

在加拿大执行中国法院

判决以及仲裁裁决

Enforcing Chinese Judgments and Arbitral Awards in Canada

I. A Solution to the Problem 问题的解决方法

Money Judgments from the Intermediate Peoples Courts of China or decisions from Chinese Arbitral Centres can be recognized and enforced through the court processes in Canada.

中国中级人民法院以及中国仲裁中心下达的关于金钱的判决或裁决可以在加拿大通过法院程序进行承认并执行。

The problem of debtors fleeing the jurisdiction or ignoring obligations when they own assets abroad has an effective solution through use of the Canadian courts. It is becoming common for Chinese businesses to engage Canadian legal counsel to investigate the possibility of enforcing in Canada, judgments obtained in China. Simply put, while debtors used to consider themselves out of reach by placing assets outside China or leaving the jurisdiction of the Chinese courts, they are now finding that judgments from Chinese courts and arbitral tribunals are being recognized and enforced to ensure that recovery of debts is made through use of the Canadian court system. The Canadian court system has powerful remedies to freeze assets of the debtors pending recognition of the Chinese judgment and/or arbitral award. A well-established process is in place for enforcement of a judgment or an arbitral award taking the necessary steps on a cost effective and expeditious manner.

如果债务人逃离管辖区域或是忽视债务，但同时在海外拥有财产，该问题可以通过加拿大的法律系统得到有效的解决。现在更多的中国企业或个人开始找加拿大律师来探求在加拿大执行中国法院判决的可能性。简单来说，在过去债务人通常认为一旦他们将财产转移到中国之外或是离开中国法院管辖的范畴，他们就可以高枕无忧，但现在这些债务人逐渐发现中国法院的判决和中国仲裁委员会的裁决开始得到加拿大法院的承认并得以执行，以确保债务的回收。即使在中国法院的判决和中国仲裁委员会的裁决得以承认之前，加拿大法院也有强有力的手段可以冻结债务人的财产。加拿大有一套完善的程序来经济有效并快捷的执行法院判决或是仲裁裁决。

II. History of the Recognition of Foreign Judgments in Canada 国外的判决在加拿大得以承认的历史

For many years Canadian courts were reluctant to recognize judgments or orders of foreign courts. In this context, 'foreign' could even mean that a judgment from one Canadian province would not be easily recognized by another province in Canada. That has changed dramatically. Now, Canadian courts routinely recognize and enforce foreign judgments from the commercial courts and arbitral tribunals of jurisdictions around the world, including China.

过去的很长一段时间里，加拿大的法院通常不愿意承认国外法院作出的判决或是指令。这甚至意味着加拿大一个省的判决在另外一个省也无法轻易得到承认。但时过境迁，现在的加拿大法院经常例行公事般承认并执行世界各地商业法庭的判决或是仲裁委员会的裁决，包括中国。

III. Arbitral Awards: A Special Simplified Process 仲裁裁决：一个特殊的简化过程

Many Canadian provinces have enacted legislation for the recognition of foreign arbitral awards such that countries and jurisdictions (including China) that have adopted the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, also known as the "New York Convention", will enforce such awards in most circumstances unless the judgment debtor can establish one of the extremely limited exceptions.

加拿大很多省都对承认海外仲裁裁决进行了立法，这意味着，《承认及执行外国仲裁裁决公约》，简称“纽约公约”，的签约国（包括中国），在大部分情况下都需要执行其它签约国的仲裁裁决，除非负责人能够有效证明非常有限的几个例外中的其中一项。

China is a signatory to the New York Convention. Under the New York Convention, a Canadian Superior Court is obliged to recognize the foreign arbitral award made in China such that recognition and enforcement may be refused in only a few limited circumstances. Recognition may be refused if the party resisting the enforcement shows:

中国是纽约公约的签约国。按照纽约公约，加拿大的高级法院必须承认中国的仲裁裁决，只有在很少并有限的几种情况下法院才可以拒绝承认和执行。法院在被申请人建立以下几种情况时可以拒绝承认仲裁裁决：

- a) that the arbitration agreement was made under some legal incapacity; or

仲裁协议是在一方存在无行为能力情形下签署的；或者

- b) that the arbitration agreement was not valid under the law to which the parties subjected it, or was not valid under the law of the state where the arbitral award was made; or

仲裁协议不符合其管辖法律，或是不符合仲裁地所在国法律；或者

- c) that the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or the arbitral proceeding or was otherwise unable to present their case at the arbitration; or

被申请人没有得到关于指派仲裁员或仲裁程序的适当通知，或因他故，被申请人未能在仲裁上申辩；或者

- d) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

仲裁裁决所处理之争议非为交付仲裁之标的或不在其条款之列，或裁决载有关于交付仲裁范围以外事项；或者

- e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or failing any agreement, was not in accordance with the law of the state where the arbitration took place; or

仲裁机关之组成或仲裁程序与各方之协议不符，或无协议而与仲裁地所在国法律不符；或者

- f) the arbitral award has not yet become binding on the parties or had been set aside or suspended by a court of that state in which under the law the arbitral award was made.

裁决对各方尚无拘束力，或业经裁决地所在国或裁决所依据法律之国家的法院撤销或停止执行。

The other grounds for defending against the recognition of a foreign arbitral award are limited to the party resisting showing that the matter in dispute was not capable of settlement by arbitration under the law of the local jurisdiction recognizing and enforcing the judgment or that the recognition or enforcement of the arbitral award would be contrary to the public policy of the local jurisdiction.

其它能够拒绝承认海外仲裁裁决的理由局限于以下两种：a) 被申请人证明，按照寻求承认和执行仲裁裁决所在地的法律，争议事宜不能够由仲裁来裁决；b) 被申请人证明，承认或者执行仲裁裁决有悖于当地的公共政策。

IV. Judgments of the Intermediate Peoples Courts

中国中级人民法院的判决

The enforcement of a commercial judgment from an Intermediate People's Court within China is also generally open to recognition and enforcement in Canada. There are only a few very narrow tests that might be raised to restrict such enforcement.

中国中级人民法院的商业判决也通常能够在加拿大得到承认并执行。只有很少数的辩护可以限制判决的执行。

Firstly, a court in Canada will consider whether there was a real and substantial connection of the underlying claim and parties with the original Intermediate People's Court that assumed jurisdiction and made the judgment. Thus, if there are provisions in an agreement between those parties that confirm that the laws of China apply to the enforcement of that agreement, this would show a real and substantial connection. Similarly, if the judgment is made between citizens of China or businesses operating in China, that would also show a real and substantial connection.

第一，加拿大的法院会考虑案件所涉及的纠纷和各方与给出判决的中级人民法院之间是否有真正和实质性的联系。所以，如果双方合同里有条款指明中国法律适用于该合同的执行，这就显示了真正和实质性的联系。同样的，如果判决是针对中国公民或是在中国运作的企业，这也可以显示真正和实质性的联系。

Secondly, a Canadian court restricts its consideration of defences to recognition to a review of the three defences of: 'fraud', 'public policy' and 'natural justice'. At the time of recognition of a Chinese court judgment in Canada, a Canadian court will not ordinarily conduct a review of the underlying merits that were decided by the Chinese court. These defences are explained below.

第二，加拿大法院将反对执行判决的辩护限制为以下三种：欺诈，公共政策，以及自然正义。在加拿大承认中国法院判决的过程中，加拿大法院通常不会复审已经被中国法院决定了的案件的实质内容。下面对这些辩护进行解释。

The 'fraud' defence focuses on whether there has been a fraud on the court to induce the Chinese court to assume jurisdiction over the subject matter of the dispute or if there has been fraud established in the conduct of the judicial officials involved in the court process leading to the judgment being advanced for recognition. The fraud defence does not look at whether there may have been misstatements made in the original court file or its witnesses or documents submitted in the original court file are open to alternative interpretations from the ones advanced by the successful plaintiff. Those types of arguments go to the merits of the case and the Canadian court is highly reluctant to reopen the merits or allow a defendant to reopen to investigate the underlying merits and issues flowing from the allegation of fraud on the court defence.

欺诈辩护关注的是是否存在欺诈来诱使中国法院对纠纷行使管辖权，或者是在承认判决的法律程序过程中法律人员的行为是否存在欺诈行为。欺诈辩护不考虑在初始的案卷里是否有不准确的证词，或者对于初始案卷里包括的证人和文件是否存在与胜诉的原告的主张不同的解释。这些论据涉及到了案件的实质，加拿大法院非常不原意重新考虑案件的实质或者让被告以欺诈辩护为由重新展开对案件实质的调查。

The 'natural justice' defence focuses on whether the defendant had opportunity to participate in the Chinese court process and to be heard. Thus, under this defence, a Canadian court will consider steps that were taken prior to judgment to ensure that the defendants were properly served under the laws of China and had opportunity to be heard at hearing or trial. The concept of natural justice does not oblige the Chinese courts to adopt western court process or procedure. In fact, the natural justice defence is quite limited to focusing on whether there have been adequate safeguards to ensure that the participants in the Chinese court process were actually served or alternatively served substitutionally in accordance with Chinese law, (such as by publishing in the People's Daily) and whether the defendants had opportunity to present evidence and make legal argument at the time of trial. Again, even if the defendants did not show up for trial, but a default judgment was taken against them, our Canadian courts restrict the defence of natural justice to the question of whether the defendants had the chance to attend and not whether they actually attended. Another aspect of the natural justice defence that further restricts this defence is that if the defendants had opportunity to set aside the judgment after the date on which the Chinese judgment was granted, then such opportunity itself provides evidence of natural justice. Under Chinese law, a judgment debtor may typically bring an application for retrial within six months after the date on which the Intermediate People's Court granted its judgment. If the defendants invoked the process for a retrial application and are unsuccessful, that is indication that there is a process of natural justice available to those defendants. Thus, the entire retrial process itself is evidence of fulfilling the expectations of natural justice.

自然正义辩护关注的是被告是否有机会参与到中国判决的过程中并有机会给出自己的辩护。所以，对于这个辩护，加拿大法院会考虑在给出判决之前采取了哪些步骤来确保被告得到了适当的通知并有机会在庭审上有机会给出自己的辩护。自然正义的理念并不要求中国法院使用西方的法律程序和步骤。实际上，自然正义辩护是很有限的，其关注的点在于是否存在足够程序上的保证以确保中国法院程序的参与者得到有效的通知或者按照中国法律的要求进行替代通知（比如在人民日报上刊登通知），以及被告人在庭审时是否有机会出示证据并做出法律辩护。即使被告人没有出席审判而法院因此给出了缺席判决，加拿大法院在自然正义辩护这个问题上关注的是被告人是否有机会来参加审判而不是他们实际上又没有出席审判。另外一个限制自然正义辩护的方面是如果被告人有机会在判决给出以后对其进行上诉，那么这个机会本身就是自然正义的证明。在中国法律里，债务人通常可以在中级人民法院给出判决六个月以内提出再审申请。如果被告提出再审申请但再审不成功，这也说明被告人得到了自然正义。因此，再审程序本身就是自然正义得到满足的证据。

The last recognized defence to the recognition and enforcement of a foreign judgment relates to "public policy". The public policy defence is a very narrow defence directed at questions as to whether the foreign court has granted a judgment for something that would be considered abhorrent to Canadian societal values. For example, a foreign judgment relating to enforcing a debt for the sale and slavery of persons would be

considered abhorrent under Canadian law. Thus, the defence on “public policy grounds” focuses on whether the laws of a foreign jurisdiction are so foundationally different and repugnant to the expectations of fair, reasonable and thoughtful commercial relations as to conclude that the foreign laws offend Canadian public policy considerations. In the context of ordinary commercial transactions in China, the public policy defence has virtually no application within the Canadian courts. Canadian courts routinely recognize and enforce Chinese court judgments relating to commercial debts and damages found due under Chinese law.

最后一个可用以反对海外判决承认和执行的辩护是公共政策。公共政策辩护是一项非常局限性的辩护，其关注的是，按照加拿大社会的价值观，国外法院的判决内容是否是不可接受的。比如说，一个执行因贩卖奴隶而产生的债务的海外判决就无法被加拿大法律接受。因此，建立于公共政策上的辩护关注的是另外一个国家的法律是否在根本上与公平合理的商业关系的期望值背道而驰，以使得加拿大法院裁决该国家的法律触犯了加拿大的公共政策。对于发生在中国的正常商业交易，公共政策辩护几乎再加拿大法庭上没有用武之地。加拿大法院经常例行公事般承认并执行中国法院对于商业债务和损失的判决。

V. Overview of the Canadian Court Process to Recognize Chinese Judgments 承认中国法院判决的加拿大法律程序概述

Canada has ten provinces and three territories. Each province has its own superior court system to handle disputes within the jurisdiction of that provincial realm.

加拿大有十个省和三个区域。每个省有自己的高级法院来解决省内的纠纷。

When a Chinese enterprise wishes to pursue recognition and enforcement of a judgment in Canada, the first step is to investigate and identify assets that may be within the jurisdiction of the province and to determine which province has jurisdiction to hear the application for recognition. Most Canadian provinces have an open and transparent land title office system. This allows name searching to identify whether individuals or corporate debtors hold title to any land within the jurisdiction. There are many other public search facilities available to investigate and identify the potential assets within the jurisdiction available for enforcement.

当一个中国的企业或个人想在加拿大承认并执行中国的判决，第一步要做的是调查并找出财产的所在地并决定哪个省有管辖权对判决的承认进行听审。大部分加拿大的省份都有一套公开透明的土地房产登记系统。通过这个系统可以查出个人或是企业负责人是否在某个特定的省里持有土地或房产。同时也有很多其它的公共搜索系统可以调查并找出可以用以执行的潜在财产。

Typically, after the investigation has identified assets within the jurisdiction, steps are then taken to prepare materials for filing with the court.

通常，一旦找到辖区内的财产就可以开始准备材料以向该辖区的法院递交。

There are two different streams potentially available for recognition of a foreign arbitral award or Chinese judgment:

有两种不同的途径可以对海外仲裁裁决或是中国法院判决进行认证：

- a) Petition: a proceeding can be commenced in Canada by way of petition to the court, supported by affidavit evidence of the history of the Chinese proceedings, supported by certified copies of the underlying arbitration agreement and arbitration award (if applicable) or the court order (if applicable) all translated to English and supported as a certified, true translated copy, together with such additional investigation information showing service of the proceedings upon the judgment debtors during the underlying process in China, the involvement of the defendants or their lawyers within the Chinese proceedings, and evidence showing the participation and knowledge of the defendants of the proceedings, the arbitral award or court order as the case maybe; or

申请：在加拿大的法律程序可以通过向法院提出申请展开，需要的辅助文件包括关于中国法律程序进程的证人陈述、仲裁协议以及仲裁裁决（如果适用的话）或是法院判决（如果适用的话）公证过的复印本以及公证为真实准确的英文翻译件，其它的能够显示负责人在中国的法律程序中得到适当的通知，并有机会自己或是通过其律师参与到法律程序中的信息，被告人得知并参与到法律程序中的证据，以及相关的仲裁裁决书和法院判决书；或者

- b) Action: in those cases where there is a complex factual or legal history to the Chinese proceedings, then the Canadian proceedings will ordinarily be commenced by action. The difference between an action and a petition is that the action allows for investigation of disputed facts or disputed legal issues and obliges the parties to produce relevant documents and make themselves available for potential examination for discovery within Canada prior to the hearing or trial that will determine whether to recognize the order or award.

审判：如果中国的法律程序包含了复杂的事实和法律上的历史，那么加拿大的法律程序通常会以审判展开。审判和申请的区别在于审判允许对有争议的事实和法律上的问题进行调查并要求双方提供有关的文件并在最终决定是否承认判决或裁决的庭审前出席可能在加拿大举行的庭外取证。

When an action or petition is filed in Canada, it may be possible to make application at the outset of the Canadian proceeding to seek an order for the freezing of assets. Canadian courts have the power to order a freezing order, without notice to the judgment debtors, and may also order a financial disclosure by those judgment debtors. Ordinarily, to obtain such an order requires that the Chinese judgment creditor provide some evidence to show risk of dissipation of assets by the judgment debtor. Thus, if there is evidence that the judgment debtor acted fraudulently in the underlying proceedings, acted fraudulently with their assets by removing them out of China, or has otherwise acted fraudulently within respect to other creditors, then this would be strong evidence of risk of dissipation. Similarly, if there is evidence that the assets in the Canadian jurisdiction are at risk of quick dissipation by way of placement of mortgages or sale, then this too may sometimes be sufficient evidence for a Canadian court to find risk of dissipation warranting a freezing order.

当申请或审判在加拿大开启时，有可能可以在一开始的时候向法院提出申请冻结财产。加拿大法院有权在不告知负责人的情况下出示冻结令，也可以要求负责人提供财产清单。通常，要获得这样的冻结令需要中国的债权人提供证据显示负责人有可能消散财产。所以，如果有证据显示负责人在法律程序中有欺诈行为，以欺诈目的将其财产转移出中国，或是对于其它债权人做出了欺诈行为，那么这些证据都能强有力的证明有财产被消散的风险。类似的，如果有证据显示在加拿大的财产有可能可以通过抵押和出售的方式被迅速消散，这也同样可以在有些时候成为足够的证据向加拿大法院证明财产有被消散的风险并促使其颁布冻结令。

VI. Solutions 解决方案

The process for enforcement in Canada can be done efficiently and cost effectively for most proceedings. The key is to review the process followed in China, ensure that the evidence compiled from the Chinese proceedings is presented carefully and thoughtfully in a logical form for the Canadian court to review, and to ensure that experienced Canadian (and Chinese) legal counsel are engaged at the outset to assist with the investigation, compilation, and presentation of that evidence for use in the Canadian courts.

大部分加拿大的执行程序都可以经济有效的完成。关键在于检阅在中国遵循的程序，小心确保以合理细致的方式向加拿大法院展示中国法律程序相关的证据，并确保一开始就找到有经验的加拿大（以及中国）律师来协助调查，收集，以及展示将在加拿大法院使用的证据。

Businesses and enterprises in China that have suffered financial loss as a result of their debtors leaving the jurisdiction do not need to be frustrated by the inability to enforce against foreign assets. Chinese arbitral awards and Chinese judgments are respected in Canada and are routinely recognized and enforced. If you would like to obtain further information with respect to the potential for recognition and enforcement, please

contact either Ross McGowan at rmcgowan@blg.com or on WeChat at RossMcG63 or Wei Kang at wkang@blg.com or at +1-778-386-6567 (associated with Wechat), or go to blg.com.

由于债务人离开中国而蒙受经济损失的中国的企业不必因为无法对海外财产进行执行而感到无奈。中国仲裁裁决和中国法院判决在加拿大是得到尊重的，并经常得以承认和执行。如果您想进一步的获取关于承认和执行的相关信息，请通过邮件或是微信联系 Ross McGowan 律师，Ross McGowan 的邮箱地址是 rmcgowan@blg.com，微信号是 RossMcG63，或者也可以通过邮件或是微信联络康唯律师，康唯律师的邮箱地址是 wkang@blg.com，电话是+1-778-386-6567 (微信上可用该号码搜索)，或登陆 blg.com。

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