

conservatory measures in Chinese legal proceedings, litigation or arbitration

Description

It is proved to be tough to do business with Chinese astute businessmen and Chinese companies. I guess very often foreign businessmen and foreign companies may be thinking about suing their Chinese distributors, supplier or business partners in China (it is a bad strategy to sue a Chinese company in foreign country because in most cases these foreign judgments cannot be enforced in China) in case of dispute. Equally often, the idea of suing a Chinese company is dropped due to many reasons, in particular, that Chinese judicial system is corrupt and not fair to foreign parties, and that a winning judgment may well end up meaning nothing to the winning party because it is too difficult to enforce and execute the judgment in China.

This post intends to cast light on helping you to secure your interests in a Chinese litigation or arbitration proceeding: making use of conservatory measures provided in Chinese Civil Procedure Law (“CCPL”, please note, this Law has been revamped at the end of last August and will take effect from January 1, 2013, and the discussion in this post is based on the new version of this law).

1. What are the Conservatory Measures in Chinese Legal Proceedings

In the new CCPL, conservatory measures here are prejudgment measures designed to secure the future enforcement of court judgment or arbitral award and to prevent other or further damage to a party. Such conservatory measures include attachment of properties and injunction ordering the action or inaction by the party concerned. This represents a conspicuous development in this regard compared with the similar provisions in the old version of CCPL. In the old version of CCPL, only property attachment is provided for therein.

Apparently, the injunction measure will increase greatly the power of court in preserving the chances of judgments and awards being enforced in the future. This new conservatory measure will create new field for smart lawyers to achieve the best interests for their clients.

However, as a new rule, there are many questions surrounding how it will work and future application in practice will need guidelines from Chinese Supreme Court, which is expected to be issued before January 1, 2013.

2. When to Apply for Conservatory Measures

In Chinese legal proceedings, such prejudgment conservatory measures are usually taken by courts after plaintiff's ex parte application for them upon filing the case with court or arbitral tribunal. Application for conservatory measures upon or after filing the case is straightforward and will generally be approved easily. Approval is normally given within certain period in the court's discretion and in the case of emergency, courts are required to give approval within 48 hours of receipt of application.

CCPL has also allowed such conservatory measures to be taken before a dispute is filed with a court or an arbitral tribunal in case that an emergency compels immediate action for conservatory measures

failing which irreparable damage will be caused to the applicant party. In such a situation, the court must make a decision for the approval and once approved, the conservatory measure shall be taken immediately.

In case that the pre-filing conservatory measures are obtained, the applicant shall file the case with court or arbitral tribunal within thirty days after the conservatory measures are executed by courts.

3. Conservatory Measures in Arbitration Proceeding

In the old CCPL, the only conservatory measure of property attachment is provided for the legal proceeding with court only. Parties that have chosen arbitration in China for dispute resolution are deprived of the right to apply for conservatory measures, an obvious disadvantage compared to litigation with court.

Now with the new CCPL, the law makes it clear that conservatory measures are available to parties going for arbitration for their dispute resolution. Both pre- and post-filing conservatory measures are now provided for and applied in legal proceeding of arbitration in the same manners as with court litigation proceeding.

As the new CCPL will only take effect on January 1, 2013, foreign parties seeking legal remedy by way of arbitration in China shall have to wait for a few months in order to take advantage of this new development.

4. Security for Applying for Conservatory Measures

To contain the possible abuse of conservatory measures by any party in dispute, the law has required that the applicant shall post certain security upon applying for conservatory measures.

In the case of the pre-filing application for conservatory measures, security is a must for court to give approval for conservation measure.

In the case of the post-filing application for conservatory measures, security may or may not be required to be posted in the discretion of the court in light of the facts of the dispute. Generally speaking, if the facts of a case are clear and application of law is also simple, the court may go ahead with approval without requiring security to be provided.

In the local practice in Shanghai, courts will generally require a security in a value not less than 20% of the property to be attached. This 20% requirement can well filter out a good number of applications for property attachment, esp, the property to be attached is of high value such as high-end real estate. In the case of a foreign company suing a Chinese a company in China, the requirement for posting a security can be real headache.

Astute businessmen have already responded to the demand for help in providing such security. There are now many companies in the market that offer help in posting security at certain charge of service fee for the help.

5. How Conservatory Measures Work in Chinese Legal Proceedings

In line with their security purposes, conservatory measures are meant to preserve certain property

such as real estate, bank deposits for satisfying future court judgment or arbitral awards.

Take attachment of real property for example. Once the court approves the application for attaching certain real property (apartment, building, houses, offices), the court will make a decision thereof and serve a notice for assistance on local real estate registry agency requesting the agency to enter a record of court attachment on the file of the real property in question. This way, the real property will not be able to be transferred or mortgaged to others.

In the case of freezing of bank deposit in a bank account, the court will also serve a notice for assistance on the bank requesting the bank not to debit the bank account to the extent that a designated amount shall be reserved therein.

These attachments are maintained throughout the legal proceedings of litigation and arbitration till a final and binding judgment and award is delivered, and will be automatically extended into the judgment enforcement or award enforcement stage, the postjudgment conservatory measures. However at the enforcement stage, conservatory measures have limited period of life. Freezing of fund shall not run beyond six (6) months, and attachment on personal property one (1) year and attachment on real property two (2) years, in each case subject to extension not longer than half of the said periods.

Conservatory measures can be very complex depending on what kind of properties are involved. Postjudgment conservatory measures can be more intricate when real estates with mortgage or in transaction are involved. For more information about the conservatory measures in Chinese legal proceedings, please contact the author of the blog.

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