TianTong Dispute Resolution 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 8 branch offices in Shanghai, Shenzhen, Nanjing, Chongqing, Shenyang, Xi'an, Zhengzhou, and Sanya, where the 6 circuit courts and 2 international commercial courts under the auspices 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 were 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. Its clients range from foreign government entities, such as the US Department of Justice, to multinational corporations, such as RBS, and from major financial institutions, including Bank of China, China Construction Bank, and Agricultural Bank of China, to China's leading companies, including Sinopec, Sinochem, China Datang Corporation and Ping An Insurance.

In addition to its traditional advantages in litigation before Chinese courts, TianTong has extensive experience in representing clients in domestic and international commercial arbitration proceedings. TianTong lawyers previously worked at leading international law firms. They have experience handling international arbitration matters conducted before CIETAC, HKIAC, SIAC, ICC, SCC and LCIA and seated in Beijing, Shanghai, Hong Kong, Singapore, Stockholm and London.

TianTong is also specialized in advising clients on 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 China in Aid of Arbitration

I. Introduction

In the event that claimants commence or are about to commence an arbitration administered by a Chinese arbitration institution and is seated in China, it is allowed under Chinese law to apply to Chinese courts for interim measures in aid of arbitration. Nevertheless, claimants may find it difficult to obtain support from Chinese courts in granting interim measures when disputes are referred to international arbitration institutions and to be resolved in a seat of arbitration outside China. This is so because Chinese law does not provide such aid for a non-Chinese arbitration (i.e. any arbitration seated outside China) except for prescribed circumstances under the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region* (the "**Arrangement**"). [1]

[1] Exceptional circumstances may arise if an arbitration is administered by one of the designated arbitration institutions (as set out below) and is seated in Hong Kong according to *the Arrangement*.

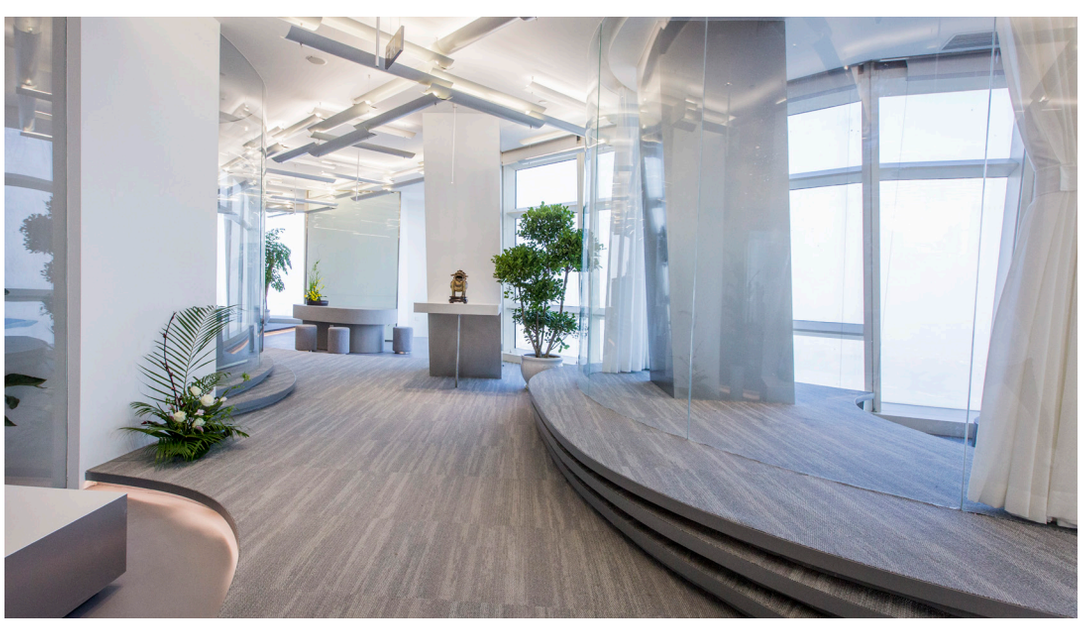
Questions then arise as to under what circumstances and how parties would be able to obtain interim measures from Chinese courts in aid of arbitration proceedings seated inside or outside China. Amongst all, this article will address the issues from three aspects:

1) under what circumstances would Chinese courts grant interim measures in aid of arbitration proceedings;
2) general rules of the applications for interim measures in China in aid of arbitration; and
3) special rules applicable to arbitration administered by designated arbitration institutions and seated in Hong Kong.

II. The Circumstances When Interim Measures are Available

Set out below are some factors Chinese courts consider in granting interim measures in aid of arbitration proceedings, such as (1) whether an arbitration is administered by an arbitration institution, (2) whether the seat of arbitration is within China [2], and (3) whether such an arbitration institution is a Chinese or non-Chinese one.

[2] China or "PRC" means the People's Republic of China, excluding the Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan.



First of all, under Chinese law, ad hoc arbitration [3] is generally not allowed to be seated in China as a matter of principle. However, according to the new policies of developing free trade pilot zones in China, ad hoc arbitration seated in certain areas of the designated free trade pilot zones ("**FTZ**", e.g. Shanghai Ling-gang area) is allowed. [4] But it remains unclear whether Chinese courts are allowed to grant interim measures in support of ad hoc arbitration seated in these specifically designated areas in FTZ.

Set out below is a table summarising this point.

Ad Hoc arbitration seated in China (e.g., arbitration in Beijing)	• Interim measures generally unavailable • Uncertain if the seat of arbitration is within the FTZ in China
Ad Hoc arbitration seated outside China (e.g., arbitration in London)	• Interim measures unavailable

Secondly, for Chinese courts, an arbitration can also be divided into two categories depending on whether the seat of arbitration is located within China [5].

[3] *Ad hoc* arbitration refers to an arbitration proceeding not administered by an arbitration institution.

[4] *Opinions of the Supreme People's Court on Providing Judicial Support for the Building of Free Trade Pilot Zones*.

[5] For the purpose of this article, Chinese arbitration proceedings refer to those arbitrations which are seated within China (excluding Hong Kong, Macao and Taiwan, as they are different jurisdictions from Mainland), whilst non-Chinese arbitration proceedings include those arbitrations seated outside China (including Hong Kong, Macao SAR and Taiwan).

Thirdly, the Chinese Arbitration Law narrowly interpretes arbitration institutions as those registered in China according to Chinese law, rather than broadly encompasses international arbitration institutions registered according to foreign law [6]. To date, it is an unsettled issue whether an international arbitration institution is allowed to administer arbitration proceedings seated in China. The uncertainty may affect Chinese courts in deciding whether to grant interim measures when an arbitration is administered by an international arbitration institution.

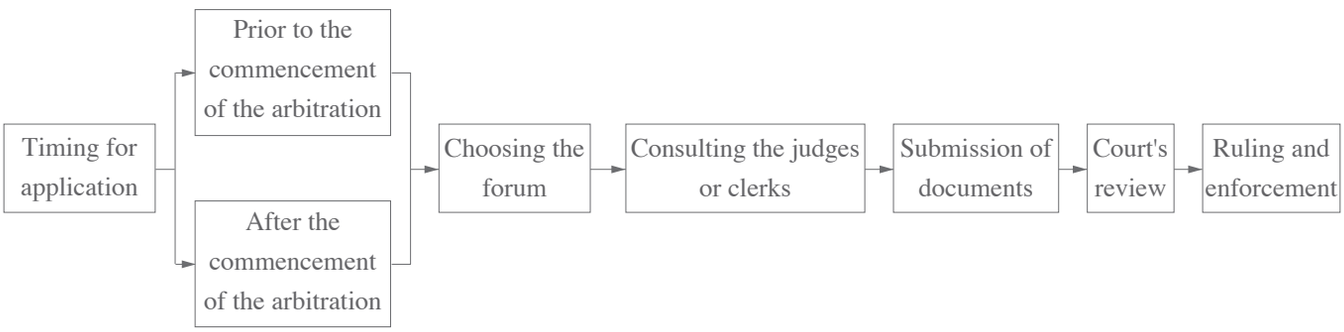
The above two factors, the nationality of arbitration institution and seat of arbitration, suggest four possible scenarios in relation to granting interim measures by Chinese courts:

Chinese arbitration institution + seat of arbitration in China (e.g., arbitration administered by the China International Economic and Trade Arbitration Commission (CIETAC), seated in Beijing)	· Interim measures available
Chinese arbitration institution + seat of arbitration outside China (e.g., CIETAC arbitration, seated in London)	· Interim measures generally unavailable · There is a possibility that Chinese arbitration institutions are added to the *Arrangement*
Non-Chinese arbitration institution + seat of arbitration in China (e.g., arbitration administered by the Singapore International Arbitration Centre (SIAC), seated in Shanghai)	· Uncertain
Non-Chinese arbitration institution + seat of arbitration outside China (e.g., arbitration administered by the London Court of International Arbitration (LCIA), seated in London)	· Interim measures generally unavailable · Exception: interim measures available when arbitration is administered by the specifically designated arbitration institution and is seated in Hong Kong (e.g., arbitration administered by the Hong Kong International Arbitration Centre (HKIAC), seated in Hong Kong)

[6] E.g. the Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA)

III. General Rules of Applying for Interim Measures

The following chart illustrates the whole process of an application for interim measures to Chinese courts.



The authority entertaining the application: generally, the application, together with supporting documents, shall be filed to the arbitration institution first and then be transferred to the court. In case of emergency, the application can be made directly to the court. Chinese courts, other than the Chinese arbitration institution or the arbitral tribunal appointed by the arbitration institution, have the exclusive power and discretion to decide whether to grant an interim measure.

The competent court: the Intermediate People's Court of the place where the party against whom the application is made resides or the place where the property or evidence is situated has the jurisdiction to hear the application for interim measures in aid of arbitrations involving foreign elements.[7] If more than one court has jurisdiction to accept the application, the applicant should consider the totality of circumstances, such as the workload of the court, locations of each piece of assets to be preserved and the respective values of them, to select a suitable venue.

Application and supporting documents: when applying for interim measures, parties need to submit a written application, a prima facie arbitration agreement[8] and other supporting documents to Chinese courts, as illustrated in the table below.

[7] See Art. 3 of the *Arrangement*.

[8] The court will not look into the validity of the arbitration agreement on merits.

S/N	Documents	Details
1	The application	The application shall be written and shall specify the following: · particulars of the parties (e.g., address and contact information); · details of the application (e.g., amount applied to be preserved, the particulars of the performance applied to be injuncted, etc.); · docket number of the arbitration (if applicable); · amount in dispute in the arbitration (if applicable); · the facts and justifications on which the application is based; · security for the application; · other matters as required by courts[9]
2	The arbitration agreement	If the agreement was concluded outside China, the agreement may have to be notarised and authenticated to be submitted to Chinese courts
3	Documents of identity	If the applicant is a foreign company, its documents of identity may have to be notarised and authenticated
4	Power of Attorney (POA)	If the POA is issued outside China, it shall be notarised and authenticated
5	Arbitration documents	Some courts require the applicant to provide copies of all exhibits submitted by the parties to the arbitration
6	Concrete threads of the property or evidence to be preserved	Information requested vary for preserving different types of properties or evidence, e.g., account information is required to lead to a train of inquiry when preserving bank accounts
7	Other materials	If the application is made prior to the commencement of the arbitration, a statement of urgency and the draft of Notice of Arbitration are required. In many cases, courts will require extra documents apart from those required under the laws and regulations

If the applicant has already commenced the arbitration, the court only requires the applicant to explain that there would be "possible difficulties in future enforcement" unless the court grants interim measures as requested. If the applicant applies for interim reliefs before it commences the arbitration, the court is highly likely to apply a stringent standard of review, where in principle, interim measures should not be granted unless "urgent circumstances" exist indicating that the respondent has been transferring or dissipating its assets.[10]

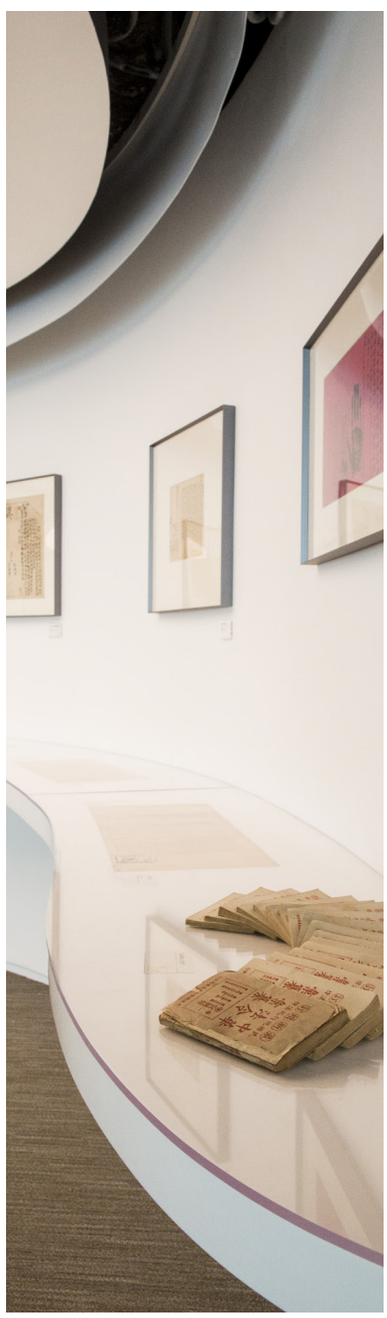
[9] Courts in different levels and regions usually have different requirements for written application and appropriate consultation with judges or clerks prior to the application is highly necessary.

[10] *Guidance on Cases of Assets Preservation Application Prior to the Filing of The Case Issued by Shenzhen Intermediate Court*.

Given the fact that Chinese courts are much less inclined to grant interim measures pertinent to the latter scenario, it is advisable to submit the application for interim measures at the same time when commencing the arbitration.

Security: Chinese courts require the applicant to provide security for preservation of assets in most occasions. Liability insurance policy of preservation of assets is the most preferred instrument. [11] The insurance companies usually charge fees on the ad valorem basis, e.g., the amount to be preserved multiplied by a rate ranging approximately from 0.5% to 0.05%.

Time period: as provided under the Chinese Civil Procedure Law, the court shall render an order to decide whether to grant interim measures within 5 calendar days from the date of accepting the application. Where the court requires the applicant to provide security for the preservation, it shall render such an order within 5 calendar days from the date of providing the security. [12] Where there is an urgency or the application is made prior to the commencement of the arbitration, the court shall render an order within 48 hours from the time of accepting the application. [13]



However, when it comes to practice, given that most applications are made pertaining to an ongoing arbitration and the court always requires provision of security, the court is likely to withhold its acceptance of the security until it is prepared to render an order and enforce preservation.[14] The court often requests additional documents, which may result in further delay to the entire process.

Fees: the court fee applying for property preservation is capped at CNY 5,000[15] . No other fees are required for the enforcement of interim measures.

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[11] Security is accepted in the form of cash, tangible property, surety provided by a third party or liability insurance policy of preservation of assets, etc according to Article 6-8 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Assets Preservation Cases*.

[12] See also Article 4 of *Provisions of the Supreme People's Court on Several Issues concerning the Handling of Property Preservation Cases by the People's Courts*.

[13] Article 100 and 101 of Chinese Civil Procedure Law.

[14] The reviewing time for each application is subject to multiple factors, including application type, application time (it usually takes more time at the end of the year), court level, type of security, etc.

[15] If the amount of the amount to be preserved is lower than CNY 896,000, the court fee will be reduced in proportion to the amount.

IV. Special Rules for Arbitration Seated in Hong Kong (The *Arrangement*)

The *Arrangement* has come into effect on 1 October 2019 and has provided exceptional arrangement on interim reliefs in aid of arbitrations outside China. Under *the Arrangement*, parties to arbitrations seated in Hong Kong and administrated by one of the designated arbitration institutions[16] are allowed to seek interim measures from Chinese courts. Hong Kong therefore becomes the only jurisdiction where Chinese courts are able to provide interim measures in aid of arbitration seated outside Mainland China.

Based on our experience, for parties that apply for interim measures via *the Arrangement*, several "take-away" points should be attended to for the purpose of ensuring quick and efficient obtainment of interim measures:

1) **The route of submission of the application**: in principle, the applicant has options to either submit the application documents and other related materials to the court through the designed arbitration institution or directly to the court according to *the Arrangement*.[17] Nevertheless, Chinese courts seem to prefer accepting documents transferred directly by the arbitration institutions rather than from the applicant. The applicant therefore may submit the application materials to the arbitration institution (e.g. HKIAC) first and ask the institution to transfer them to the Chinese court together with the institution's letter of acceptance.

2) **Preparation of documents**: court's pace in reviewing application largely depends on how well the documents are prepared. Sometimes local courts adopt different requirements and it is therefore necessary for the applicant to consult with judges or clerks of the competent court and ascertain the requested documents beforehand. The applicant may prepare a complete set of application materials to the institution in the first place. Otherwise, the court may require the applicant to supplement with additional documents, resulting in further delay of the proceedings.

3) **Coordination of lawyers in Mainland China and Hong Kong**: when Chinese lawyers and Hong Kong lawyers are both engaged by a client for the purpose of making an application of preservation via the *Arrangement*, it is usually necessary to formulate a detailed working schedule in advance to specify the responsibilities of the client, Chinese lawyers and Hong Kong lawyers for better coordination among all people.

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[16] To date, the designated arbitration institutions include HKIAC, China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre ("**CIETAC HK**"), International Court of Arbitration of the International Chamber of Commerce - Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Center (HK), and eBRAM International Online Dispute Resolution Centre.

[17] *See Notice by the Supreme People's Court of Implementing 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*. However, some China's courts refuse to accept documents directly submitted from applicant and only those documents passed on by the arbitration institution will be accepted, which requires China law counsel's appropriate communication with court prior to the application.

Chinese Law Updates

Mainland China and Hong Kong Signed Supplemental Arrangement on Mutual Enforcement of Arbitral Awards

The *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* was signed on 21 June 1999 and has come into effect since 1 February 2000 (the "**1999 Arrangement**"). The 1999 Arrangement largely mirrors *the New York Convention* in terms of grounds of refusing to enforce arbitral awards.

On 27 November 2020, the Supreme People's Court of the People's Republic of China ("**SPC**") and the Department of Justice of Hong Kong signed the *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (the "**Supplemental Arrangement**", together with the "1999 Arrangement" as the "**Arrangements**"), modifies the legal regime of the 1999 Arrangement and removes some existing restrictions. In addition, the SPC also published 10 typical cases concerning the mutual enforcement of arbitral awards in Mainland China and Hong Kong, providing parties and practitioners with reference to implementation of the Arrangements.

The Supplemental Arrangement introduces four substantive changes in its four articles. First, the Supplemental Arrangement clarifies that the 1999 Arrangement covers not only the narrowly-interpreted enforcement proceedings

but also recognition proceedings of arbitral awards. Second, the Supplemental Arrangement eliminates the limit that arbitral awards made in Mainland China to be enforced in Hong Kong should be issued by "recognised arbitral authorities." Third, parties to a Mainland China or Hong Kong arbitration now may apply for enforcement of arbitral awards simultaneously in courts in Mainland China and Hong Kong, without the necessity of applying for enforcement in one jurisdiction first and waiting for the proceeding to be closed before applying for the same in the other jurisdiction. Fourth, following the *Mainland - Hong Kong Interim Measures Arrangement* effective from 2019 which avails parties to qualified Hong Kong arbitrations of interim measures in Mainland, the Supplemental Arrangement recognises that courts may order interim measures after accepting the application for enforcement of an arbitral award made in the other jurisdiction.

All four articles of the Supplemental Arrangement have become effective as promulgated since 27 November 2020 in Mainland China, whilst Articles 2 and 3 would take effect in Hong Kong after necessary amendments to the *Arbitration Ordinance of Hong Kong*. We envisage that the implementation of the Supplemental Arrangement will further enhance mutual judicial assistance of enforcement of arbitral awards between Mainland China and Hong Kong.

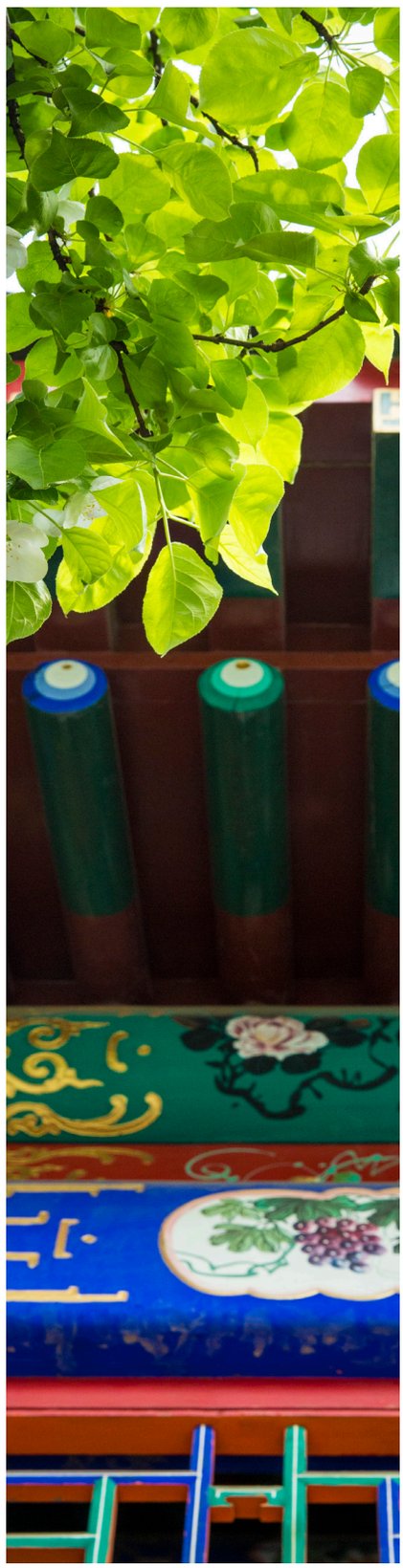
The SPC Released the Judicial Interpretation on Taking Security

The SPC released the *Interpretation of Application of the System of Security under the Civil Code of the People's Republic of China* (the "**Judicial Interpretation**") on 31 December 20 which has become effective since 1 January 2021. The Judicial Interpretation is aligned with the newly promulgated *Civil Code of the People's Republic of China* (the "**Civil Code**").

Further to the implementation of the *Minutes of the National Courts' Ninth Conference on Civil and Commercial Trial Work* and the Civil Code, the Judicial Interpretation continues to reform Chinese legal regime of security interest, comprehensively sorting out many outstanding issues concerning the law of taking security that has been highly controversial in Chinese judicial practice.

The Judicial Interpretation consists of 71 articles, four sections including (i) general principles of taking security, (ii) guarantees, (iii) typical security (mortgages, pledges and liens), and (iv) taking security in untypical forms (e.g., retention of titles, factoring, financing lease, etc.). Highlights of the Judicial Interpretation include but not limited to issues concerning: (i) *ultra vires* signatory, (ii) security provided by third parties and the right of subrogation, (iii) the scope of mortgages, (iv) preliminary registration of mortgages, (v) holding security via an escrow agent, and (vi) taking security by transferring titles.

The Judicial Interpretation is regarded as one of the most important changes accompanying the promulgation of the Civil Code and is deemed to have profound influence on the future business undertaken in China.



China and EU Reached Agreement in Principle on Investment

On 30 December 2020, the People's Republic of China ("**PRC**") and the European Union ("**EU**") concluded the *EU-China Comprehensive Agreement on Investment* ("**CAI**"), putting a close to seven years of negotiations. This comprehensive bilateral treaty would replace the 26 existing bilateral investment agreements between China and individual EU Member States and would provide a uniform legal framework for EU-China trade relationship.

CAI touches upon more areas than traditional bilateral investment agreements, mainly concerning (i) market access, (ii) fair competition, (iii) sustainable development and (iv) dispute resolution mechanism. First, CAI ensures greater level of market access of China for EU investors in the areas of cloud services, computer services, motor vehicles, medical health and etc. Second, EU investors may expect a higher level of certainty and predictability for their business operations in the opened sectors in China with clear rules on transparency in subsidies, prohibition of forced technology, non-discriminatory practices, and disciplines for state-owned enterprises. Third, EU and China also undertake commitments in the areas of labour and environment under principles of sustainable development. Finally, EU and China will later negotiate on the dispute resolution mechanism and the monitoring mechanism set up for CAI under the investor-state dispute settlement regime.

The package deal includes a commitment of attempts to complete negotiations on investment dispute settlement within 2 years of the signature of CAI. CAI will then be submitted for approval by the National People's Congress in China, the EU Council, and the Parliaments of EU Member States.

The agreement is ground-breaking and expected to promote investment between China and EU, in particular by providing EU investors with a more predictable market climate in China and clearing doubts of Chinese investors about EU's scrutiny standards on Chinese investment.

China Released New "Blocking Rules"

On 9 January 2021, the Ministry of Commerce of the People's Republic of China ("**MOFCOM**") issued the *Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Laws and Other Measures* (the "**Blocking Rules**"). The Blocking Rules came into effect as China's first attempt to implement measures similar to "blocking statutes" in Europe in response to the ramped-up sanctions and other control measures undertaken by the Trump Administration.

The 16-article rules apply when extra-territorial applications of non-Chinese laws and other measures violate international law and basic principles of international relations, and unjustifiably prohibit or restrict Chinese citizens, legal persons, and other organisations ("**Chinese Person(s)**") from engaging in normal economic, trade and related activities.

According to the Blocking Rules, a Chinese Person affected by any judgment or ruling based on foreign laws and measures prohibited may institute civil proceedings in Chinese courts against the benefiting parties and seek compensations. The Blocking Rules further authorises relevant government departments to provide necessary support to Chinese Persons, had they suffered significant losses as a result of non-compliance with relevant foreign laws and measures.

It is yet unclear whether the MOFCOM will further clarify the scope of "foreign laws and measures" subject to the application of the Blocking Rules and how the MOFCOM will implement the Blocking Rules. Nevertheless, subsequent to the promulgation of the Blocking Rules, entities doing business in China will have to pay close attention to the newly introduced obligations including reporting unilateral export control measures, sanctions, or other trade restrictions imposed by western countries.