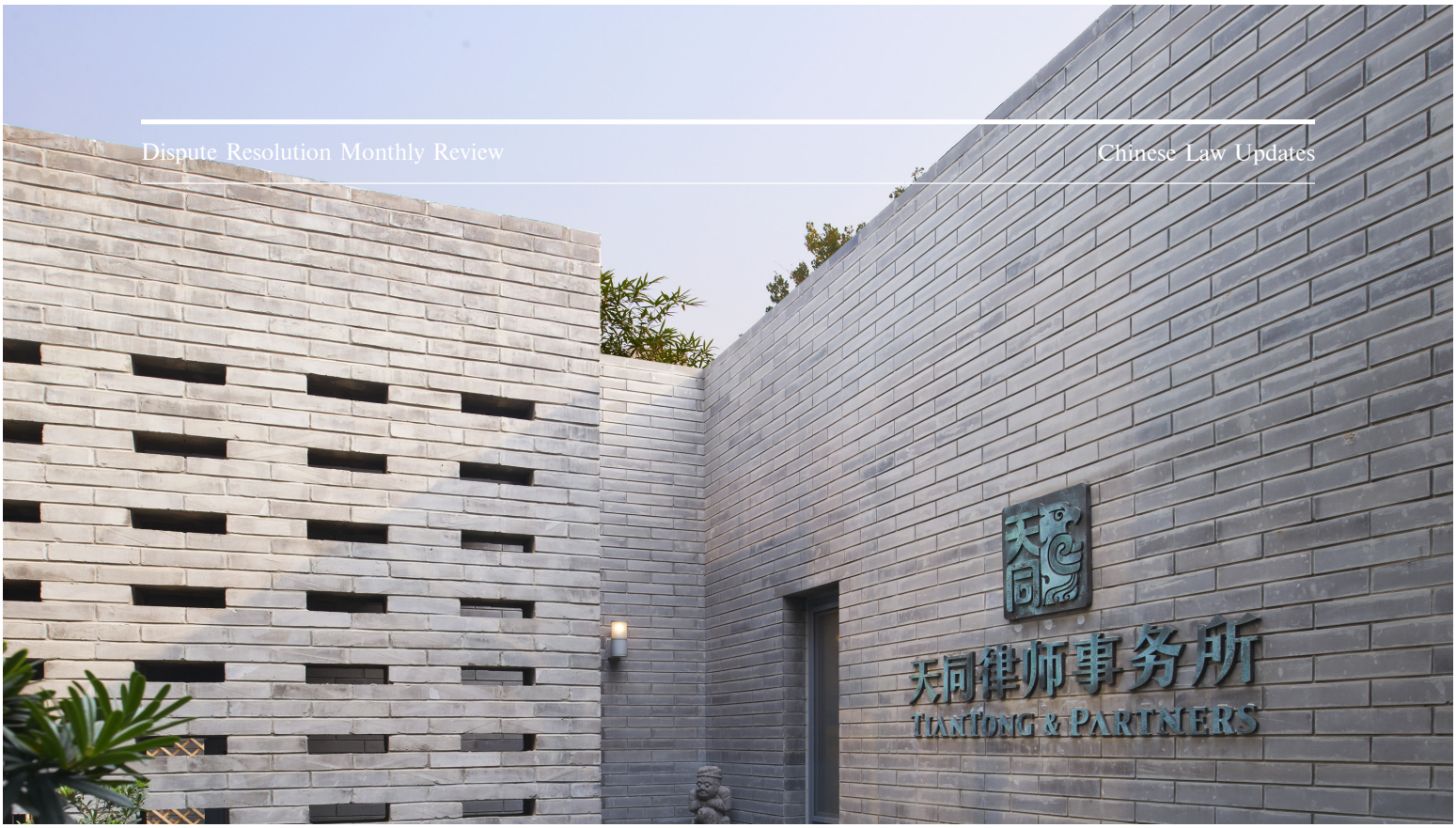
The major revisions in *Regulation on the Administration of Foreign-invested Insurance Companies* include: (1) removing requirements for foreign insurance companies that to apply for setting up foreign-invested insurance companies in China, the companies must have at least 30-year business record and has set a representative branch in China for over two years, and (2) allowing foreign insurance groups to invest in insurance companies in China and foreign financial institutions to participate in such investment.

The *Regulation on the Administration of Foreign-invested Banks* were mainly revised to (1) lift restrictions on stakeholders which plan to set up foreign-invested banks in China; (2) allow foreign banks to simultaneously set up wholly-owned foreign banks and branches in China; and (3) expand the business scope of foreign banks to include issuance, cashing and selling government bonds as agency.

Regulation of Lawyer Conduct of Hainan Special Economic Zone Was Issued

On 27 September 2019, the 14th Meeting of the Standing Committee of the Sixth Hainan Provincial People's Congress voted to adopt the *Regulations of Lawyer Conduct of Hainan Special Economic Zone* (the "**Regulation**"). The Regulation has come into effect since 1 October 2019.

The Regulation broadened the access requirements for Special General Partnership law firms (LLP), allowing not only qualified lawyers but also certified accountants, certified tax agents, certified cost engineers, patent agents and other professionals to become partners, subject to a share restriction of 25%. Additionally, having taken lessons from



Singapore, the Regulation encouraged qualified law firms to implement a corporate management system. Last but not least, the Regulation encouraged local law firms to set up a business associate by agreement or as a partnership with law firms registered in Hong Kong, Macao or Hainan branches of foreign law firms.

MOFCOM Released Notice of the Expiry of Certain Anti-Dumping Measures in 2020

The Ministry of Commerce ("**MOFCOM**") released *Notice of the Expiry of Certain Anti-Dumping Measures in 2020* (the "**Notice**") on 22 October 2019. The Notice specified remedies related anti-dumping measures which will expire between 1 January and 31 December of 2020, i.e., polyamide-6.6 chips originated in the U.S., Italy, the U.K., France and Taiwan Region, adipic acid originated in the USA, European Union and South Korea and methyl methacrylate originated in Singapore, Thailand and Japan.

According to the *Anti-dumping Regulation of China*, the time limit for levying anti-dumping tariffs and for implementing the pricing commitments shall not exceed 5 years, with the exception that if the dumping or damage is possible to continue or occur again, the time limit may be extended. As such, the Notice provides that within 60 days prior to the expiry of the abovementioned anti-dumping measures, the relevant Chinese industry or any individual, entity or association which can represent such industry can apply in writing for re-examination on the expiry to the MOFCOM. Otherwise, those measures will expire accordingly unless the MOFCOM conducts a re-examination on its own initiative.