



# TianTong Dispute Resolution Review



天同律师事务所  
TIAN TONG 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.

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## Featured Article

# Interim Measures in aid of Certain Hong Kong-seated Arbitrations can be Sought in Mainland China

## 1. INTRODUCTION

Under Chinese law, the power to grant interim measures in aid of arbitration rests exclusively with Chinese courts. Previously, it was common knowledge that Chinese courts granted interim measures in aid of arbitration only when it was an institutional arbitration seated within Mainland China.

This situation has changed since 1 October 2019, when *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* came into force (the “**Arrangement**”). This is a significant development beneficial to parties in arbitral proceedings administered by certain arbitration institutions and seated in Hong Kong, as they may directly seek recourse to Chinese courts for preservation orders on property, evidence or conduct.

Since the Hong Kong Arbitration Ordinance (Cap. 609) allows parties to an arbitration seated anywhere to seek interim measures from the Hong Kong courts<sup>1</sup>, the following briefing will mainly focus on how to apply to the Chinese court for an order of interim measure in aid of certain Hong Kong-seated arbitration according to *the Arrangement*.

<sup>1</sup> See Section 45, Article 17J of UNCITRAL Model Law (Court-ordered interim measures) *Cap. 609 Arbitration Ordinance*, available at [https://www.elegislation.gov.hk/hk/cap609?xpid=ID\\_1438403521211\\_006](https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1438403521211_006)



## 2. KEY FEATURES OF THE ARRANGEMENT

In Mainland China, interim measures referred to in this *Arrangement* include property preservation, evidence preservation and injunction. Such measures may be applied for in Mainland China in aid of an arbitration administered by a number of selected institutions mutually acknowledged by the China Supreme People’s Court (“**SPC**”) and the Hong Kong Department of Justice (“**HKDOJ**”)<sup>2</sup>.

The first batch of selected arbitration institutions include: (i) Hong Kong International Arbitration Centre (“**HKIAC**”), (ii) China International Economic and Trade Arbitration Commission, Hong Kong Arbitration Centre, (iii) International Court of Arbitration of the International Chamber of Commerce - Asia Office, (iv) Hong Kong Maritime Arbitration Centre, (v) South China International Arbitration Centre (Hong Kong), and (vi) eBRAM International Online Dispute Resolution Centre. It is anticipated that more international arbitration institutions would be added into the list in the future.

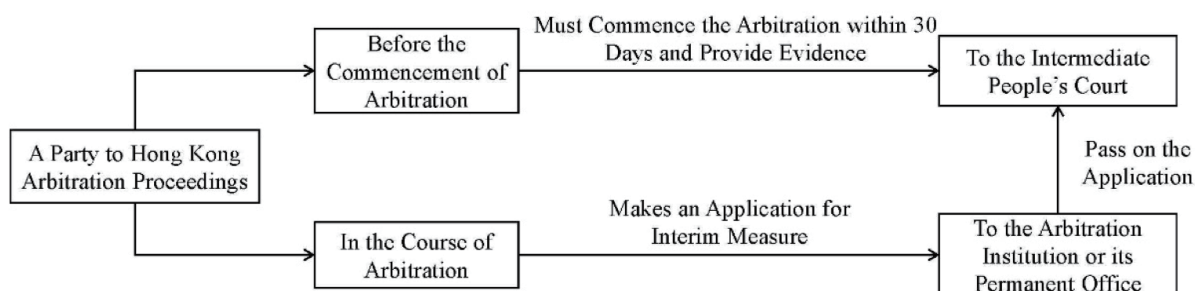
The below table and diagram set out the details about how to apply for interim measures in Mainland China according to the *Arrangement*.



<sup>2</sup> The list of the institutions mutually acknowledged can be found at the following web: [https://www.doj.gov.hk/pdf/2019/list\\_of\\_institutions\\_e.pdf](https://www.doj.gov.hk/pdf/2019/list_of_institutions_e.pdf)



<b>Timing</b>	Before arbitration is commenced or in the course of arbitration
<b>Jurisdiction</b>	The Intermediate People's Court where the respondent is domiciled or where the asset or evidence is located
<b>Documentation</b>	<p>A written application setting out:</p> <ul style="list-style-type: none"> <li>• interim measures sought, including the amount of asset preservation sought, or content and time period of injunction sought</li> <li>• the factual and legal basis for the application, including how the circumstances constitute an emergency, the irreparable harm the applicant would suffer and/or the reason why it would be difficult to enforce the award if no interim measure is granted</li> <li>• clear information on or specific indication as to the asset or evidence, the subject of the preservation application</li> <li>• information about the property in Mainland China to be used as security or certification of financial standing</li> <li>• relevant institution or permanent office, and the status of such application</li> </ul>
<b>Procedures</b>	The Chinese court is required to decide whether to grant an interim measure within 48 hours if an application is made in aid of arbitration to be commenced or in the case of emergency, and within five days if arbitration has been commenced
<b>Security</b>	Security is required to put up for an application



### 3. CASE STUDIES

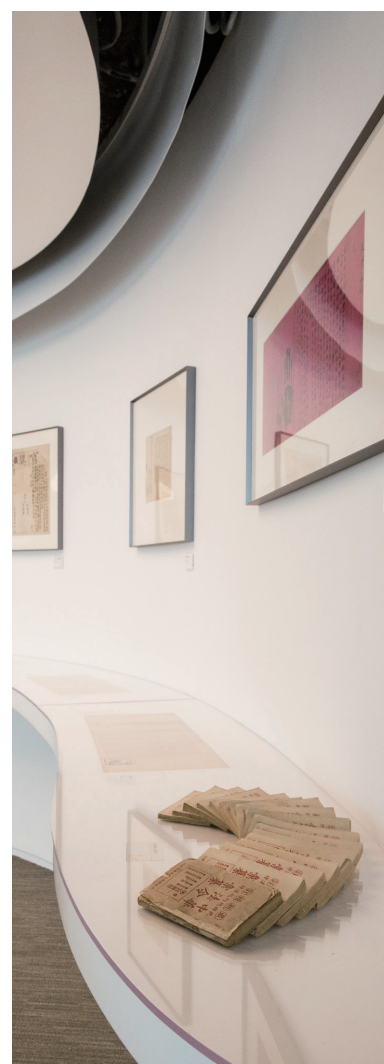
Within ten days after the *Arrangement* came into force, the HKIAC had already received five applications for interim measures to be ordered by Chinese courts<sup>3</sup>. Until 13 February 2020, the HKIAC had processed 13 applications<sup>4</sup>. Below are two published cases of this kind.

#### *Elim Spring Marine Case*

On 8 October 2019, the Shanghai Maritime Court granted interim measures in support of an arbitration administered by HKIAC. The Applicant had commenced an *ad hoc* Hong Kong-seated arbitration arising out of a charterparty against a Shanghai-based company. The dispute was concerning a coal shipment from Indonesia to Shanghai. During the course of the arbitration, the parties reached a settlement but the Respondent did not fulfill its obligations under the settlement agreement. As such, the Applicant commenced a second arbitration administered by HKIAC. The Applicant applied to the Shanghai Maritime Court to freeze the Respondent's bank account and to seize its other assets located in Mainland China totaling USD 268,600. The Applicant lodged a guarantee provided by the People's Insurance Company of China, Shanghai Branch for the purpose of making the application. The Shanghai Maritime Court granted the interim measures subsequently.<sup>5</sup>

#### *Dickson Case*<sup>6</sup>

An application was made to the Intermediate People's Court of Lianyungang



<sup>3</sup> HKIAC News, *Five Interim Relief Applications Under New Arrangement*, available at <https://www.hkiac.org/news/five-interim-relief-applications-under-new-arrangement>

<sup>4</sup> HKIAC News, *New Decade, New Updates*, available at: <https://www.hkiac.org/news/new-decade-new-updates>

<sup>5</sup> *In Re: Elim Spring Marine (Hong Kong) Limited*, Civil Order for Property Preservation ([2019] Hu 72 Cai Bao No.298), issued on 8 October 2019.

<sup>6</sup> *Dickson Holding Enterprise Company Limited v. Dickson Valora Group (Holdings) Company Limited*, Civil Order ([2019] Su 07 Cai Bao No.10), issued on 8 November 2019.



City, Jiangsu Province (the “**Court**”) where by a Hong Kong company to seek an asset preservation order against the Respondent, another Hong Kong company. The Applicant commenced arbitration before HKIAC first and then applied to preserve all the property of the Respondent totaling RMB 142,590,000. Upon receipt of the application, HKIAC forwarded it to the Court later. China Pacific Property Insurance Co., Ltd., Shenzhen Branch issued a guarantee, and the Court upheld the application.

The foregoing cases demonstrate that:

**First**, in both cases, the interim measures were granted in favor of the applicants, indicating that the Chinese courts are willing to aid Hong Kong-seated arbitrations according to the *Arrangement*;

**Second**, the applicants can ask Chinese insurance companies to provide the security, instead of providing security on their own; and

**Third**, the Chinese courts promptly entertained the applications. In the first case, the Shanghai Maritime Court granted the interim measure within one day, whilst in the second case, the Lianyungang Court upheld the application within two days, upon receipt of the relevant application.







## China Law Updates

### HKIAC Released Case Statistics of Applications for Interim Measures to Chinese Courts under the Arrangement

In October 2019, the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region* (the “**Arrangement**”) came into effect in Mainland China and Hong Kong. The Arrangement enables parties to Hong Kong-seated arbitrations to seek interim relief from Chinese courts. On 13 February 2020, the Hong Kong International Arbitration Centre (“**HKIAC**”) announced that it had processed 13 applications seeking to preserve evidence or assets in Mainland China of an aggregate value of RMB 5.5 billion. Until then, Chinese courts have preserved the concerned assets at the total value of RMB 1.7 billion.

Amongst these applications, approximately 40% of the applicants are from Mainland China, with the remaining 60% of the applicants from Hong Kong, Switzerland, Singapore, Samoa and the British Virgin Islands (“**BVI**”). Nearly 60% of the assets preserved belong to the parties from Mainland China, and the remaining belong to parties from Hong Kong, the Netherlands, BVI and the Cayman Islands.

### The BVI High Court for the First Time Recognised Chinese Judgments





On 28 January 2020, the BVI High Court made the first decision in *Industrial Bank Financial et al v Xing Libin* [BVIHC (Com) 0032 of 2018] to recognise and enforce the Chinese court judgments.

The underlying dispute arose from three Chinese judgements of USD 140 million against a Chinese debtor. The debtor was a sole shareholder of a BVI company, which had valuable assets including bank accounts, real properties and shares in a Hong-Kong listed company. The creditor was a Chinese bank which applied for appointment of equitable receivers to enforce the judgment debt. The court-appointed receivers could exercise the shareholder voting rights and take control of the BVI company for the benefit of the bank.

Many Chinese companies would register special purpose vehicles or holding companies in offshore jurisdictions like BVI, to directly or indirectly possess Mainland China or Hong Kong assets. This decision may assist future enforcement of Chinese court judgments where assets are held by BVI incorporated vehicles.

### **Hong Kong Court for the First Time Recognised the Chinese Insolvency Administrators**

On 13 January 2020, the Hong Kong Court of First Instance granted a recognition order to the Chinese insolvency proceeding. The insolvency administrators appointed by the Chinese court (the “**Administrators**”) claimed the assets owned by the insolvent company (the “**Company**”) in Hong Kong. This is the first case of cross-border insolvency cooperation between Mainland China and Hong Kong.

The Company is an investment holding company incorporated in Mainland China. The Shanghai Third Intermediate People’s Court put the Company into liquidation and appointed the Administrators. Upon their appointment, the Administrators discovered the Company’s valuable assets in Hong Kong, including a claim of HKD 7.2 billion against the Company’s Hong Kong subsidiary (the “**Subsidiary**”). The Administrators also found that a third party had obtained a default judgment against the Company and a garnishee order nisi against the Subsidiary. The garnishee order nisi attached the Company’s receivables from the Subsidiary. Therefore, the Administrators made an urgent application to the Hong Kong court for recognition of their appointment and assistance to stay the garnishee proceedings.

The Hong Kong court granted the order recognising the Administrators, reasoning that (1) the Chinese insolvency proceeding was collective pursuant





to the *Enterprise Bankruptcy Law of China*; (2) the insolvency proceeding had been commenced in the Company's place of incorporation; (3) the assistance requested was necessary for the Administrators to deal with the Company's assets; and (4) the assistance requested was consistent with the substantive law and public policy of Hong Kong. This decision represents an important development of cross-border insolvency between Mainland China and Hong Kong.

### California Northern District Court for the First Time Approved U.S. Discovery to a China-Seated Arbitration

On 25 February 2020, the California Northern District Court (the “**Court**”) granted a motion for discovery under 28 U.S.C. § 1782 (“**Section 1782**”) with respect to an international commercial arbitration seated in Hainan, China. This is the first time that a U.S. court allowed discovery in aid of a China-seated arbitration. Before this decision, the U.S. federal courts had split over the issue whether Section 1782 applied to foreign seated arbitrations where parties sought discovery in the U.S.

The motion for discovery was filed for the arbitration proceedings administered by the China International Economic and Trade Arbitration Commission (the “**CIETAC**”), by a group of U.S. companies and their Chinese subsidiaries (the “**applicants**”) against the owner of a Chinese hospital. The underlying arbitration arose from a dispute of an investment worth USD 10 million made by the applicants to the Chinese hospital in an in vitro fertilization (IVF) center located in Hainan, China. The applicants alleged in the arbitration that the hospital unilaterally and wrongfully terminated the contract. Further, the applicants sought discovery in the Court to depose the owner of the hospital who resided in California. The arbitration in China is still ongoing.

The Court ordered for discovery, on the ground that the language in Section 1782 allowed discovery for “foreign or international tribunals”, which should include the arbitral tribunal constituted in the CIETAC proceedings in China. This case is now on appeal in the Ninth Circuit Court. The decision, if not later overruled, may encourage other U.S. courts to grant discovery in aid of Chinese arbitrations in the future.