



PRESERVATION OF PROPERTY IN CIVIL LITIGATION AND ARBITRATION IN CHINA

The essence of litigation or arbitration lies not only in the result of judgments or awards, but also in the likelihood that one's favorable judgments or awards can be enforced effectively. Preservation of property is often regarded as a measure that kills two birds with one stone: preventing debtors' disposal of their assets and acting as an impetus to prompt an early settlement. This special provides an overview of preservation of property in civil litigation and arbitration in China (governed by the law of the Peoples' Republic of China), as well as main developments in this field.

Preservation of property in civil litigation

Provisions relating to preservation of property ('the Preservation') are mainly set forth in the Civil Procedure Law of the P.R.C. ('CPL'). Detailed regulations covering specific aspects of the Preservation are elucidated in several judicial interpretations issued by the Supreme People's Court.

The Preservation will often be initiated by parties through submitting applications to competent courts. This applies to both pre-action and post-action proceedings, which means a party may submit an application before or after a claim is officially brought to court. Depending on the nature or features of the property concerned, the Preservation often takes the form of sealing up, distaining or freezing ('SDF'), by which any future transfer, removal or alteration of such assets without courts' prior approval will be restrained.

Preservation of property in arbitration

Arbitral tribunals do not have inherent power to issue preservation orders. Nevertheless, applications should always be submitted to arbitral tribunals, which will then be handed over to corresponding courts. Court orders will be issued if conditions are met.

The Preservation measures are available prior to or after the commencement of arbitration proceedings if applications are submitted to domestic arbitral tribunals or institutions, including those which are fully capable of dealing with foreign-related disputes, such as the China International Economic and Trade Arbitration Commission, the Shanghai International Arbitration Center etc.

On the contrary, applications for the Preservation are unlikely to be approved by courts when arbitration proceedings have been administered by tribunals or institutions established outside of mainland China. However, exceptional orders have been handed down by Chinese maritime courts, which gave approvals to such applications, even though arbitration proceedings had commenced in Hong Kong and London. These results may largely benefit from the stand-alone procedure rules for shipping-related disputes. Nevertheless, it may become a practice which will eventually be adopted in non-shipping disputes as well.

Property

Both pre-action and post-action preservation could be utilized against a wide variety of property, such as bank

accounts, real estate, movable assets (including vehicles, ships etc.), shares and equity. Normally, all of the subject properties should be owned or occupied by the respondent. Properties encumbered with mortgages, pledges, or possessory liens are also open to preservation as long as the rights of mortgagees, pledgees or lienholders are not jeopardized. Court orders may be obtained to seize respondents' earnings or outstanding debts due to them.

The actual preservation practice may vary from district to district and has evolved with the passage of time. Precedents have sprung up in various courts regarding online domain names as the target property due to their scarcity and enormous commercial value.

Usually, details of property should be provided by applicants. However, on many occasions it can be difficult to ascertain the whereabouts and value of the property. One way out of this predicament may rest upon the much awaited system named 'online execution, enquiry and control system' ('EEC'), which has reportedly connected to more than 3,000 banks across the country. An inquiry application should be submitted to courts where EEC is up and running. A search of suitable property will then be carried out through the EEC. It is worth noting that the value of the property or the amount of the preservation should be commensurate with the value of claims, unless proportional preservation is practically unfeasible given the structure of the property, e.g. when it is inseparable as a unit.

Guarantee

A guarantee is a prerequisite for a pre-action preservation. After an application for a pre-action preservation is filed and a guarantee is provided by the applicant, the court may give an order for a pre-action preservation. The applicant's claim should then be brought against the respondents by filing a claim form (to courts or arbitral tribunals) within 30 days after

the order of pre-action preservation is enforced, so that the merit of the case can be heard. Failing to do so will give rise to a lift of the order. An automatic transition from pre-action PP to post-action PP will take place once the case is officially lodged.

If, however, an application is submitted only after the commencement of the proceeding, courts have discretion to determine whether a guarantee is required or not. In practice, courts are often prone to err on the side of caution and require a guarantee to be provided.

Guarantees are often made in the form of cash, real estate, movable assets or assurance, all of which can be categorized into two classes: asset guarantee and assurance guarantee. Details of these guarantees will be set out in either a letter of guarantee ('LOG'), a letter of assurance or an independent bond. Subject to each court's discretion, cash may be paid to courts' designated accounts whilst an order of SDF may be issued against real estate or other movable assets for the Preservation to eventually take place.

Since December 2016, a specialized interpretation for the Preservation has come to light. This has in fact loosened the guarantee requirements, as it allows applicants to purchase insurance from reputable insurance companies. An LOG will subsequently be provided by the insurance companies directly. Instead of a large sum of money, a small premium may suffice to satisfy the requirement of guarantees. A list of insurance companies may be drawn from courts' websites.

Observation

Although procedure rules of the Preservation may still be subject to interpretations of each court throughout the country, the trend is to standardize it by bringing implementing regulations to light. Consultation with local courts would still be recommended before taking action.



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