

JUNHE SPECIAL REPORT



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Property preservation available during a judicial review of an application for recognition and enforcement of a foreign judgment

Recently, the Beijing No. 4 Intermediate People's Court (the "**Beijing Court**") rendered a ruling to recognize and enforce a Paris Court Ruling (the "Case"). This was with respect to an application for recognition and enforcement of an order ("ordnance" in French) of the Commercial Court of Paris (the "**Paris Court**") dated June 3, 2015, approving and rendering enforceable a settlement agreement involving an amount of more than USD 46 million (such order, the "**Paris Court Ruling**").

It is noteworthy that during the judicial review of the Paris Court Ruling, the Beijing Court rendered a civil ruling on August 10, 2017, approving the application filed by a claimant for property preservation and seizing, attaching and freezing the relevant property and the other interests of Mr. W, the respondent (the "**Respondent**"), up to the amount requested by the claimant.

To our knowledge, this Case may be the first case in which an application for property preservation is approved by a PRC court during the judicial review of an application for recognition and enforcement of a general foreign commercial judgment. This has significance for the handling of similar judicial assistance cases.

I. Mutual recognition and enforcement of judicial judgments under the Belt and Road Initiative

With the implementation of the Belt and Road Initiative, cooperation between countries covered

under the Belt and Road Initiative has increased. In the judicial field, the PRC Supreme Court has also issued a number of policies to facilitate the implementation of the Belt and Road Initiative. According to Article 6 of the *Opinions of the Supreme People's Court on the Provision of Judicial Services and Protection by People's Courts for the Belt and Road Initiative*, Chinese courts shall, in strict accordance with the international treaties concluded between, or jointly acceded to, by China and the other countries covered under the initiative, actively handle the requests for judicial assistance such as recognition and enforcement of foreign court judgments and provide efficient and convenient judicial remedies for Chinese and foreign parties to protect their legitimate rights and interests. In addition, in the *Nanning Statement of the Second China-ASEAN Justice Forum* dated June 8, 2017 and other relevant documents, the PRC Supreme Court has repeatedly reiterated the need to promote the mutual recognition and enforcement of civil and commercial judgments of relevant countries in order to provide judicial protection for cross-border transactions and investments.

In this context, PRC courts at all levels, including the PRC Supreme Court, have adopted a policy of actively recognizing and enforcing foreign court judgments in judicial practice so as to facilitate the implementation of the Belt and Road Initiative. For example, in a case involving an application by Kolmar Group AG for recognition and enforcement of a civil judgment made by the Singapore High Court, the PRC Supreme Court

mentioned that the recognition and enforcement of the foreign court judgment involved in the case would effectively promote judicial cooperation in the field of recognition and the enforcement of civil and commercial judgments among the countries covered under the Belt and Road Initiative.

Although the issue of recognition and the enforcement of foreign civil and commercial judgments has become increasingly important in China, the procedures and review standards for the recognition and the enforcement of foreign judgments in judicial practice need to be developed. Similarly, Chinese courts lack authoritative guidance as to the applicable procedures for handling the applications for property preservation in such cases.

II. Difficulties in applying for property preservation during a judicial review of an application for recognition and enforcement of a foreign judgment

Firstly, the relevant treaty may have no specific provisions on this issue. In accordance with Article 282 of the *Civil Procedure Law of the People's Republic of China* (the “**PRC Civil Procedure Law**”), the recognition and enforcement of foreign court judgments shall be conducted in accordance with the international treaties concluded or acceded to by China, or in accordance with the principle of reciprocity. Taking this Case as an example, as it involves the recognition and enforcement of a ruling made by a French court and the *Agreement on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the French Republic* (the “**Sino-French Assistance Agreement**”), the request for judicial assistance in this Case shall be reviewed mainly in accordance with the Sino-French Assistance Agreement. However, the Sino-French Assistance Agreement has no specific provisions as to the conditions and applicable procedures for property preservation. Therefore, the judge cannot directly rule on our application for

property preservation in accordance with the Sino-French Assistance Agreement.

Secondly, the relevant law has no specific provisions on this issue either. Part IV (Special Provisions on Foreign-related Civil Procedures) of the PRC Civil Procedure Law (including Chapter 27 (Judicial Assistance)) has no specific provisions on whether property preservation can be conducted during the judicial review of an application for recognition and enforcement of a foreign judgment.

Thirdly, there has been no judicial precedent. No judicial precedent in which property preservation was granted during the judicial review of an application for recognition and enforcement of a foreign judgment could be found through public channels.

III. Main arguments made in this Case to seek the approval of property preservation from the Beijing Court

After filing the application for property preservation, we communicated with the judge of the Beijing Court and put forward the following main arguments:

1. Based on Article 4 of the Sino-French Assistance Agreement, the Sino-French Assistance Agreement clearly provides that except for the matters stipulated in the Sino-French Assistance Agreement, the parties to the Sino-French Assistance Agreement shall apply their own laws to the provision of judicial assistance within their own territories, and this argument was made to procure the judge to focus on the relevant legal provisions of China.

2. There is a clear legal basis under the PRC law for our application for property preservation. This Case is a foreign-related civil action, and Part IV of the PRC Civil Procedure Law shall apply to this Case, Article 259 of which clearly provides that “*this Part shall apply to foreign-related civil actions conducted within the*

territory of the People's Republic of China. Matters not covered in this Part shall be subject to the other relevant provisions of this Law". Since Part IV of the PRC Civil Procedure Law has no provisions on property preservation during the recognition and enforcement of foreign judgments, Article 100 and other relevant provisions of the PRC Civil Procedure Law shall be applicable to such property preservation.

3. The PRC Civil Procedure Law does not prohibit property preservation during the recognition and enforcement of foreign judgments.

4. The claimant has lawfully provided sufficient security for property preservation and its application for property preservation conforms to the applicable law, and the acts of the Respondent such as transferring the shares held by him have demonstrated the urgency and necessity of property preservation.

The Beijing Court accepted our arguments and approved our application for property preservation. There is no doubt that the understanding and application of relevant laws by the Beijing Court are rational, and it not only implements the opinions of the PRC Supreme Court on providing judicial services and protection for the Belt and Road Initiative, but also demonstrates that the rule of law is

improving in China.

IV. Conclusion

With the development of the Belt and Road Initiative, it has become increasingly important to further improve the mechanism for the recognition and enforcement of foreign civil and commercial judgments in China. During the judicial review stage of applications for recognition and enforcement of foreign court judgments, applications for property preservation could be reasonable and necessary for the actual enforcement of the judgments and protection of the legitimate rights and interests of the Chinese and foreign parties concerned. However, in past judicial practice, due to the relatively small number of similar cases, local Chinese courts lack experience in conducting property preservation during their judicial review of applications for the recognition and the enforcement of foreign judgments, thereby giving rise to inconsistent court practices in different regions.

The ruling made by the Beijing Court in this Case to approve the application for property preservation is undoubtedly of great significance, providing other courts with some kind of reference for handling similar cases.

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外国判决承认和执行申请的司法审查期间可进行财产保全

近期，北京市第四中级人民法院（下称“北京四中院”）裁定承认和执行法国巴黎商业法庭（下称“巴黎商业法庭”）于2015年6月3日作出的批准一份《和解协议》并赋予该《和解协议》强制执行力的裁决书（Ordnance，下称“涉案裁决书”），涉及金额逾4,600万美元。

值得关注的是，北京四中院在对涉案裁决书进行审查期间，于2017年8月10日作出民事裁定，准许了申请人所提出的财产保全申请，裁定对被申请人W先生（下称“被申请人”）的财产及其他权益在申请人所申请的额度内进行查封、扣押及冻结。

据笔者了解，这可能是我国法院首次在申请承认和执行一般外国商事判决的司法审查期间准许财产保全申请。该等司法实践对于同类司法协助案件无疑有着重要借鉴意义。

一、“一带一路”政策下司法判决的相互承认和执行

随着“一带一路”政策的不断推行，“一带一路”沿线国家之间的合作日益增多。在司法领域，最高人民法院也陆续颁布了多项政策性意见，以保障“一带一路”政策的实施。根据《最高人民法院关于人民法院为“一带一路”建设

提供司法服务和保障的若干意见》第6条，我国法院要严格依照我国与沿线国家缔结或者共同参加的国际条约，积极办理承认与执行外国法院判决等司法协助请求，为中外当事人合法权益提供高效、快捷的司法救济。与此同时，在2017年6月8日发布的《第二届中国-东盟大法官论坛南宁声明》以及其他相关文件中，最高人民法院也多次重申应促进各国民商事判决的相互承认和执行，将其作为跨境交易和投资的司法保障。

在这一大背景下，包括最高人民法院在内的各级法院在司法实践中均实行积极承认和执行外国法院判决的政策，以保障“一带一路”政策的实施。例如在高尔集团股份有限公司申请承认和执行新加坡高等法院民事判决案中，最高人民法院提到，该案承认和执行外国法院判决将有力推进“一带一路”沿线国之间在民商事判决承认和执行领域的司法合作实践。

尽管外国民商事判决的承认和执行问题的重要性日益凸显，目前在司法实践中承认和执行外国判决的程序和审查标准均有待于不断完善。而法院对于此类案件中的财产保全申请应当适用何等程序也同样缺乏权威参考。

二、外国判决承认和执行申请审查期间申请财产保全的难点

首先，条约依据缺乏。根据《中华人民共和国民事诉讼法》（下称“《民事诉讼法》”）第282条的规定，对于外国法院判决的承认和执行，将依照我国缔结或者参加的国际条约，或者按照互惠原则进行。以本案为例，由于涉及的是法国法院所作裁决的承认和执行且中法之间曾缔结《中华人民共和国和法兰西共和国关于民事、商事司法协助的协定》（下称“《中法协定》”），因此，本案所涉司法协助事项应主要依照《中法协定》进行审查。但是《中法协定》并没有对财产保全所应满足的条件以及适用的程序作出明确规定。因此，法官无法直接依照《中法协定》就财产保全申请作出裁定。

其次，法律依据缺乏。《民事诉讼法》第四编“涉外民事诉讼程序的特别规定”（包括第二十七章“司法协助”）中并未对外国判决承认与执行的审查期间能否进行财产保全作出具体规定。

第三，司法实践依据缺乏。在本案前，在公开渠道未检索到外国判决承认与执行的审查期间准许财产保全的司法判例。

三、本案中争取北京四中院裁定准许财产保全的主要理由

在提出财产保全申请后，笔者与北京四中院的承办法官进行了多次沟通，并发表了如下主要意见：

- 1、首先，从《中法协定》第四条出发，说明条约明确了除非其有规定的事项外，缔约双方在本国领域内实施司法协助的措施各自适用其本国法，进而引导承办法官重点关注中国的相关法律规定。
- 2、其次，指出相关保全申请具备明确的中国法律依据。本案属于涉外民事诉讼案件，应当

适用《民事诉讼法》第四编“涉外民事诉讼程序的特别规定”的各项规定，其中第259条明确规定“在中华人民共和国领域内进行涉外民事诉讼，适用本编规定。本编没有规定的，适用本法其他有关规定”。因此，在《民事诉讼法》第四编“涉外民事诉讼程序的特别规定”中对外国判决承认和执行中的财产保全没有规定的情况下，应当适用《民事诉讼法》第100条以及其他相关规定进行财产保全。

- 3、再次，《民事诉讼法》并未禁止在外国判决承认和执行中进行财产保全。
- 4、最后，申请人已经依法提供了足额的保全担保，其保全申请符合法律规定，而被申请人转移其所持的公司股份等行为说明了进行财产保全的紧急性和必要性。

北京四中院最终考虑了笔者的观点，并作出了准许保全的裁定。毫无疑问，北京四中院对于相关法律的理解和适用是理性和开明的，不仅贯彻了最高人民法院为“一带一路”提供司法服务和保障的意见，更是以实际行动证明了中国法治正不断自我完善和进步的努力。

四、结论

随着“一带一路”建设的不断深入，进一步完善外国民商事判决在我国的承认和执行机制显得日益重要。在承认与执行外国法院判决的司法审查阶段，申请财产保全对于判决的实际执行以及保障中外当事人的合法权益而言具有合理性和必要性。但在以往的司法实践中，由于此类案件本身的数量相对较少，各地法院对于外国判决承认和执行审查期间的财产保全均缺乏经验，导致出现各地法院处理方式不一致的情况。

北京四中院在本案中作出的准许财产保全的裁定无疑有着重要意义，为其他法院在处理类似案件时提供了借鉴和参考。

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