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

Beijing Court Sets Aside an Arbitral Award for Tribunal's Refusal to Suspend Proceedings

I. INTRODUCTION

On 8 May 2021, the Beijing Fourth Intermediate People's Court (the "**Court**") released a decision [1] on setting aside a CIETAC arbitral award on the ground that the tribunal's decision not to suspend the arbitration proceedings violates the legal procedures under the Chinese legal regime.

This case is worth attention for it fills in the gap how Chinese courts interpret about "the legal procedures" and "the necessary circumstance to suspend" in the arbitration proceedings.

Additionally, this case touches upon the issuance of exploration licenses and the administrative review, which is of much representativeness in many industries with an underdeveloped market in China, especially the natural resource industry.

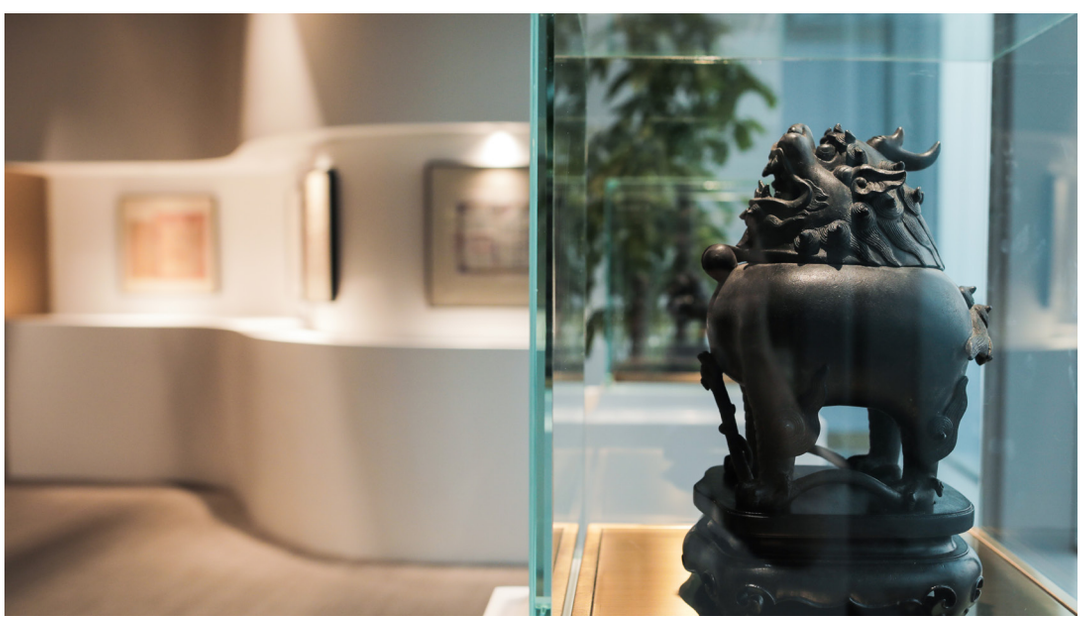
[1] (2020) Jing 04 Min Te No. 183.

II. Summary of Facts

The arbitration arose from a share purchase agreement concerning a mining company named Jilin Xinchao Economic and Trade Co., Ltd. ("**Xinchao**"). On 29 August 2012, China National Gold Group Co., Ltd. ("**CNGG**", the Respondent in the arbitration) entered into a share purchase agreement with *inter alia* two shareholders of Xinchao ("**Sellers**", the Claimant in the arbitration), under which CNGG agreed to purchase 51% shares of Xinchao (the "**Agreement**"). The purchase price of the sales shares, however, had not been paid in full when the dispute broke out.

After the deal was closed, two of the three exploration licenses owned by Xinchao were announced to be forfeited by the Department of Land and Resources of Jilin Province, which, according to the Forfeit Notice, was due to Xinchao's failure to complete the relevant administrative procedures within the time period required by Chinese law.

On 21 November 2014, the sellers commenced an arbitration against CNGG in China International Economic and Trade Arbitration Commission ("**CIETAC**"), claiming for damages allegedly as a result of CNGG's failure to renew the exploration licenses owned by Xinchao as required by the Agreement, which allegedly caused a material reduction in the value of Xinchao's shares.



In the course of the arbitration, Xinchao applied for an administrative review to the Ministry of Natural Resources ("**MNR**"), seeking to nullify the Forfeit Notice made by the Department of Natural Resources of Jilin Province in relation to the two exploration licenses in dispute. [2] The administrative review was suspended by MNR on 24 June 2018 and remained in suspension throughout the arbitration proceedings.

Against this backdrop, CNGG applied to the arbitral tribunal for suspension of the arbitral proceedings respectively on 17 June 2019, 9 July 2019, and 19 December 2019. Nevertheless, the arbitral tribunal rejected CNGG's application each time and proceeded with the arbitration despite CNGG's objection.

On 27 February 2020, the arbitral tribunal issued an award on merit against CNGG (the "**Award**"). In particular, the Award finds that: (i) pursuant to the Agreement, it is CNGG's obligation to take actions to renew the exploration licenses at issue in its capacity as the controller of Xinchao; and (ii) CNGG is liable for compensating the Claimant losses incurred as a result of CNGG's failure to fulfil the said obligation.

CNGG then applied to set aside the Award before the Beijing Fourth Intermediate People's Court.

III. Court Decision

Under Article 58 of the *Chinese Arbitration Law*, an arbitral award can only be set aside in the following circumstances:

(a) there is no agreement to arbitrate;

(b) the award has dealt with a difference beyond the scope of claims referred to arbitration, or the subject matter of

[2] The licensing authorities of the mineral exploration licenses were called Department/Ministry of Land and Resources and renamed as Department/Ministry of Natural Resources in March 2018.

the award is not arbitrable;

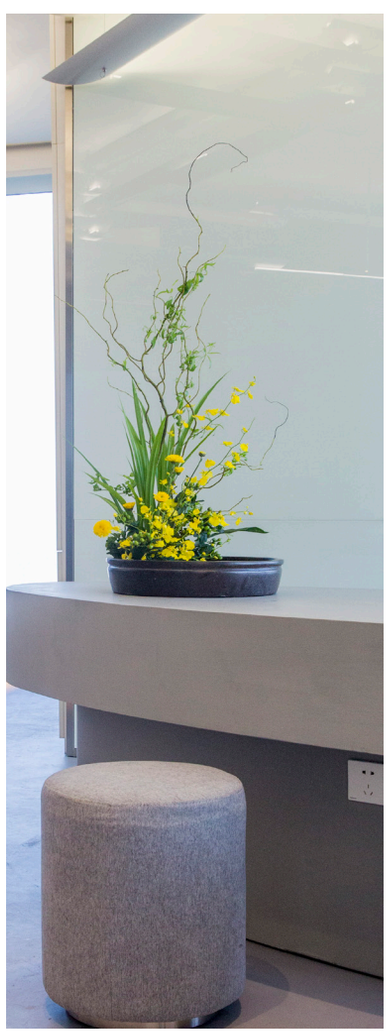
(c) the composition of the arbitral tribunal or arbitration procedure violates the legal procedures;

(d) the arbitral award is made based on false or forged evidence;

(e) a party conceals or suppresses evidence significant enough to undermine the justice of the award; and

(f) the arbitrator(s) has solicited or accepted bribes, played favoritism and made an illegal arbitral award.

In the instant case, CNGG contended that the Award shall be set aside on the two grounds: (i) the Award dealt with a difference beyond the scope of claims referred to arbitration; and (ii) the arbitration proceedings have violated the relevant legal procedures.



The Court overturned the first claim but upheld the second one, based on Article 20 of the *Interpretation of the Supreme People's Court Concerning Some Issues on the Application of the Arbitration Law*, which provides that "the violation of legal procedures as stipulated in Article 58 of the Arbitration Law refers to the circumstances when the violation of the arbitration procedures as stipulated in the Arbitration Law or the arbitration rules agreed by the parties may impact the correctness of the award."

Based on this article, the Court finds that, under CIETAC Rules 2012, the arbitral tribunal may exercise its discretion to suspend the arbitration proceedings whenever it deems appropriate, to the extent that such suspension has little or no impact on the justification of the final award.

The Court further finds that, in the instant case, the result of MNR's administrative review on the Forfeit Notice has a substantial impact on the Award, as the Award's finding of CNGG's breach of the Agreement is based on the factual assumption that the two exploration licenses had been forfeited by the Forfeit Notice. Since Xinchao sought to nullify the Forfeit Notice during the arbitration proceedings, it therefore cannot be ascertained whether the two exploration licenses at issue had been forfeited as a matter of fact before MNR makes its decision in this regard.

Indeed, after the issuance of the Award, MNR decided to nullify the Forfeit

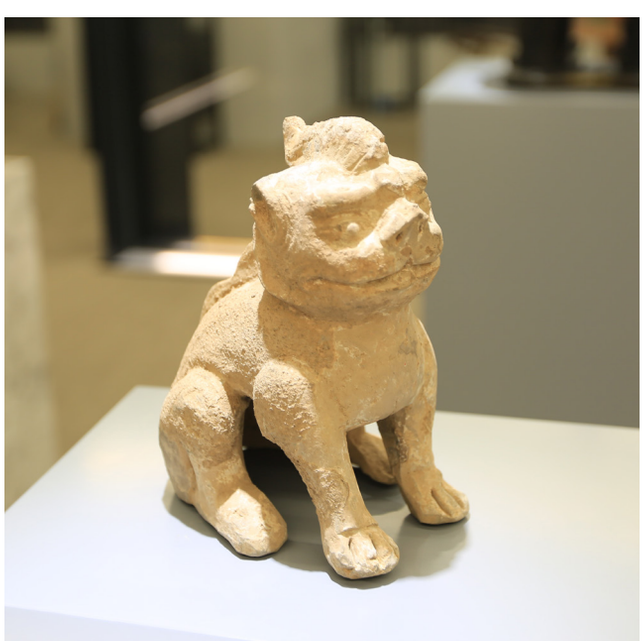
Notice made by the Department of Natural Resources of Jilin Province and Xinchao obtained the two exploration licenses back on 1 July 2020. Under these circumstances, the factual assumption based on which the Award was issued has substantially changed, and the arbitral tribunal's non-suspension decision had infringed on the justification of the final award.

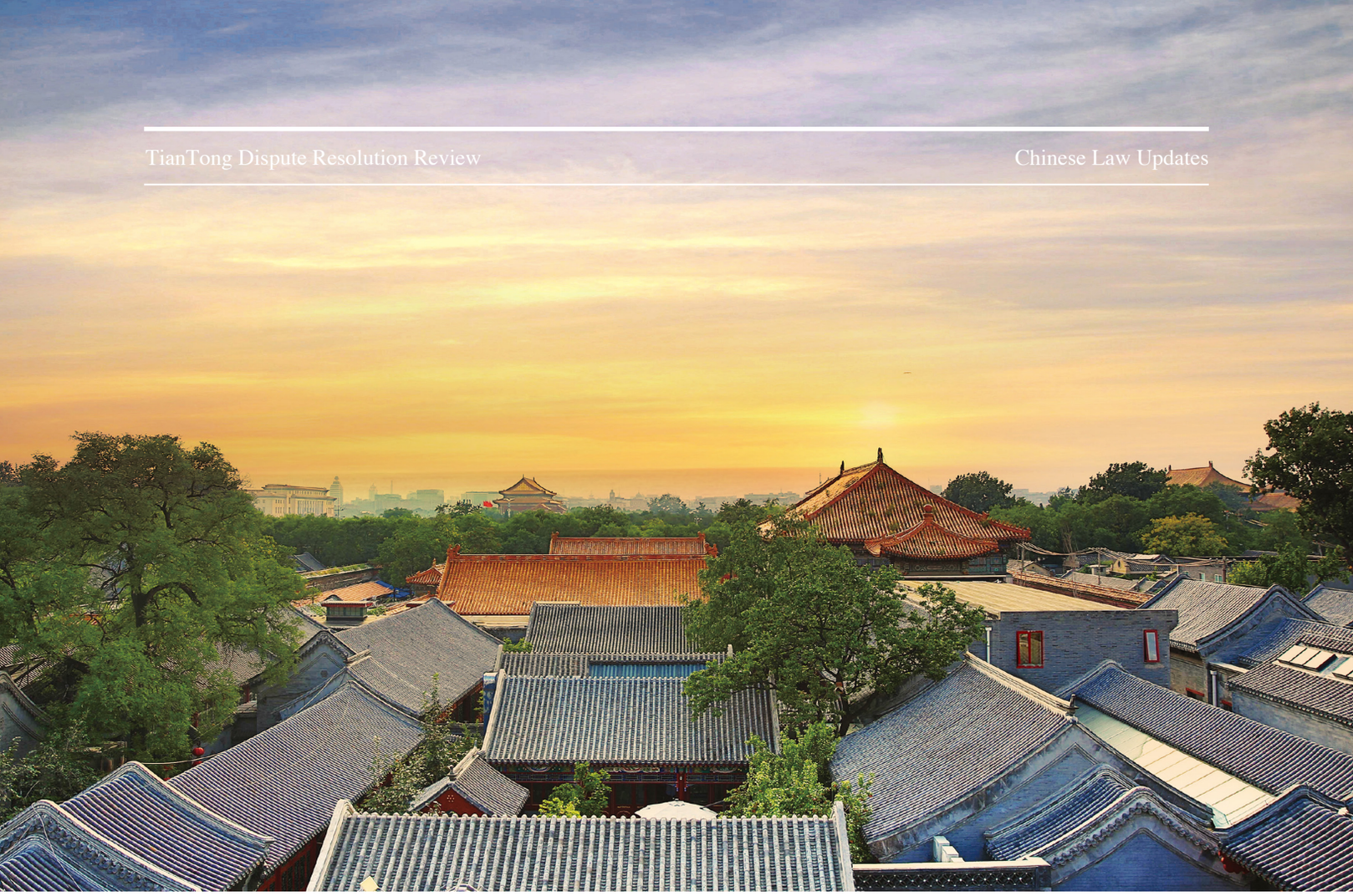
Based on the foregoing reasoning, the Court decided to set aside the Award in accordance with Article 58 of the *Chinese Arbitration Law*.

IV. Conclusion

Article 9 of the *Chinese Arbitration Law* provides that an arbitral award is final. In order to preserve party autonomy and honour arbitral awards, Chinese courts are slow to set aside domestic arbitral awards. In a small number of cases where courts uphold setting-aside applications, the inappropriateness of arbitration procedures constitutes one of the grounds that Chinese courts are used to fall back on.

This case reveals the interplay of the procedural requirements under the *Chinese Arbitration Law* and relevant procedures under the CIETAC Arbitration Rules with respect to the "necessary suspension of arbitration proceedings". Since the term "necessary suspension" is broadly delineated under the arbitration rules of the leading arbitration institutions in China, this case opens up a door for any subsequent attempt to challenge arbitral awards on the ground of improper non-suspension.



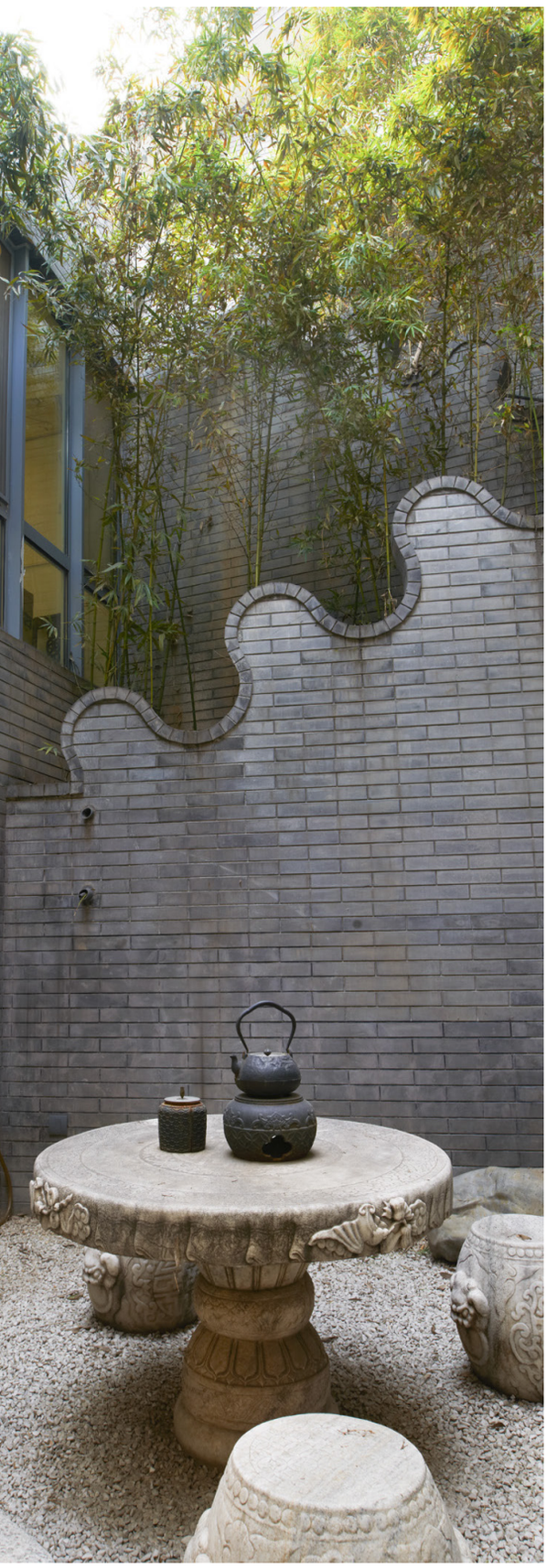


China Law Updates

Mainland China and Hong Kong Released a New Co-operation Mechanism for Cross-border Insolvency

On 14 May 2021, the Supreme People's Court of the People's Republic of China (the "**SPC**") and the Department of Justice of Hong Kong reached consensus on the mutual recognition of and assistance to insolvency proceedings between Mainland China and Hong Kong. The SPC released *the Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region* on the same date to implement this mechanism for judicial assistance between the two regions.

Under the mechanism, a Hong Kong liquidator or provisional liquidator may apply to Intermediate People's Courts in Shanghai, Xiamen, and Shenzhen for recognition of insolvency proceedings in Hong Kong. Nevertheless, this pilot program is limited to the three cities above and such applications must be supported by evidence that the debtor's principal assets are located in, or it has a place of business or representative office in these mainland cities.



China Introduced New Rules on Personal Information Collection for Mobile Internet Applications

On 12 March 2021, the Cyberspace Administration of China released *the Provisions on the Scope of Necessary Personal Information Required for Common Types of Mobile Internet Applications* (the "***Provisions***") together with the other three authorities.

Being effective on 1 May 2021, the *Provisions* specify 39 common types of mobile applications and the various scope of necessary personal information these mobile applications may collect and use. According to the *Provisions*, "necessary personal information" refers to users' personal information that is necessary for the functions and services of the app. The *Provisions* also stipulate that apps shall not deny the users' access to basic functions and services when the users refuse to provide unnecessary personal information.

Since the *Provisions* took effect, a total of 343 mobile applications in four batches had been criticised for having failed the inspection of the Cyberspace Administration of China, including DiDi, Baidu, Keep, Douyin, LinkedIn and many widely used mobile applications. Meanwhile, the Cyberspace Administration of China released the draft *Measures for Network Security Review* for public opinion on 10 July 2021. All this gives out a clear policy signal that the Chinese authority is tightening the fence to protect personal information of Chinese citizens.

China Introduced Hainan Free Trade Port Law to Develop a Globally Influential Free Trade Port

The *Hainan Free Trade Port Law* (the "***Hainan FTP Law***") was issued and effective on 10 June 2021, one year after China released the road map to develop Hainan Province into a free trade port with global influence. In line with the master plan to transform Hainan into a world-leading free trade port like Hong Kong and Singapore, the *Hainan FTP Law* aims to attract foreign and domestic investors by means of upgrading many policy incentives into legislative reality.

Highlights of the *Hainan FTP Law* include:

1. it empowers Hainan Province to formulate and adopt laws and regulations to develop Hainan Free Trade Port. For justifiable reasons and following certain procedures, Hainan Province is even

authorised to flexibly implement existing laws and regulations;

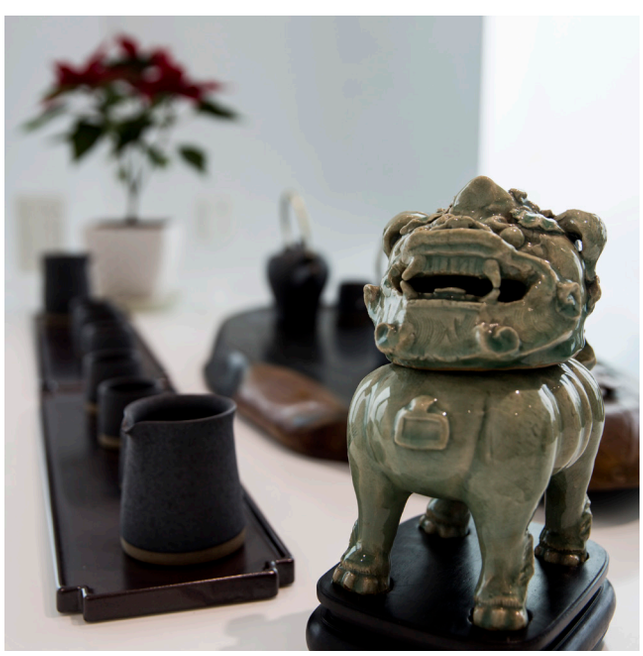
2. it simplifies and facilitates the procedures regarding market entry, company registration, bankruptcy and business operation. Hainan will be fully open to domestic and foreign investors, except for industries related to national security, social stability, ecological protection and significant public interests; and

3. it supports Hainan Free Trade Port to establish its own taxation system based on the principles of "zero tariffs", "low tax rates" and "simplified tax regime".

Even though the implementation of the *Hainan FTP Law* is still subject to the to-be-formulated negative list, tax and customs duty policies, and other measures, the introduction of this law undoubtedly demonstrates China's firm determination to further opening up and promoting economic globalisation.

China Issued Counter Foreign Sanctions Law to Counter Foreign Government Sanctions

On 10 June 2021, the Standing Committee of China's National People's Congress passed the *Counter Foreign Sanctions Law* (the "***Anti-Sanction Law***"), which is effective immediately. The *Anti-Sanction Law* upgrades the previous actions in response to foreign sanctions, import prohibitions, and export control restrictions on Chinese entities and introduces



the countermeasures against not only individuals and entities directly or indirectly engaged in the conduct that forms the basis for retaliatory actions but also affiliates of that party (including but not limited to controlled affiliates).

The countermeasures in the *Anti-Sanction Law* comprise:

1. denial of visa applications, denial of entry into China, cancellation of a visa or deportation;

2. seizure or freezing of property located within China; and

3. ban or restriction on any transaction or cooperation with any organisation or individual that is located within China.

According to the *Anti-Sanction Law*, relevant departments of the State Council will be empowered to make a final decision on the inclusion of a person onto the counter sanction list, as well as to suspend, amend or cancel such countermeasures. Meanwhile, a "working coordination mechanism" will be established to share information and adopt and implement these countermeasures.

China has taken a series of actions to establish a legal framework, including the Unreliable Entity List and the Blocking Rules. As the latest step of these actions, the *Anti-Sanction Law* is broadly drafted to apply to any unilateral sanctions that China regards as serious violations of its sovereignty and interests. Nevertheless, the full scope and focus of implementation of the *Anti-Sanction Law* remain unclear for the companies and individuals who may be subject to conflicting legal obligations. Potentially impacted parties shall keep an eye on how the authority will interpret and clarify the *Anti-Sanction Law* and assess their risk of exposure to conflicting legal obligations accordingly.