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BELT AND ROAD PRACTICAL GUIDE

How to Get Your Money Back? Asset Preservation in Hong Kong

Belt and Road Practical Guide

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How to Get Your Money Back?

Asset Preservation in Hong Kong

China's Belt and Road initiative fosters both new investment opportunities and commercial activities. Along with opportunities, issues may surface, of course, and so the demand for dispute resolution services may increase. Should disputes arise, any investor would want to be assured that there are assets against which it could recover its loss from the other party. Where assets are located in Hong Kong, the investor would have to resort to the Hong Kong legal system for protection and preservation.

As the interface between the PRC and the rest of the world, Hong Kong provides one of the best platforms for resolving disputes that may arise from the various multi-national activities involved in the Belt and Road initiative.

Under the *One Country, Two Systems* regime, Hong Kong retains common law as its source of law. It also has a separate yet well-established mechanism for asset preservation, which is different from the position in the PRC. In the PRC, investors may rely on, for example, the PRC Civil Procedure Law to apply for asset freezing orders by providing the amount equal to the value of the frozen assets. In Hong Kong, parties can make use of the asset preservation mechanism to apply for injunctions to prohibit the disposal or transfer of properties in disputes, whether the assets are located in Hong Kong, the PRC or other parts of the world. Even when assets have been dissipated, it is within the jurisdiction of Hong Kong Courts to make orders to enable the tracing of those assets. Hong Kong's legal system also provides an effective mechanism to enforce PRC and foreign judgments and arbitral awards against assets in Hong Kong.



Tip 01

TIPS FOR INVESTORS - ASSET PRESERVATION

Parties often make concessions and compromises while negotiating deals, but investors also ought to give some thought to any potential litigation risks which might arise. Here are some tips to bear in mind, to enhance the chance of effective asset preservation in case the deal falls through or a dispute arises:

- **Conduct due diligence:** Before committing to an investment, due diligence should be conducted on the financial background and asset location of the counter party. In some cases, the parent and group companies and major shareholders should also be identified, as well as the usual corporate structure and validation protocol. In cases where the counter party may have insufficient assets to make compensation when the investment falls through, it is advisable to include additional parties (such as the parent company or ultimate beneficial owner of the counter party) in the investment plan as one of the counter parties or guarantor.
- **Consider governing law:** It is also important to incorporate a favourable governing law clause and jurisdiction clause in the investment agreements. Due consideration should be given to the characteristics of different jurisdictions and dispute resolution in deciding which jurisdictions and dispute resolution methods to be adopted. Locations with reputable legal systems are common choices.
- **Keep records:** Proper records should be kept of the identification and information of the individuals and corporations to the investment plan, such as ID card, passport, address proof, incorporation documents and bank account numbers. This information would be helpful in the event of dispute. Bank statements and financial documents showing the fund flows in relation to the investment plan would also assist identification of assets, when the need arises.

- **Seek advice early:** At any sign of the investment plan going sour, it is important to turn to legal counsel for early advice. Early legal advice would better protect your position and avoid inadvertent prejudice of legal rights. Early engagement of legal counsel would expedite any urgent application to the Court for asset preservation, freezing bank accounts and discovery of documents where there is swift development of matters.

These tips will help to save time and expedite the preparation of evidence in case of the urgent application for asset preservation in litigation or arbitration proceedings. The remaining sections of this publication will give investors from the PRC an idea of what the Hong Kong legal regime can provide to safeguard their legal rights.

We will now consider in more detail three key areas of which investors must be aware before taking any legal action to recover assets:

- Asset protection
- Asset tracing
- Enforcement in Hong Kong.

A circular graphic with a dark blue background and a white border. The text 'Tip 02' is in a large, bold, white font, and 'ASSET PROTECTION' is in a smaller, white font below it. The background of the entire page features a close-up of a person's eye with a white mask and a white flower-like object in the foreground.

Tip 02

ASSET PROTECTION

Concept of asset protection

Before commencing any legal action or arbitration to recover assets or claim damages in Hong Kong, the first matter an investor, as a plaintiff, has to consider is whether the intended defendant has any assets in Hong Kong for the purpose of enforcing any existing or future judgment/arbitral award against him. If there is any hint that the intended defendant may dissipate his assets, the plaintiff needs to act quickly to prevent him from doing so - to make sure that the judgment/arbitral award will not be defeated and the intended defendant has assets in Hong Kong for satisfying the judgment/arbitral award.

Investors should also be aware that asset protection is important in cases where a party has misappropriated or wrongfully transferred funds and is ready to launder the stolen funds out of Hong Kong. In these cases, impeding the wrong-doing party from moving the funds is one of the primary steps to take for protecting the plaintiff's assets.

Mareva injunction order

The Hong Kong civil court has the power to grant a *Mareva* injunction order to freeze any asset of the intended defendant (such as funds in bank accounts, shares in private or public companies and landed properties) and refrain individuals or corporations from removing from or disposing of assets in Hong Kong.

In general, a *Mareva* injunction granted by a Hong Kong Court may also restrain the intended defendant from dealing with his assets outside the jurisdiction – this injunction is referred to as a “worldwide *Mareva* injunction”. The effect of a worldwide *Mareva* injunction granted by the Hong Kong Court is subject to the enforcement of the same in other jurisdictions.

The effective period of a *Mareva* injunction order usually lasts until the conclusion of the main civil action or arbitration against the intended defendant.

Investors should further be aware that a *Mareva* injunction order is a powerful tool to use in asset preservation. Before granting the injunction order, the Court has to be satisfied that there is a real risk that the defendant might dissipate his assets or render them unavailable for judgment.

The Court also requires the plaintiff to make full and frank disclosure regarding the circumstances of the case. Accordingly, when presenting its case to the Court, the plaintiff must not withhold any information and document even if it is detrimental to the application. Further, where the *Mareva* injunction order is granted, the Court would normally require the plaintiff to give an undertaking to compensate the loss suffered by the defendant as a result of the injunction order in the event that the plaintiff fails in the substantive claim. In general, the Court would accept either a written undertaking from the plaintiff or payment of a certain sum of money into Court as security.

Case illustrations

There are some typical scenarios in which a *Mareva* injunction order are usually granted by Hong Kong Courts:

- Where the defendant owns landed property in Hong Kong, and there is evidence showing the defendant would dispose of the landed property or transfer the proceeds of sale of the landed property to a third party.
- A debtor shareholder may be refrained from attempts to destroy the value of the shares in a company to the detriment of the creditors by voting against the resolutions to restructure the company in the general meetings which would rescue the company and preserve the value of the shares.
- The defendant's conduct in disposing of his assets is not in the ordinary course of the business and taking into account the nature and conducts of the dealings between the plaintiff and the defendant, the defendant has acted to very low commercial standards or even dishonestly.

Tip 03

ASSET TRACING

Concept of asset tracing

In order to identify the defendant (for example, obtaining the ID card or passport number and residential address of an individual, getting relevant incorporation documents or accounting documents of a company), follow the flow of the funds and locate the properties, the investor, as the plaintiff, may consider applying for ancillary discovery orders at any time before or after, or together with the application for *Mareva* injunction order.

Norwich Pharmacal discovery order

The plaintiff may apply for a *Norwich Pharmacal* discovery order to seek discovery from third parties who possess the relevant information or documents of the intended defendant.

The plaintiff may seek a *Norwich Pharmacal* discovery order to require banks with which the defendant has maintained accounts with to provide bank statements and other relevant transactional documents of the defendant for the material period of time. This would allow the plaintiff to trace the fund flow of the money in question and also to gather further evidence on, *inter alia*, whether the defendant's bank accounts still have deposit and whether there have been any suspicious transactions amounting to proof of dissipation of the defendant's assets.

The targeted third party of *Norwich Pharmacal* discovery orders are not limited to banks. Accounting firms, estate agents and secretarial companies could also be subject to a discovery order. For instance, in a case where the plaintiff falling victim to a world-wide conspiracy only knew the names of the companies used by the conspirators but not the conspirators' identities, the Court may grant *Norwich Pharmacal* discovery orders in favour of the plaintiff against an accounting firm and its related business service firm, ordering them to provide information revealing the identities of the fraudsters.

As mentioned above, *Norwich Pharmacal* discovery orders could assist the plaintiff to discern the identity of the intended defendant, which would not otherwise be available. In a copyright infringement case, some international companies providing encrypted programming services to subscribers for a fee discovered that several websites had uploaded pirate hardware and software infringing their services. They therefore applied to the Hong Kong Court for a *Norwich Pharmacal* discovery order against the server provider. The server provider was ordered to disclose the identities and some other information of the owners of the websites as well as their members and subscribers who have taken part in the sale and purchase of the pirate hardware and software.

In practice, it is usual for the plaintiff to pay the costs of the disclosing third party unless the disclosing third party had been implicated in the crime or tort or sought to obstruct justice being done.

To minimize the risk of the defendant being alarmed and taking steps to frustrate any of the plaintiff's potential claims, the plaintiff may apply for a gagging order simultaneously. A gagging order has the effect of prohibiting the third party from informing the defendant of the discovery application and matters related thereto.

For situation where a *Norwich Pharmacal* discovery order is applied after the issue of *Mareva* injunction order, upon receiving further information on the defendant's asset, the plaintiff may make fresh applications to the Court to stop the defendant from dissipate the newly discovered assets.

Tip 04

ENFORCEMENT IN HONG KONG

Enforcing PRC and foreign judgments in Hong Kong

With increasing multi-national investment and commercial activity involved in the Belt and Road initiative come contracts governed by laws of different jurisdictions. Given the international nature of the Belt and Road initiative, disputes may be resolved by courts in one jurisdiction, but enforcement of the court order may be sought in another jurisdiction. As Hong Kong is part of the PRC and an Asia investment hub, judgment debtors often hold assets there, against which a judgment creditor would wish to enforce a foreign judgment. Hong Kong provides for robust enforcement regimes to enforce non-Hong Kong judgments, whether they are made in the PRC or other countries.

A non-Hong Kong judgment first has to be recognised and registered with the Hong Kong Courts before it becomes enforceable in Hong Kong. Given that many Belt and Road investors are from the PRC, inevitably many disputes may fall under the jurisdiction of the PRC Courts. Under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (the “**MJREO**”), a PRC judgment can be registered in the Hong Kong Court if it is a final and conclusive judgment given by certain Courts in PRC (such as a Higher People’s Court), and these courts have the exclusive jurisdiction to determine the dispute under the parties’ agreement, ordering monetary award that is enforceable in PRC.

Once registered, the PRC judgment has the same force and effect as a Hong Kong judgment for the purposes of enforcement. The MJREO specifically addresses the unique nature of civil proceedings in China and provides special procedures that are generally in line with the requirements laid down by Hong Kong Courts for determining the finality and conclusiveness of a foreign judgment.

The time limit for applying to register the judgment is 2 years running from the last day of the specified period within which the judgment ought to have been performed; or, in any other case, from the date from which the judgment takes effect. The MJREO only applies to enforcement of money judgments on disputes arising out of commercial contracts and not in respect of payment of tax, fine or penalty.

For judgments from countries other than the PRC, they can either be recognised under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (the “**FJREO**”) or under common law. FJREO applies to an exhaustive list of designated countries, including many popular jurisdictions such as Australia, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, Netherlands, New Zealand and Singapore. The applicant must apply to have the judgment registered within 6 years of the date of the original judgment. The foreign judgment must be final and conclusive on the merits of the claim and must be for a definite monetary sum.

For judgments made in a country that is not a designated country for the purposes of the FJREO, they may be recognized under common law. A judgment creditor can use the foreign judgment as a proof of a valid debt and sue upon it, and obtain a Hong Kong judgment on the debt. Similarly, foreign judgments capable to be registered in Hong Kong under common law must be for a sum of money and must be “final”. In this process the Hong Kong Court will not review the merits of the foreign judgment, which saves time and costs.

Enforcing PRC and foreign arbitral awards in Hong Kong

Arbitration has become a popular choice of dispute resolution. Many contracts now specify that all disputes are to be resolved by arbitration exclusively. This is especially the case for construction-related contracts, which are common in the Belt and Road initiative. It also applies to other technical contracts, as parties can appoint arbitrators with the relevant expertise. Hong Kong’s Arbitration Ordinance (Cap 609) (the “**Arbitration Ordinance**”) empowers Hong Kong Courts to enforce arbitral awards made in different jurisdictions. Hong Kong mirrors the principles and spirit of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “**New York Convention**”) and has adopted a pro-enforcement attitude in enforcing arbitral awards. Hong Kong has had an excellent record in recognising and enforcing arbitral awards. Although there are grounds a party can rely on to oppose the enforcement of an arbitral award, case law show many instances where the Hong Kong Courts would not easily allow a party to challenge the enforceability of an award.

Given the role of the PRC in the Belt and Road initiative, many parties may choose to resolve disputes at PRC arbitral tribunals. The Hong Kong government has entered into a bespoke agreement with the PRC government (*Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong* (the “**Arrangement**”)). This provides that certain arbitral awards made in China will be eligible for enforcement in Hong Kong. The Arrangement applies to arbitral awards which are made by designated Chinese arbitration organisations, including CIETAC and the China Maritime Arbitration Commission, as well as most domestic arbitration commissions established under the PRC Arbitration Law. The time limit for an applicant to apply to the Hong Kong Courts for enforcement of a PRC arbitral award is 6 years.

As at the date of this article, Hong Kong is one of the 157 contracting parties to the New York Convention. The New York Convention allows enforcement of arbitral award between contracting parties. The Arbitration Ordinance provides a simple and straightforward process for enforcing arbitral awards made in the contracting countries of the New York Convention in Hong Kong.

As for arbitral awards made in a jurisdiction which is not a party to the New York Convention and under the UNCITRAL Model Law, the Arbitration Ordinance contains provisions that put them under the same enforcement regime as arbitral awards made in Hong Kong. In such cases, Hong Kong Courts may grant leave to enforce an international award summarily, without need to bring fresh proceedings, which makes this method much quicker and cheaper. Upon leave being granted, the award may be enforced in the same manner as a Hong Kong judgment. Alternatively, a party can also seek to enforce a foreign arbitral award by bringing fresh proceedings in Hong Kong on the basis that the award constitutes a debt due by the respondent to the claimant.

The Arbitration Ordinance also contains provisions for the enforcement of a Macao award in Hong Kong which mirror the provisions for enforcing a New York Convention award.

Means of enforcement

Once a foreign judgment or arbitration award is either registered under statute or is successfully sued upon under the common law process, the resulting registered foreign judgment, having the same status as a Hong Kong judgment, can be enforced. The Hong Kong legal system provides a wide range of enforcement means. Depending on the types of assets available to the judgment creditors, various means of enforcement could be employed. The importance of investigation into the assets of the debtor followed by legal advice as to the appropriate choice of enforcement methods and strategy is not to be undermined. Below are some of the more commonly used means of enforcement.

Garnishee proceedings

Garnishee proceedings are the ideal enforcement means against money sitting in the debtor’s bank account. A garnishee order is an order to be attached to debts due or accruing due to a judgment debtor owed by a third party (the “garnishee”). Upon granting of the order, the garnishee would, instead of paying to the judgment debtor, be obliged to pay such debts directly to the applying judgment creditor. In the usual case of application against a bank as the garnishee, the garnishee order would put an obligation on the bank to transfer the funds held in the judgment debtor’s bank account (which is considered a sum owed to the judgment debtor) directly to the applying judgment creditor. Therefore, this is one of the most direct methods to enforce a judgment.

In these applications, the garnishee must be within the jurisdiction and the debtor must be the sole and beneficial owner of the debt. A debt due to the debtor jointly with another person cannot be attached in garnishee proceedings.

Charging order and order for sale of assets

Charging orders are usually used for (i) land and securities; (ii) interests under a trust; and (iii) certain property held by a person as trustee, and beneficially owned by the judgment debtor.

By obtaining a charging order over the debtor’s assets, a charge will be created on the debtor’s assets which prohibits the debtors from disposing of the assets. If the judgment remains unsatisfied, the judgment creditor may enforce the charging order by obtaining an order for the sale of the property under the charging order and the proceeds of such sale be applied to satisfy the judgment debt.

Writ of fieri facias

Enforcement by writ of *fieri facias* is ideal where the judgment debtor has property that is worth seizing, e.g. goods, bank notes, bills of exchange or promissory notes.

The writ gives the bailiff (a public officer appointed by the Court) the legal right to seize such goods, chattels and other properties of the judgment debtor as are reasonably sufficient to satisfy the judgment debt together with interest and the costs of the execution. The bailiff is empowered to seize not only goods in the hands of the judgment debtor himself, but also properties belonging to the debtor in the possession of a third party.

Appointment of receivers

Receivers can be appointed to handle income-producing asset, e.g. property that is tenanted, or where the asset in question falls outside the scope of other enforcement means.

The Court will appoint a receiver to receive the income from the debtor's property, which income will be applied to satisfy the judgment debt. Unlike a charging order, this does not create a charge on the property affected, so a judgment creditor may also need to apply for an injunction to prevent the judgment debtor's property from being transferred.

Liquidation – application for winding up and bankruptcy

This is often considered as a last resort, where there is no real prospect of the judgment debt being recovered by execution, or where the debtor has absconded, or shut up shop, leaving no available assets.


Unlike other enforcement proceedings where the benefit of that execution will go to the judgment creditor alone, bankruptcy or winding up of an insolvent debtor is a process of collective enforcement of the debtor's debts for the benefit of the general body of creditors. Once a bankruptcy or winding up order is made, the trustees in bankruptcy or the liquidators would take over the assets of the bankrupt / wound up company and distribute the assets upon realization to the creditors in accordance with the established priorities. Therefore, the judgment creditor should consider carefully, including whether there are sufficient assets to settle all claims from the general body of creditors, before making a bankruptcy/winding up petition.

Due to the drastic consequences of a bankruptcy or winding up order, the mere threat of possible winding up or bankruptcy proceedings may pressurize the judgment debtors into paying the judgment debt.

Examination orders

If little is known about the judgment debtor's assets, it is possible to proceed first by way of oral examination of the judgment debtor. This method can be used to enforce a judgment or order for payment of money.

Under an order for oral examination, the judgment debtor is obliged to attend before the Court and be examined as to his income and assets, and to produce any relevant documentation. If the Court is satisfied that the judgment debtor is able or will be able to satisfy the judgment debt, the Court may order the judgment debtor to pay the judgment debt. Non-compliance of examination order and/or provision of false or misleading information at examination may lead to possible contempt proceedings which is serious in nature, and may lead to imprisonment.



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