



HERBERT
SMITH
FREEHILLS

INTERIM RELIEF IN MAINLAND CHINA

LEGAL GUIDE

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Introduction

What is this guide about?

Interim relief describes measures available to parties prior to the final resolution of their legal dispute. Such measures can be directed towards protecting evidence, or the rights and assets of parties, from damage or dissipation during proceedings. In some circumstances, interim relief can be sought prior to the initiation of formal proceedings. It is often granted in urgent circumstances, where inaction or delay could lead to irreparable harm. When made in support of either arbitration or litigation in Mainland China, such interim measures are called "**Preservation measures**" (保全措施). Chinese law provides for three different types of preservation measures:

- **Evidence Preservation** (证据保全), an order to preserve evidence from being lost or destroyed;
- **Asset Preservation** (财产保全), an order to preserve assets from being dissipated or transferred; and
- **Action Preservation** (行为保全), an order requiring a party to take a specific action (责令作出一定行为) or prohibiting a party from taking a specific action (禁止作出一定行为).¹

Preservation measures can be sought by parties to litigation in Mainland China, as well as in support of arbitration seated in Mainland China. This guide provides practical guidance on when and how to bring an application for interim relief. It provides the following information on applications for interim measures prior to and following the commencement of an action in support of arbitration and litigation:

- Grounds for application
- Competent court
- Form of application
- Timing of application
- Security
- Timing of court order
- Illustrative cases

This guide also discusses the practical limitations of interim measures, and compares the interim relief available in Mainland China to that available in common law jurisdictions such as Hong Kong. Finally, it contains templates and precedents for bringing an application for interim relief in the courts of Mainland China.

Who is it for?

This guide is aimed at both Chinese and foreign companies who are conducting business in China or with Chinese counterparties, and who may be involved in disputes leading to arbitration or litigation in Mainland China.

What are the key points?

Other than evidence, asset and action preservation, Chinese courts have no discretion to grant the other types of interim relief that courts in common law jurisdictions can order.²

All three types of preservation measures may be ordered during litigation or arbitration proceedings or, in urgent circumstances, before proceedings commence.³

Interim relief in support of arbitration

- The right to grant interim relief is reserved exclusively to the Chinese courts. Strictly speaking, arbitral tribunals seated in Mainland China have no power to order interim relief (at least in relation to the three types of preservation measures) listed above.
- An application for interim relief during arbitration proceedings should be made to the arbitration commission, which will forward the application to the competent Chinese court.
- Chinese courts do not grant interim relief in support of arbitrations seated outside Mainland China.
- Chinese courts do not grant interim relief in support of proceedings to enforce foreign arbitral awards made outside Mainland China.

¹ The phrases, "ordering a party to take a specific action" or "prohibiting a party from taking a specific action", are broadly equivalent to mandatory or prohibitory injunctions in common law systems.

² Many common law legal systems have a more extensive range of measures for interim relief. For example, Hong Kong courts can place a company into receivership, or make an order to maintain or restore the status quo.

³ Section 100 CPL Amendment 2017, which provides for Action Preservation, refers only to civil litigation and not to arbitration. However, we are cautiously confident that Action Preservation can be applied in support of arbitration after its commencement. This is discussed at Section 3.B below.

Structure of this guide

Section 1 provides a brief overview of the interim relief regime in Mainland China.

Section 2 sets out the types of interim relief available in Mainland China.

Sections 3 and 4 deal with the process of seeking relief in support of arbitration and litigation.

Section 5 explains what you may need to do after an order is obtained, including enforcement, review and compensation.

Section 6 offers practical tips for seeking interim relief.

Disclaimer

The contents of this publication are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your particular circumstances should always be sought separately before taking any action based on this publication. Information provided is accurate as at February 2018.

1. Interim relief in Mainland China

Brief history

In Mainland China, the Arbitration Law and the Civil Procedure Law are the key statutes providing for interim relief in arbitration and litigation. Historically, the types of interim measures available in Mainland China were limited compared to common law jurisdictions like England, Australia or Hong Kong. The CPL 2012 Amendment introduced a more sophisticated regime. In particular, the CPL 2012 Amendment:

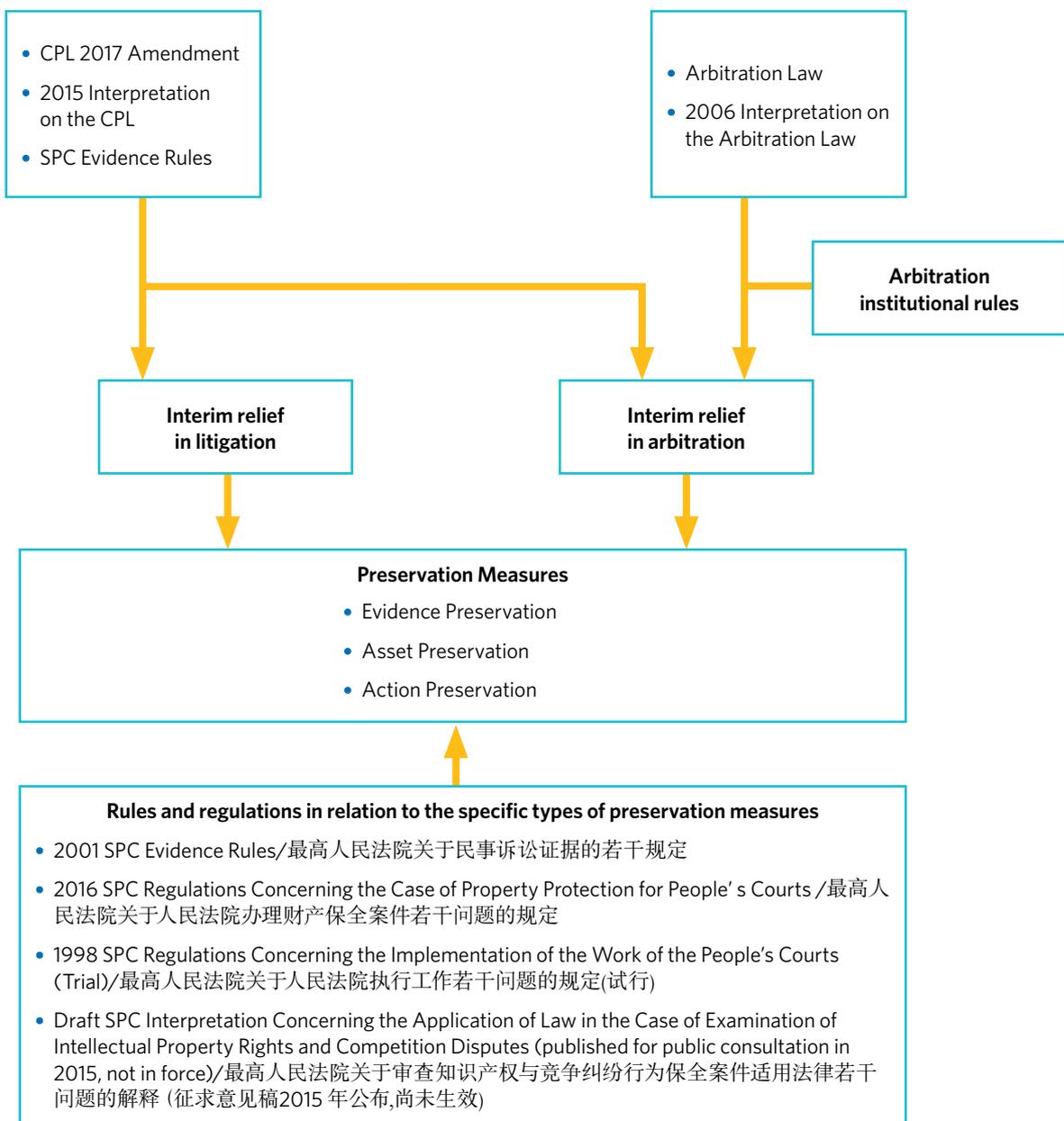
- **extended the right to apply for Action Preservation to all general commercial disputes.** Prior to the CPL 2012 Amendment, only Asset Preservation and Evidence Preservation were available in general commercial disputes. Action Preservation was available only in IP and maritime disputes;
- **expanded pre-litigation interim relief in general commercial disputes to include Evidence Preservation and Action Preservation.** Prior to the CPL 2012 Amendment, pre-litigation Evidence Preservation and Action Preservation had been available only in IP and maritime disputes;
- **allowed Evidence Preservation, Asset Preservation and Action Preservation to be granted on an urgent basis before arbitration seated in Mainland China is commenced.** Prior to the CPL 2012 Amendment, interim relief was not available before arbitration proceedings had formally commenced; and
- **extended to thirty (30) calendar days the time limit for a party to commence arbitration or litigation from the date when a pre-action Asset Preservation order is made.**⁵ If no arbitration or litigation is brought within the thirty-day limit, the pre-litigation preservation order will be lifted. Prior to the CPL 2012 Amendment, the time limit was fifteen (15) calendar days.

Since the CPL 2012 Amendment, parties to arbitration and litigation have had access to a greater range of interim relief measures to protect their rights. Although the CPL was amended again in 2017, the regime in respect of interim relief remains unchanged.

⁵ The Patent Law (amended 2008), Copyright Law (amended 2010) and Maritime Special Procedure Law (1999) still adopt the fifteen-day time limit, consistent with the previous regime under the Civil Procedure Law. The Trademark Law (amended 2013) adopts the thirty-day time limit consistent with the CPL 2012 and CPL 2017 Amendments. We consider that the thirty-day limit stipulated by the CPL 2012 Amendment may override the fifteen-day limit under the old statutes. However, unless the Patent Law, Copyright Law and Maritime Special Procedure Law are officially amended to accord with CPL 2012 (and CPL 2017) Amendments, the discrepancy in the time limit may result in inconsistent court practice.

Interim relief in Mainland China

Legal framework



For cases including IP and maritime disputes, please also refer to legislation and regulation relevant to the relevant subject matter, for example, Trademark Law (amended 2013), Patent Law (amended 2008), Copyright Law (amended 2010), Maritime Special Procedure Law (1999) and their respective SPC interpretations.

The CPL 2017 Amendment⁶, Arbitration Law, SPC Evidence Rules and 2015 Interpretation on the CPL are the key pieces of legislation in China's interim relief regime.

In the context of arbitration proceedings, the CPL must be read with the Arbitration Law to establish the legal framework for interim relief. The 2015 Interpretation on the CPL provides detailed rules for implementing the amendments contained in the CPL 2012 Amendment and is a binding legal authority for the PRC courts. Because the relevant terms of the CPL 2017 Amendment are identical, the 2015 Interpretation on the CPL continues to apply.

Also relevant are the 2001 SPC Evidence Rules, which contain further rules on preserving evidence.

In addition, there are a number of specific interim relief regimes under Chinese Law. Such specific regimes are created, for example, under the Trademark Law (amended 2013),⁷ the Patent Law (amended 2008),⁸ the Copyright Law (amended 2010)⁹ and the Maritime Special Procedure Law (1999).¹⁰ The SPC has also published special interpretations guiding the practice of interim relief in IP cases.¹¹

Readers are reminded that case law is not legal authority in China, unlike in common law countries. The SPC interpretations promulgated to date do not wholly cover the field. As a result, where there is no specific interpretation from the SPC in respect of a particular statutory provision, or there is uncertainty in the application of an SPC interpretation to a particular factual scenario, the practices of Mainland Chinese courts may vary.

6 With respect to preservation measures, the CPL 2012 and 2017 Amendments are identical.

7 Sections 65 and 66.

8 Sections 66 and 67.

9 Sections 50 and 51.

10 Chapters 3, 5 and 6.

11 SPC Rules on Pre-litigation Injunctions in Patent Cases; SPC Rules on Pre-litigation Injunctions and Evidence Preservation in Trademark Cases

2. What interim measures are available?

Preservation measures

Chinese courts are empowered to make Evidence, Asset and Action Preservation Rulings.

Rulings for Evidence and Asset Preservation are common in general commercial disputes in Mainland China, and the relevant law and practice are well established.

Since the CPL 2012 Amendment came into force on 1 January 2013, there have been numerous successful applications for Action Preservation outside of intellectual property and maritime disputes, including in trade secret and competition disputes. We expect the number of applications for Action Preservation will continue increasing and will be sought in a wider range of disputes.

Action Preservation Rulings are particularly important in disputes that involve infringement of patent, trademark and copyright. On 26 February 2015, the SPC released the Draft SPC Interpretation on Action Preservation in IP and Competition Cases. This interpretation contains the criteria that the courts should adopt when considering Action Preservation applications in IP and competition cases. The timetable for promulgating the final SPC Interpretation is unknown. Once published, the criteria and procedure for granting Action Preservation may be extended to other types of disputes.

Evidence Preservation

The types of evidence used in civil proceedings include statements made by parties, documentary evidence, physical evidence, video and audio material, electronic data, witness statements, expert opinions and inspection reports.¹²

The court is authorised to preserve such evidence through a range of measures. It can seal, seize, photograph, audio or video record or inspect the object, or take witness statements, as appropriate.¹³

The court can photograph, photocopy or inspect documentary evidence on site. The court may also evaluate and inspect other physical evidence on site and make a written report of the inspection. The court can also depict, photograph, or video physical evidence. In relation to witnesses, the court can take a written statement or make an audio or video recording of the witness.¹⁴

¹² Section 63 CPL 2012 Amendment

¹³ Article 24 SPC Evidence Rules

¹⁴ Article 24 SPC Evidence Rules

Evidence Preservation by a notary public

A notary public in Mainland China may notarise the process of preserving evidence by a party.¹⁵ This is commonly known as Evidence Preservation by notary public. A notary public can witness and notarise the preservation of documentary evidence, physical evidence, video and audio data, statements from a party or witness, and the process and fact of a particular act.¹⁶ The notary public may depict, photograph, audio or video record, copy, seal, inspect onsite or take statements, depending on the types of evidence to be preserved. For example, parties could preserve information on the internet or emails saved on servers or local hard drives, witnessed by a notary public,¹⁷ or request a notary public to record or document the status of a property or an object at a specific point in time.

Evidence Preservation by notary public is different from Evidence Preservation by a court. A notary public's function is to witness the process of a party's own attempt to collect or preserve evidence, thus increasing the credibility of the evidence collected. A notary public does not have the power or authority of a court to preserve evidence which is in the possession of the applicant's counterparty or third parties. The applicant must submit the evidence to the notary public,¹⁸ and demonstrate that the evidence may be destroyed or disappear if not preserved.¹⁹ In a notice dated 2009, the Ministry of Justice clarified that, in urgent circumstances, a notary public can seal premises where evidence is located while it preserves the evidence and it does not have the same effect as if the court had sealed a property or premise.²⁰ Tampering with the seal of a people's court is an offence punishable by fine or detention.²¹ This is not the case when a notary public imposes the seal.

Evidence Preservation by notary public is common in Mainland Chinese arbitration and litigation. It is relatively easy for the parties to access and the process is usually straightforward. It should be noted that the courts will not entertain an application for Evidence Preservation where the party has access to the evidence and the preservation of such evidence can be satisfactorily achieved by a notary public.

15 Section 11(9) Notarisation Law of the People's Republic of China promulgated 28 August 2005 and effective 1 March 2006, amended 1 September 2017 (《中华人民共和国公证法》, 2005年8月28日颁布, 2006年3月1日生效, 2017年9月1日)

16 For example, the notary public may preserve an act of IP infringement by taking a statement or by audio or video recording the act. In the case of *Beida Fangzheng Co. Ltd. and Hong Lou Research Institute v. Gaoshu Tianli Co. Ltd.* regarding an infringement of computer software copyright (2006) Min San Ti Zi No. 1 (北大方正公司、红楼研究所与高术天力公司、高术公司计算机软件著作权侵权纠纷案, (2006)民三提字第1号), the SPC held that the process of the defendant selling and installing pirated computer software, which was secretly recorded and witnessed by a notary public, was legitimate evidence of the defendant's infringement of the plaintiff's intellectual property right.

17 See website of China Notary Association: http://www.chinanotary.org/content/2017-03/14/content_7051782.htm?node=82578. Last accessed 19 April 2018.

18 Article 5 China Notary Association Guiding Opinions on Conducting Notarization in Evidence Preservation, passed 18 August 2004, amended 25 November 2008 《中国公证协会办理保全证据公证的指导意见(修订)》, 2004年8月18日通过, 2008年11月25日修订

19 *Ibid*, Article 5(3) and Article 8(1).

20 See "Reply by the Ministry of Justice Division of Public Notary to query whether public notary can seal up properties to preserve evidence during its witness of Evidence Preservation", [99] Si Lv Gong Han No. 091, dated 3 December 1999 (司法部律师公证工作指导司关于《关于公证处办理证据保全公证中对物证能否采用封签进行封存的请示》的复函, [99]司律公函091号)

21 Section 111 CPL 2017 Amendment

What interim measures are available?

Asset Preservation

Different methods of preservation apply to different types of assets. Typical methods of asset preservation include sealing, seizing and freezing the relevant assets. For example:

- Bank accounts:** the court will issue a notice for bank assistance to freeze accounts. A bank which receives such a notice has a legal obligation to assist the court in freezing the specified amount. The notice will contain the time period for freezing the account. Subject to the court's instructions, the usual period is one year and may be extended for another year if the applicant applies and the court agrees.²² The bank will release a frozen bank account only upon receipt of a notice for release from the court, or upon expiry of the time limit.²³
- Movable assets including vehicles or equipment:** the court can physically place seals which state "*sealed by [xxx] people's court on [date]*" on the relevant asset. The court can also make public announcements to seal the asset. With respect to assets with registered title (for example vehicles), the court will require the registering authority to freeze the transfer of title of the asset. The court can also request that the owner surrender the title document to the court. If the court considers it necessary, it can detain the asset either by itself or through a designated entity. The time limit for the sealing or seizure of movable assets is two years, which can be extended for up to another two years upon application.²⁴ The court may require that perishable goods and livestock be sold off, and the proceeds preserved.
- Land and real property:** the court can seal land or buildings by placing seals stating "*sealed by [xxx] People's Court on [date]*". The court will issue a notice to the relevant authority to freeze the transfer of title, which should also work to prevent actions that would further add encumbrance to the property, such as a mortgage. The court can also request that an owner surrender the title document to the court. Land rights and real property rights can be frozen for up to three years, which can be extended for up to another three years upon application.²⁵
- Shares and bonds in public companies trading on the stock exchange:** the court will issue a preservation notice to the exchange where the stocks and bonds are traded to prevent the transfer or trading of the shares or bonds.²⁶ The time limit of freezing stocks and bonds is one year, but this can be extended on application. Each extension is limited to a maximum of six months, but there is no limit as to the number of extensions.²⁷ However, considering that the general rules for moveable property preservation stipulated in Article 487 2015 Interpretation on CPL also apply here, the entire freezing period shall not exceed two years, with potential for extension of up to another two years.
- Equity interest in a private company:** the court will issue a preservation notice to both the company and the local Administration of Industry and Commerce where the company is registered. Upon receipt of the notice, the local AIC will suspend the registration for transfer of equity in the company.²⁸ The time limit for this kind of preservation follows the general time limit for movable property, which is two years, with a potential extension of up to another two years.²⁹

²² Article 487 2015 Interpretation on the CPL

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Article 52 SPC Provisions on Enforcement; SPC Provisions on Some Issues on Freezing and Auctioning Public Shares

²⁷ Article 6 SPC Provisions on Freezing and Auctioning Public Shares

²⁸ Article 53 SPC Provisions on Enforcement

²⁹ Article 487 2015 Interpretation on the Civil Procedure Law

Action Preservation

The action that the court orders a party to take or refrain from taking varies from case to case depending on the applications of the parties. In an IP dispute, a Ruling is often sought to stop an act of infringement. Such acts may include, for example, manufacturing, distributing or selling products which potentially infringe trademark or patent rights. Rulings may also be sought to prohibit a party from using or disclosing information that contains trade secrets. In a shareholder dispute, a party may seek an order for a company to open its books and accounts for inspection, or to refrain from validating a share transfer. There is also precedent for a court to order that the disputing shareholders suspend their shareholders' rights pending resolution of the dispute.³⁰

When making an application for Action Preservation, ensure that the relevant action is clearly and specifically described for the court to order and enforce.

Preservation orders

The court's decision to grant or reject an application for Asset, Evidence or Action Preservation must be made in the form of a Ruling (裁定). The court must include reasons for its decision. Rulings on preservation measures cannot be appealed, but parties can apply for review. This is discussed in more detail in Section 5 below.

³⁰ See *Guofeng Group v Hu Bo and Bu Biao re shares of Tibet Tourism Co. Ltd* (<http://finance.sina.com.cn/chanjing/gsnews/20151023/052423552422.shtml>)