

Provisional Attachment

Effective Methods of International Debts Collection in Japan

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I. Introduction

Recently we successfully represented Chinese cloths manufacturer to collect the debts of Japanese whole seller by suspending the payment of the sales proceeds from the department stores through provisional attachment order issued by the Tokyo District Court. According to the judge who issued the order, this was the first order of this kind issued by the Tokyo District Court.

As the provisional attachment is effective sanction of the Japanese wholesaler to repay the debts, we would like to explain the details of the provisional attachment sometimes referring to the issues we faced in the real case.

We also would like to explain the technical requirements for the foreign creditors, in particular the Chinese creditors, again referring to the issues we faced in the real case.

II. Provisional Attachment of the Claim of the Sales Proceeds from the Department Stores

1. Chain of Distribution of Cloths from China to Japan

In Japan, it is regarded as a lucrative business for the importer or whole seller to manufacture the cloths in China and sell in Japan. For example, a child cloth can be manufactured by the Chinese manufacturer for 5-10 US dollars and sold for 50-100 US dollars at the department store in Japan.

Although the cloths importer from China and the whole seller to the department store in Japan are sometimes the same entity, they are often the different entities.

In other words, participants of the distribution chains of the cloths are often the Chinese manufacturer, Japanese close importer, Japanese whole seller, Japanese department store and the consumer (end user).

Because of the Japanese whole seller having good relationship with the department store has the bargaining power, the Japanese whole seller often would not pay the sales proceed to the Japanese importer until the whole seller receives the sales proceed from the department store.

The whole seller is required to sell the clothes by its stuff at the department store to the customers of the department under the name of the department store. Upon the sales of the cloths, the sales proceeds are collected by the department store and after couple of months from the sales of the clothes, the whole seller receives from the department store the sales proceeds less the charge of the space of the department store for the sales of the cloths.

In this distribution chain, the most effective way for the Chinese cloths manufacturer to collect the debts is to receive the sales proceeds directly from the department store.

The provisional attachment of the sales proceeds to be payable from the department store to the whole seller is therefore the best way for the Chinese cloths manufacturer to collect the debts in Japan.

2. Legal method to collect the sales proceeds of the cloths in Japan

Because the Chinese cloths manufacturer sells cloths to the Japanese importer, the Chinese cloths manufacturer is required to collect the sales proceeds from the Japanese importer. The Japanese importer, however, often does not have enough money to pay the sales proceeds to the Chinese manufacturer until the Japanese importer receives the sales proceeds from the whole seller.

The Chinese manufacturer normally has the bargaining power over the Japanese importer and therefore could create the pledge over the debts owned by the whole seller to the importer to secure the debts owned by the Japanese importer to the Chinese manufacturer. Under the Japanese pledge, the Chinese manufacturer may directly collect the debts owned by the Japanese whole seller to the Japanese importer.

Furthermore, the Chinese manufacturer may file a law suit against the Japanese whole seller and attach the debts owned by the department store and receive the payment directly from the department store. It is, however, a long time to take a law suit and during the law suit, the Japanese whole seller receives the payment from the department store. To suspend the payment by the department store until the law suit is over, the provisional attachment is available to the Chinese manufacturer.

Once the provisional attachment order is issued to the department store, the department store would start suspecting the ability of the whole seller to continue to sell the cloths manufactured in China. To maintain the good relationship with the department store, the whole seller has the strong incentive to pay the debts to the Chinese manufacturer and lift the provisional attachment before the commencement of the long law suit.

III. Application for the Provisional Attachment

1. Appointment of Japanese Attorney

It is necessary for the Chinese manufacturer to appoint the Japanese attorney to file an application for the provisional attachment against the rights of the Japanese whole seller to retrieve the sales proceeds of the cloths against the Japanese department store.

Upon the appointment, the Chinese manufacturer is required to execute the power of attorney entrusting Japanese attorney to file an application for the provisional attachment to the court.

Normally, the Japanese attorney drafts the power of attorney by referring to the name card of the representative director of the Chinese manufacturer provided to him/her as the Japanese court would accept the power of attorney written in such manner.

2. Required documents upon the Application for Provisional Attachment

Upon the filing of the provisional attachment, the Japanese court normally requests the registration certificates of the company showing the trade name and address of the company, the name and title of the representative of the company.

We understand that the Chinese company could obtain the company certificates with the above information from the State Administration for Industry and Commerce of the People's Republic of China.

The court also requires the Japanese translation of the company certificates. As the Chinese characters used in China and Japan are slightly (sometimes substantially) different, the Tokyo District Court requires two types of Chinese characters to identify the Chinese company.

IV. Requirement of the Provisional Attachment Order

1. The Rights of the Chinese Manufacturer to be enforced in the Litigation

As the provisional attachment is to enforce the judgment against the whole seller effectively, it is necessary for the Chinese manufacturer to show the existence of the secured debts under the pledge and the debts owned by the whole seller to the Japanese importer.

Because of the confidentiality of the provisional attachment, the provisional attachment order is normally issued without hearing the opinion of the whole seller. The provisional attachment could therefore cause the detrimental damage to the whole seller without his participation.

The judge is keen to the above damage of the whole seller and required the high level of the evidence of the existence of the debts owned by the whole seller to the Japanese importer.

The problems we faced in the real case were that there was no contract between the Japanese importer and the whole seller. It is therefore necessary to show the evidence of existence of the debts by other documents, such as invoices and written statements of the Japanese importer to explain the transaction between the Japanese importer and the whole seller.

It was critical to make the due diligence of the debts owned by the whole seller to the Japanese importer and create the additional statement of the Japanese importer to fill

in the gap of the documentary evidence provided by the Japanese importer prior to the application for the provisional attachment.

V. Deposition of Fund and Peculiar Issue we faced in the real Case

As we succeeded in persuading the judge, the judge orders us to deposit the fund within 7 calendar days (including Saturday, Sunday and National holiday) from the date of the order for the compensation of the damages of the whole seller. The amount of the deposit is normally 20% of the amount of the rights to be enforced in the subsequent litigation. For example, if the amount of the rights of the Chinese manufacturer is JPY40 million, the deposit was JPY8 million. The amount is retrievable upon the winning of the subsequent litigation or settlement of the dispute between the Chinese manufacturer and the whole seller.

The deposit shall be made to the Legal Affairs Bureau under the jurisdiction of the court issued the fund deposit order. In our case, as the filing was made to the Tokyo District Court deposit was required to be made in the Tokyo Legal Affairs Bureau.

As the deposit procedure is not conducted by the Chinese company but us, the Tokyo Legal Affairs Bureau required us to provide both the power of attorney authorizing us to deposit on behalf of the Chinese company and the company registry issued by the State Administration for Industry and Commerce of the People's Republic of China.

It is necessary to pay attention on the description of the deposit application form because sometimes there is difference of description between the power of attorney and company registry issued by the State Administration for Industry and Commerce of the People's Republic of China. This difference occurs on the description of name card of the representative director of the Chinese company, difference of the Chinese characters used in Japan and China and error in writing happened in China. Regarding the description of the application form, Tokyo Legal Affairs Bureau accepts both descriptions based on the power of attorney and company registry issued by the State Administration for Industry and Commerce of the People's Republic of China. In the practice of the Tokyo District Court, however, the Court only accepts the deposit certificate issued by the Legal Affairs Bureau with the address description of company registry issued by the State Administration for Industry and Commerce of the People's Republic of China.

In the case where the court does not accept the deposit certificate, it is possible to receive the certificate of the refusal of the acceptance of the deposit certificate from the court, withdraw the deposit from the Legal Affairs Bureau and deposit the fund again with precise description on the deposit application form. As the practice of Tokyo Legal Affairs Bureau, however, it requires seal certificate of the registered company seal which is affixed on the power of attorney. As for Chinese companies, since there is no seal certificate system it is necessary to get notarization of the signature of the representative director affixed on the power of attorney from the Chinese notary organization which is supervised by the Ministry of Justice of the People's Republic of China. Contrary to Japanese notary public, it takes 3 to 7 business days to issue the notarized document. Thus, it can be impossible to get signature notarization document and withdraw deposit and make re-deposit within 7 calendar days. Therefore, the description of the deposit application form shall be done with full attention to avoid the case where we cannot withdraw the deposit and are required to prepare deposit money again for another deposit.

VI. Conclusion

It is useful for the Chinese cloths manufacturer to suspend the payment of the sales proceeds payable by the department store to the Japanese whole seller based on the distribution chain of the cloths manufactured in China and sold in Japan.

To obtain the provisional attachment order to suspend the payment of the sales proceeds by the department store to the Japanese whole seller, it is necessary to show the existence of the debts owned by the whole setter to the Japanese importer. As there often be no contracts in this type of transaction among the parties in Japan, it is necessary to show other persuasive documentary evidences and appropriate written statement of the Japanese importer, which should be prepared upon the preparation of the application for the filing of the provisional attachment.

In the application of the provisional attachment, including the deposit of the funds, we highly recommend the Chinese company to obtain the company registry from the beginning of the application and its Japanese translation with the special care of the Chinese character.

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