

Remedies for Defaults in China

David Zhou Yi

H & Y Law Firm

Distinguished guests, ladies and gentlemen,

Let me bid a warm welcome to all of you attending this event.

I would like to thank the sponsors for affording me the opportunity to speak with all of you in attendance. It's my pleasure to be here and discuss with all of you the remedies for defaults in China.

My presentation will address on four areas that anyone having business in or related to China may be interested in, which hopefully will be of assistance for your actions to be taken in case of a default event arising there. First, I will highlight general aspects of the contracts with a Chinese counterparty. Secondly, I will introduce you the effectiveness of legal sureties in China. I will then brief you further on the dispute resolution mechanisms commonly implemented in China nowadays. Finally, I would like to conclude my presentation with the topic on enforcement of titles in China.

I. CONTRACTS WITH A CHINESE COUNTERPARTY

- ✧ **Overview of China's contract laws**
- ✧ **Who will be your contracting party**
- ✧ **To form a valid contract**
- ✧ **Main clauses in the contract**

We all know some methods of payment in international trade need to be regulated by the contracts; therefore, I will give an overview of the legal requirements needful to a valid contract in China.

The existing Contract Law of China came into effect in 1999. Except the general provisions on the basic principles and standards for construction of contracts, there are several chapters establishing specific rules for different types of contracts like Contract for Sales, for Donation, for Loans, for Lease, for Financial Lease, for Construction Projects, for Transportation, etc. Actually, commercial contracts are not merely governed by the contract law, but also by other relevant laws and regulations such as General Principles of Civil Law in China. Furthermore, legal interpretations issued by China's Supreme Court from time to time may be applicable under certain circumstances.

In general, business entities are free to contract with one another for goods and services. However, with regard to contracts which are subject to approval or registration as provided for by the laws or administrative regulations, the provisions thereof shall be followed. Only approved corporate officers or their agents can enter into a legally binding contract on behalf of the company. Besides the authorized signature, here I would like to address the importance of stamping the corporate seal when executing contracts in China or with a Chinese party, because Chinese practices always give considerable weight to the corporate seal in terms of forming a valid execution of contracts. Moreover, some industries require that the contracting party

needs to have an administrative approval or license in order to operate (e.g. advertising, construction, executive search, security service, transportation). Without such approval and license, companies or entities engaged in those businesses are incapable of concluding valid and enforceable contracts.

The legal requirements for a valid contract in China are similar to those in the United States and European countries. Virtually all commercial contracts are strongly suggested to be in writing and there must be a valid offer and acceptance. An offer is a proposal hoping to enter into a contract with other parties. That proposal shall include contents that are detailed and definite and indicates the proposal of the offeror to be bound in case of acceptance. An offer becomes effective when it reaches the offeree.

The commercial contract becomes effective when the above is established and the written contract is signed by the legal representatives or duly authorized signers of the contracting parties with stamping their respective corporate seal. However, the parties may agree on a conditional time period as to the effectiveness of the contract. A contract with a termination time period shall become invalid when the period expires. Certain contracts may not become effective until requisite government approval is obtained depending on the industry affected by the contracts or government restrictions over the procurement of certain goods or effectuation of a certain transaction.

In China, the commercial written contract will contain the following main clauses:

- (1) title or name and domicile of the parties;
- (2) object of the contract;
- (3) quantity;
- (4) quality;
- (5) price or remuneration;

- (6) time limit, place and method of performance;
- (7) liability for breach of contract; and
- (8) the way to settle disputes.

- ✧ **Defence in performance**
- ✧ **Assignment of the contract**
- ✧ **Breach and time bar**
- ✧ **Special focus on the sales contract**

Then we will talk about the defence in performance. Firstly, if the parties have obligations towards each other and there is no order of priority in performance, the parties shall perform the obligations simultaneously. One party has the right to reject the other party's request for performance before the other party's doing so.

Secondly, where there is an order of performance between the parties, prior to performance by the party required to perform first, the party who is to perform later is entitled to reject its request for performance.

Thirdly, in the process of performing the contract, one party, which shall render its performance first, may suspend if it has conclusive evidence that the other party is under any of the following circumstances:

- (1) its business conditions are seriously deteriorating;
- (2) it moves away its property and takes out its capital secretly to evade debt;
- (3) it loses its commercial credibility; or
- (4) other circumstances showing that it loses or is possible to lose the capacity of credit.

Where a party subsequently suspends performance without conclusive evidence, it shall be liable for breach of the contract.

In trade finance arrangements, the contract for underlying transaction usually will be assigned to the financiers. Under Chinese law, when comes to assignment of contract, the creditor may assign, wholly or in part, its rights under the contract to a third party. Of course, the creditor's assigning its rights shall notify the debtor. Without such a notification required, the assignment shall not become effective to the debtor.

Where one party to a contract fails to perform the obligations or its performance fails to satisfy the terms of the contract, the party shall bear such liabilities for breach of contract as to continue to perform its obligations, to take remedies, or to compensate for losses. Also, where one party to a contract expresses explicitly or indicates through its acts that it will not perform the contract, the other party may demand it to bear the liability for the breach of contract before the expiry of the performance period. This is anticipatory breach being something that Chinese legislation quotes from the common law system.

The time limit for action before the court or for arbitration before an arbitral institution regarding disputes relating to contracts for international sales of goods or contracts for technology import and export shall be four years, calculating from the date on which the party knows or ought to know the infringement on its rights. The time limits for action before the court or for arbitration regarding other contract disputes usually will be two years or in accordance with special provisions under specific laws or regulations in China.

Special focus will be placed here on the sales contract which closely ties up with the trade finance issues that you may be interested in. In view of its importance in routine transactional acts, particular chapter on the sales contract immediately follows the general provisions in the Contract Law of China. On top of those common rules governing the contractual relationships in China, sales contract chapter sets forth another 46 articles stipulating additional clauses required in such contracts, transfer of ownership, intellectual property rights, time and venue for delivery, transportation of

the goods, inspection and acceptance, payment and so on. Not only for the traders but also to the banks or financial institutions providing trade finance facilities, consulting the rules in this chapter is a must for better understanding the validity and enforceability of underlying deal in negotiations.

II. THE EFFECTIVENESS OF LEGAL SURETIES

- ✧ **Overview of security laws in China**
- ✧ **Guarantee**
- ✧ **Guarantors in a surety**

Under Chinese legislation system, security or we call guaranty is a behavior or act set by the parties in civil relations in accordance with the agreement between them or the stipulation of the laws in order to ensure the realization of the creditor's rights and to secure the performance of the debtor. In China, the security shall have special characters of subordinating, supplementarity and relative independency. Subordinating means a security or guaranty agreement is ancillary to the principal contract. Generally speaking, the security or guaranty agreement's effectiveness will depend on the principal contract's validity, unless otherwise agreed upon by the parties on this point. Supplementarity refers to its functioning as a complementary system to assist the realization of the creditor's rights under the principal contract. In the meantime, the security or guaranty is relatively independent from the principal contract. The parties to the contract may provide separately and specially that the security or guaranty agreement shall remain in full force even if the principal contract is deemed null and void. The main statutes and acts regarding the security and related issues in China include the Security Law, China's Supreme Court's legal interpretations on the said law, General Principles of Civil Law, Contract Law, Real Right Law, Measures for Administration of Guaranties made Overseas by Institutions within the Chinese Territory and its detailed implementation rules.

According to China's security laws, the forms of security or guaranties provided in China can be divided into surety, mortgage, pledge, lien and deposit. In other words, it can be simply categorized into the guarantee by property and the guarantee by person including natural person and legal person. The guarantee by property under Chinese law refers to mortgage, pledge, lien and deposit, which properties or property rights may be converted into monetary equivalent to set off the defaulted debtor's debt or have priority in satisfying the creditor's claim from the proceeds by auction or sales of such properties or property rights. However, in the international trading and financing business, a personal guarantee, namely suretyship provided by natural person or legal person, has been more prevalently adopted.

Suretyship under Chinese law means an agreement pursuant to which the guarantor and creditor agree that the guarantor shall perform the obligation or bear the liability according to the agreement in the event that the debtor fails to perform his obligation under the principal contract.

A natural person, legal person, entity or other organization capable of assuming debts may act as the surety according to the Security Law of China. Here the surety is strictly limited by the said law that no state organ or government agency shall act as a surety, except in the case of transferring loans for the purpose of using the loans from foreign governments or international economic organizations as approved by the State Council. Besides, institutions and social organizations such as schools, kindergartens and hospitals established for purposes of public welfare or interest as well as the branches and functioning divisions of an enterprise legal person shall not act as a surety either. Nevertheless, a branch having a power of attorney from its parent enterprise legal person may provide a surety within the scope of authority.

For the guaranties made overseas by Chinese institutions, special Measures in this regard was promulgated by the People's Bank of China, which further stipulated that only financial institutions authorized to operate the business of providing guaranty to

foreign entities (exclusive of foreign financial institutions), and non-financial enterprise legal persons including domestic and foreign-invested enterprises with the capability to repay debts for the others may act as the surety for providing guaranties to the parties overseas.

- ✧ **Validity of a surety**
- ✧ **Right of plea**
- ✧ **Indemnity**

A surety shall enter into force when a suretyship agreement is concluded in writing between the guarantor and the creditor. A suretyship agreement also includes the letters or telex or other written forms in essence of suretyship between the parties, or the suretyship clauses provided in the principal contract which is guaranteed by the surety. In judicial practice, even there is no suretyship clause in the principal contract, once a party signed or affixed the stamp on the principal contract in the name of a guarantor to undertake the surety liability, a suretyship agreement may be deemed duly formed.

The term of validity shall be provided for in a suretyship agreement. If the guarantor and the creditor have no agreement on that, the term for the suretyship shall be six months counting from the date on which the debt under the principal contract has matured.

Basically, there are two models of surety under Chinese law: general surety and surety of joint and several liabilities. A general surety refers to the suretyship wherein the parties agree that the guarantor shall undertake surety liability in case the debtor defaults. A general surety entitles the guarantor to refuse undertaking the surety liability towards the creditor before a dispute over the principal contract is tried or arbitrated and the debtor's obligations cannot be fulfilled even its assets have been enforced according to law. However, the guarantor in the general surety may not

exercise the above right of refusal if the creditor cannot demand the performance of obligations due to the debtor's change of domicile, or the court's enforcement suspends for accepting debtor's bankruptcy proceedings, or the guarantor waives such right of refusal in writing. Surety of joint and several liabilities refers to a suretyship agreement in which the parties agree that the guarantor and the debtor shall be jointly and severally liable for the debt and obligations under the principal contract. Where the debtor fails to fulfill the obligations provided for in the principal contract, the creditor may either demand the debtor to perform such obligations, or request the guarantor to undertake the liability within the scope of the surety provided. Here I would like to emphasize, in the absence of an agreed or expressly agreed model of surety, Chinese law sets forth that the parties shall bear the joint and several liabilities for the obligations under the principal contract. Therefore, in a default case, the creditor shall have more choice in the contract with the guarantor providing the surety of joint and several liabilities.

A right of plea under Chinese law refers to the debtor's defending right, exercised on legal basis, against the creditor who is demanding the performance of obligations by the debtor. Under either general surety or a surety of joint and several liabilities, the guarantor may step into the shoes of the debtor and shall be entitled to the right of plea of the debtor under the principal contract. Where a debtor waives his right of plea against the obligations, the guarantor shall still enjoy such a right of plea.

A right of plea against preferred claims is only entitled to the guarantor under general surety as abovementioned – that is the guarantor may refuse to undertake the surety liability towards the creditor before a dispute over the principal contract is tried or arbitrated and the debtor's obligations cannot be fulfilled even its assets have been enforced according to law.

Where there are both suretyship and guarantee by property provided for the same debt, the guarantor may refuse to be liable for the credit that the guarantee by property has

secured. Even if the creditor waives the guarantee by property, the guarantor shall be released from his liability of surety to the extent waived by the creditor.

The guarantor, after having borne the surety liability, shall be entitled to claim indemnity from the debtor. If the debtor's bankruptcy proceedings have been accepted by the court whereas the creditor does not declare or register the credit, the guarantor may take part in the distribution of the bankrupted assets to exercise his right of indemnity in advance.

Where there are two or more guarantors for the same debt which we call joint surety, the guarantors shall, according to their own shares agreed upon in the suretyship agreement, bear the surety liability. Absent agreement on the surety shares, the guarantors shall bear the joint and several liabilities. The guarantor who eventually borne the surety liability exceeding his share in the suretyship agreement may seek indemnity from the other guarantors for the debt not recoverable from the debtor. Again, absent agreement on the surety shares, the liabilities will be averagely proportioned to each guarantor.

- ✧ **Guaranties made overseas**
- ✧ **Letter of Undertaking and stand-by L/C**
- ✧ **Other forms of security in China**
 - Mortgage**
 - Pledge**
 - Lien**
 - Deposit**

In China, the guaranties made in favor of overseas entities by a domestic institution shall be subject to the Measures for Administration of Guaranties made Overseas by Institutions within the Chinese Territory and its detailed implementation rules. Here the guaranties made overseas mainly refer to surety, mortgage and pledge under the

security laws of China. In the meantime, domestic institutions' guaranties provided to the financial institutions with foreign investment in China are regarded as the guaranties made overseas.

According to the Measures and its detailed implementation rules, the guaranties made overseas shall be approved and administrated by or registered with the State Administration of Foreign Exchange in China, failing which the guaranties so provided will be deemed null and void in judicial practices.

Letter of Undertaking and Stand-by L/C are two of the most popular vehicles in international trade finance transactions. However, LOU and Stand-by L/C attribute to special form of guarantee under the security laws of China which do not have specific regulations in these regards. Notwithstanding this, the abovementioned Measures and its detailed implementation rules do have referred to LOU and Stand-by L/C and acknowledged their legal binding effect as the suretyship's. So, the doctrines and rules we discussed above on the suretyship may also apply to LOU and Stand-by L/C in China.

Besides the surety we have discussed above, you may also need to understand that under Chinese law there are other forms of security namely mortgage, pledge, lien and deposit.

Mortgage: the Premises and other facilities firmly attached to the land owned by the mortgagor, machineries, vehicles and other properties owned by the mortgagor, land-use-right of State-owned land, Premises and other facilities firmly attached thereto that the mortgagor is entitled to dispose of, etc. may be mortgaged in China according to the security laws. Where the subject mortgaged is land-use-right, Premises, aircrafts, ships, vehicles or machineries, a registration for such mortgage shall be made in the competent authorities according to law.

Pledge: Under Chinese law, pledge includes pledge of movables and pledge of rights. A pledge contract on movables shall enter into force upon delivery of the pledged goods to the possession of the pledgee. A pledge contract on rights shall enter into force from the date on which the document of title for the right so pledged is delivered to the pledgee, or such pledge has been duly registered in the competent authority. In general, the following rights may be pledged according to the security laws of China:

- (1) bills of exchange, cheques, promissory notes, bonds, certificates of deposit, warehouse receipts, bills of lading;
- (2) shares of stocks or certificates of stocks which are assignable according to law;
- (3) trademarks, patent rights and property rights of the copyright which are assignable according to law; and
- (4) other rights that may be pledged according to law.

Lien: Lien is a statutory right under Chinese law taking effect of guaranty to ensure the creditor's rights. Lien mainly applies to the contractual relationship on custody, transportation and processing. In terms of its being generated by law, lien is not subject to negotiation or agreement by the parties. Once the default event occurs, the creditor may exercise the lien on the property legitimately in his possession or under his control to maintain the credit according to law.

Deposit: This is a guaranty under the security laws of China that we call "penalty rule of deposit". The parties to a contract may agree that one party shall pay a deposit to the other for the performance of the contract. In case the payer fails to fulfill his obligations, the deposit will be forfeited by the receiver; on contrary, the receiver failing to perform the contract shall double refund the deposit to the payer. Simply put, "penalty rule of deposit" under Chinese law means deposit forfeited or double refundable. The security laws of China, especially the Supreme Court's legal interpretation, regulate that the deposit shall be agreed in written form with an amount no more than 20% of the principal contract price; and any sums paid up in advance

intended to apply “penalty rule of deposit” namely deposit forfeited or double refundable shall be expressly agreed by the parties, otherwise the claim to apply such a rule afterward will not be held by the court in China.

III. DISPUTE RESOLUTION

- ✧ **China’s legal regime and court system**
- ✧ **Litigation**
- ✧ **Arbitration**

As with every business venture, problems between contracting parties may arise requiring dispute resolution mechanisms in order to either resolve the issues so that the contracting parties can continue with their business relationship, or enable both parties to cancel their business relationship and move on to more fruitful ventures with other parties.

In China most commercial contracts contain a dispute resolution clause that requires friendly consultation efforts to be engaged in first at the outset of any disagreement between the parties prior to sending the matter for litigation or arbitration.

The Chinese legal system is in the form much closer to the legal systems of continental Europe than to the common law system, but also contains substantial elements borrowed from the latter, esp. in commercial law areas such as contract law and company law.

China has a 4 tier court system which includes the lower level Basic Court, the Intermediary Court, the High Court and the Supreme Court. Disputes between Chinese entities can be filed at the Basic Court and the second instance trial will generally be held at the Intermediary Court. Commercial disputes involving foreign elements are generally heard in the first instance at the Intermediary Court which has

been given original jurisdiction over certain such cases depending on the nature of the action and the amount in controversy. At the conclusion of the first instance trial, should one of the parties wish to appeal the decision, a second instance trial will be ordered in the High Court whereby each party will be afforded the opportunity to present new evidence. Litigation involves the court system in China which relies heavily on written evidence and gives little credence to merely oral testimony.

In China, the precondition for the parties to initiate an arbitration proceeding is a written arbitration agreement or an arbitration clause contained in their contract, Most arbitral institutions may have a model arbitration clause, e.g. China International Economic and Trade Arbitration Commission (CIETAC) has recommended such clause that:-

“Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.”

And Chinese arbitration generally involves use of one of several arbitral bodies such as CIETAC which have their own procedural rules. The arbitral panel may consist of one arbitrator or 3 arbitrators. The parties may decide the method of how to appoint their arbitrators subject to the applicable arbitration rules.

- ✧ **Litigation vs. arbitration**
- ✧ **ADR in China – a hybrid process**
- ✧ **Remedies that can be sought**

Based upon the subject matter disputed, litigation in China is divided into three categories, namely civil litigation, criminal litigation and administrative litigation,

amongst which civil litigation, which covers disputes arising out of commercial issues, will be the scenario that foreign parties encounter in most circumstances when dispute resolution is involved. I wish to lay out a general comparison between civil litigation and arbitration under the Chinese legal system.

Similarities exist between civil litigation and arbitration. Significantly, both Arbitration Law and Civil Procedure Law of China are the laws of procedure made by Chinese legislative institution; all the parties, say, natural persons, legal persons or other organizations, have equal legal status in both civil litigation and arbitration; and the two Laws confer independent judicial powers to the courts and arbitral institutions without any intervention.

In China, as in most other countries, the differences between arbitration and litigation are vast. For instance, arbitration produces a resolution faster, and is more private than litigation. On the other hand, litigation takes much longer time, but provide the litigants the second chance in appeal if unsatisfied with the outcome in the trial court. What's more, major differences between arbitration and litigation exist in the following aspects:

1. Scope of acceptable cases
2. Competence and terms of reference
3. Whether appeal is allowed
4. Selection of referee
5. Criteria and qualifications of referee
6. Trial Time limit
7. Enforcement measures
8. Remedy
9. Charges

Generally, ADR can be seen as dispute resolution involving a structure process with

third party intervention which does not lead to a legally binding outcome imposed on the parties. According to the degree to which the parties have control over the process and outcome, ADR can be classified as unilateral action, negotiation, mediation, conciliation, early neutral evaluation, etc.

In China, there exists a deeply-rooted historical preference for informal and friendly means of dispute resolution which has evolved on the basis of cultural tradition that extends from ancient times. By such non-confrontational dispute resolution procedures, face could be reserved and commercial relationships maintained. This has served to support a firm commitment to conciliation in dispute resolution process in China and may help to explain the existence of various forms of conciliation in litigation and arbitration proceedings.

Accordingly, many forms of ADR are combined with litigation and arbitration in China, what can be called hybrid processes, which ultimately lead to legally binding outcomes under proper situations. Therefore, in Chinese legal practice, definition of ADR shall be slightly different from that given above, ADR can lead to a legally binding outcome, in hybrid, if agreed by both parties in dispute and will be enforceable upon the endorsement by the court or arbitral institution.

If parties failed to conciliate or mediate, judges and arbitrators can't force the parties to compromise. The parties may agree to join conciliation proceedings, or retreat therefrom at any time so long as the outcome of conciliation has not yet taken legally binding effect.

Remedies are actually a broad legal concept, which can be mainly classified into remedies for breach of contract and remedies for tort. Here I would like to focus on the remedies for breach of contract under Chinese law.

According to the Contract Law of China, if a party fails to perform its obligations

under a contract, or rendered non-conforming performance, it shall bear the liabilities for breach by, among other things, 1) specific performance, 2) cure of non-conforming performance, or 3) payment of damages.

Based on its nature, specific performance may be monetary or non-monetary. In China, specific performance is just one of the options that the non-breaching party may choose as remedies pursuing the other party's breach of contract.

Cure of non-conforming performance is mostly used in liabilities for quality non-compliance cases. According to Contract Law, where a performance does not meet the prescribed quality requirements, the breaching party shall be liable for breach in accordance with the contract. The aggrieved party may, by reasonable election in light of the nature of the subject matter and the degree of loss, require the other party to assume liabilities for breach by way of repair, replacement, remaking, acceptance of returned goods, or reduction in price or remuneration.

The payment of damages is usually to put the injured party into the same financial position he would have been in, had the contract been properly performed. That means the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including any profit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseeable or should have been foreseen by the breaching party at the time of concluding the contract. In general, damages are not awarded for non-pecuniary loss such as mental distress and loss of enjoyment.

IV. ENFORCEMENT OF TITLES

- ✧ **Legal instruments enforceable by the court**
- ✧ **Jurisdiction of the court to undertake enforcement**

- ✧ **Time limit for enforcement**
- ✧ **Measures for enforcement**

After the legal instrument issued by judicial authority takes effect, if the liable party fails to fulfill the obligations specified in the legal instrument yet, the winner shall have the right to apply for the court's enforcement of such legal instrument. You may know that in China only the court has the authority and power to execute the enforcement.

Under Chinese law, the following legal instruments can be enforced by the court:

- 1) Civil or administrative Judgment, Adjudication and Mediation Award rendered by the court; Civil Punishment Orders and Payment Order;
- 2) Administrative Punishment Decision or Disposal ought to be enforced by the court;
- 3) Arbitral Award and Mediation Award rendered by Chinese arbitral institutions; Property or Evidence Preservation Ruling rendered by the court;
- 4) Legally binding credit instruments executed by the notary public on claims for debt or goods;
- 5) Judgments or orders issued by foreign courts as approved by Chinese court; arbitral awards rendered by foreign arbitral institution;
- 6) Other legal instruments to be enforced by the court.

Upon receipt of a legally effective judgment or arbitral award, please be sure to petition for enforcement before a competent court. In civil litigation, the party shall apply to the court of first instance for enforcement. In arbitration, the party shall apply for enforcement to the court at the place where the other enforced upon party has his domicile or where his property is located. In arbitration involving foreign elements, such enforcement application shall be lodged with the intermediary court at the place where the party against whom the application for enforcement is made has his

domicile or where his property is located.

Anyhow, do not miss the time limit for enforcement. Chinese law provides for the time limit for the submission of an application for enforcement. According to the newly amended procedure law in China, it shall be two years, counting from the last day of the period of performance specified by the judicial document. If the party fails to apply for enforcement within above time limit, the court will not carry out the enforcement any longer.

As a general practice in China, a notification on enforcement will be sent to the party to be enforced in the first instance by the executive judge of the court after receipt of the application for enforcement filed by the winning applicant, demanding the party to be enforced to fulfill the obligations under the legal instrument within a specified time limit. In the event the party to be enforced failed to do so promptly, the court will commence the compulsory execution accordingly. Of course, if the party to be enforced can put forward a security before that, the court may, with the consent of the party applying for enforcement, decide to suspend the enforcement measures and to extend the time limit before taking further actions. If the party to be enforced refused or delayed in fulfillment of obligations subject to the legal instrument again in the period of time so extended by the court, the court shall have the authority and power to enforce the security provided by the enforced party abovementioned, or directly take further enforcement measures, that is compulsory execution, according to law.

The court's compulsory execution may be exercised in one or more of the following ways:

(1) the court shall have exclusive authority and power to make inquiries to the banks, credit facilities or other institutions that may deal with the savings of the party to be enforced, and shall be entitled to freeze and transfer such savings for the purpose of enforcement;

(2) the court shall have the authority and power to withhold or draw the income of the party to be enforced save that the necessary living expenses will be left for the party to be enforced and his dependent family members;

(3) The court may seal up, seize, attach, freeze, or sell off the assets of the party to be enforced, and then return the monies from the proceeds by auction, public tendering or other appropriate ways to the winning applicant for the amount awarded by the legal instrument as the base for enforcement.

In the Chinese courts' practice, the assets subject to execution shall be equivalent to the amount or value to be enforced and such measure should not affect the business operation of the party to be enforced. This may constitute one of the factors making the enforcement difficult even if the party to be enforced appears to have substantial assets which however are not dividable. It is less possible for the court to attach or seal up the enforced party's integral workshop or whole product line to satisfy a relatively small amount applied for enforcement by the winning applicant.

I presume you may also have a question here: how to deal with the scenario where the debtor becomes insolvent in China? The new bankruptcy law of China has entered into force since last June. It was considered being revised quite a lot to be more accordant with the international practice such as setup of asset administrator, debt restructuring and settlement procedures in addition to liquidation. Especially, the new bankruptcy law of China sets forth that the secured debts shall be reimbursed by the specific assets or properties serving as the guaranties in the first instance prior to the repayment of employees' salaries and social insurance/welfares which in the past however took the first priority from the bankrupt's assets regardless of being security or not in China.

I know enforcement has long been perceived as one of the weakest links in China's judicial system. Among other things, the process is subject to considerable delays and the individual judge overseeing an enforcement action enjoys what has often been

regarded as a potentially unhealthy discretion. In the attempt to address this issue, China's Supreme Court issued two sets of rules designed to improve the transparency and efficiency of the enforcement of judgments, arbitral awards and certain other legal instruments in Chinese courts. Some aspects of these two sets of rules represent a step in the right direction (whilst others are simply consolidations or amendments of existing rules). It remains to be seen, however, what practical impact these rules will have.

Well, I will be happy to answer your questions after my presentation as well as during conference breaks. So, please feel free to come up to me and ask any question you may have.

THANK YOU VERY MUCH!