
BELT AND ROAD PRACTICAL GUIDE

HOW TO GET YOUR MONEY BACK?
ASSET PRESERVATION IN HONG KONG

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HOW TO GET YOUR MONEY BACK?

Asset preservation in Hong Kong

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

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Publications have emerged about the Belt and Road Initiative (BRI). Some focus on applicable laws; others are in country-by-country format providing statistics and other background. At the moment, there seem to be few practical guides. Our series of publications aims to fill that gap. We will tell you about our own experience with our clients working on the BRI. Within each of our booklets, we will offer practical tips regarding the BRI subject in question.

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 China Mainland. In China Mainland, investors may rely on, for example, the China Mainland Civil Procedure Law¹ to apply for asset freezing orders by providing an amount equal to the value of the frozen assets by way of counter-security. 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 dispute, and/or such owned by the defendant, whether the assets are located in China Mainland, Hong Kong 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 and restitution of those assets. Hong Kong's legal system also provides an effective mechanism to enforce China Mainland and foreign judgments and arbitral awards against assets in Hong Kong.

Following the implementation of the Reciprocal Recognition and Enforcement Arrangement on 29 January 2024, a broader range of civil / commercial judgments from China Mainland may now be recognised and enforced in Hong Kong.²

* Any reference to "Hong Kong" or "Hong Kong SAR" shall be construed as a reference to "Hong Kong Special Administrative Region of the People's Republic of China".

¹ Civil Procedure Law of the PRC 2023 with effect from 1 January 2024 Articles 103 to 108 Chapter 9: Property Preservation and Advance Enforcement

² Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Court of the Mainland and of the Hong Kong Special Administrative Region, signed on 18 January 2019



TIP 1 | INVESTORS ASSET PRESERVATION PRE-DISPUTE



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:

- **Consider governing law:** It is 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 mechanisms in deciding which jurisdictions and dispute resolution methods should 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 that are party to the investment plan, such as ID card, passport, address proof, incorporation documents and bank account numbers. Such information would be helpful in the event of a dispute. Bank statements and financial documents showing the fund flows in relation to the investment plan would also assist in the 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 inadvertently prejudicing your legal rights. Early engagement of legal counsel would expedite a prospective urgent application to the Court for asset preservation, freezing of bank accounts and discovery of documents where developments may occur quickly.

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 China Mainland 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.

TIP 2 | 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 existing or future judgment / arbitral award against them. If there is any hint that the intended defendant may dissipate his assets, the plaintiff needs to act quickly to prevent them from doing so – to make sure that the judgment / arbitral award will not be defeated and that the intended defendant has assets in Hong Kong to satisfy 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 transmit the stolen funds out of Hong Kong. In these cases, impeding the wrong-doing party from moving the funds is one of the key steps to take for protecting the plaintiff's assets.

Mareva injunction order

The Hong Kong Courts have the power to grant a Mareva injunction order to freeze assets of the intended defendant (such as funds in bank accounts, shares in private or public companies and landed properties) and restrain individuals or corporations from disposing of assets in or removing assets from 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 its enforcement in other jurisdictions.

A Mareva injunction order is usually effective until the conclusion of the main civil action or arbitration against the intended defendant.

A Mareva injunction order is a powerful asset preservation tool. 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 satisfying a judgment / arbitral award.

The Court also requires the plaintiff to make full and frank disclosure regarding the circumstances of the case. Accordingly, when presenting his case to the Court, the plaintiff must not withhold any information and documents even if they are 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 (if any) 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 Mareva injunction orders are usually granted by Hong Kong Courts:

- Where the defendant owns landed property in Hong Kong, and there is evidence showing the defendant would likely dispose of the landed property or transfer the proceeds of sale of the landed property to a third party.
- A debtor shareholder may be restrained 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 business and taking into account the nature and conduct of the dealings between the plaintiff and the defendant, the defendant has acted with a very low standard of commercial morality or even dishonestly.

Interim measures arrangement for arbitral proceedings between China Mainland and Hong Kong

On 2 April 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of China Mainland and of the Hong Kong Special Administrative Region (the “**Interim Measures Arrangement**”) was signed between China Mainland and the Hong Kong SAR, which came into force on 1 October 2019. Whilst parties to arbitral proceedings administered by a China Mainland arbitral institution may apply for interim measures prior to the signing of the Interim Measures Arrangement, parties to Hong Kong-seated institutional arbitrations can now apply for interim measures including asset preservation (similar to a Mareva injunction order), evidence preservation and conduct preservation orders from the China Mainland courts in aid of arbitral proceedings in Hong Kong. The arbitration must be seated in Hong Kong and administered by one of the specified qualifying institutions or permanent offices, for instance, the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong Arbitration Center, and the International Court of Arbitration of the International Chamber of Commerce (ICC) - Asia Office (Hong Kong).

The Interim Measures Arrangement has the benefit of minimising the risk of dissipation of assets by the respondents in China Mainland prior to the conclusion of arbitration proceedings in Hong Kong. The Interim Measures Arrangement is a significant development given that Hong Kong is the only jurisdiction to have an interim relief arrangement with the China Mainland courts and such arrangement has no doubt enhanced Hong Kong's status and position as an attractive arbitration seat. Following the implementation of the Interim Measures Arrangement, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards (the “**Supplemental Arrangement**”) came into full force on 19 May 2021. This amends the earlier arrangement in force since 1 February 2000. Among other key changes, Hong Kong and Mainland courts now have the power to order preservation or mandatory measures before or after an application for enforcement of an arbitral award. Alongside the Interim Measures Arrangement, this enables interim measures to be available both prior to and during an arbitration and to assist in enforcement after the conclusion of the arbitration proceedings.

TIP 3 | 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 of the defendant, the investor, as the plaintiff, may consider applying for ancillary discovery orders at any time before or after, or together with the application for a 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 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, 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 gather further evidence on, inter alia, whether the defendant's bank accounts still have funds and whether there have been any suspicious transactions amounting to proof of dissipation of the defendant's assets.

Norwich Pharmacal discovery orders are not only directed to third party banks. Accounting firms, estate agents and secretarial companies could also be subject to a discovery order. For instance, in a case where the plaintiff, who has fallen victim to a world-wide fraudulent scheme, only knows the names of the companies used by the fraudsters but not the fraudsters' 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 correctly identify the intended defendant. In a copyright infringement case, some international companies providing fee-paying encrypted programming services to subscribers discovered that several websites had uploaded pirated software infringing their intellectual property rights. They therefore applied to the Hong Kong Court for a Norwich Pharmacal discovery order against the website hosting service provider. The service provider was ordered to disclose the identities and related information of the owners of the websites as well as their members and subscribers who had taken part in the sale and purchase of the pirated hardware and software.

In practice, the plaintiff usually has to pay the legal costs of the disclosing third party unless the disclosing third party had been implicated in the crime or civil wrong or had sought to obstruct justice being done.

To minimise the risk of the defendant being alerted and taking steps to frustrate 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 related matters.

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



TIP 4 | ENFORCEMENT IN HONG KONG

Enforcing China Mainland 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 the 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 China and an Asia investment hub, judgment debtors often hold assets here, against which a judgment creditor would wish to enforce a foreign judgment. Hong Kong law provides for robust enforcement regimes to enforce non-Hong Kong judgments, whether they are made in China Mainland or other countries.

The Old Regime Prior to 29 January 2024

A non-Hong Kong judgment first has to be recognised by the Hong Kong Courts before it becomes enforceable in Hong Kong. Given that many Belt and Road investors are from China Mainland, inevitably, many disputes may fall under the jurisdiction of the China Mainland Courts. Under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (the “**MJREO**”), a China Mainland judgment made prior to 29 January 2024 can be registered in the Hong Kong Court if it is a final and conclusive judgment given by certain Courts in China Mainland (such as a Higher People’s Court), and these Courts have the exclusive jurisdiction to determine the dispute under the parties’ agreement, ordering payment of a monetary sum that is enforceable in China Mainland.

Once registered under the MJREO, a Mainland 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 Mainland and provides special procedures that are generally in line with the requirements laid down by the Hong Kong Courts for determining the finality and conclusiveness of a foreign judgment.

The time limit for making an application 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, fines or penalty. If the Mainland judgment does not meet the requirements of the MJREO, the judgment creditor may seek to enforce the judgment at common law.

The New Regime from 29 January 2024

On 18 January 2019, the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of China Mainland and of the Hong Kong Special Administrative Region was signed between China Mainland and Hong Kong SAR. This has been given effect in Hong Kong by the Mainland Judgments in Civil and Commercial Matters (Reciprocal Enforcement) Ordinance (Cap 645) (the “**RE Ordinance**”), which came into effect on 29 January 2024. The RE Ordinance will be applicable to judgment given on or after 29 January 2024. The RE Ordinance contains key enhancements which allows for a wider range of China Mainland judgments to be recognised by the Hong Kong Court:

- **No requirement for a contract:** Previously, under the MJREO, only judgments relating to commercial contracts could be enforced. Under the RE Ordinance, most civil / commercial judgments are covered, subject to specific exceptions (such as insolvency and matrimonial matters, which are covered under other regimes). There is no requirement for the judgment to be based on a contract.
- **Abolition of the exclusive jurisdiction requirement:** Under the RE Ordinance, there is no longer the requirement for the applicant to show that the China Mainland courts had exclusive jurisdiction under the relevant contract.
- **Enforcement of non-monetary judgments possible:** Under the MJREO, only monetary judgments could be registered. However, the new regime under the RE Ordinance allows for both monetary and non-monetary enforcement (including, for instance, injunctions and specific performance).
- **Wider range of eligible courts:** Decisions and judgments of certain lower Mainland courts are now registrable in Hong Kong under the RE Ordinance.

For judgments from countries other than China Mainland, they can either be recognised under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (the “**FJREO**”) or at common law. The 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, the Netherlands, New Zealand and Singapore. The applicant must apply to have the judgment registered within 6 years from 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 recognised at common law. A judgment creditor can use the foreign judgment as proof of a valid debt and sue upon it to obtain a Hong Kong judgment on the debt. Similarly, foreign judgments capable of being recognised in Hong Kong at 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 China Mainland 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 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 shows many instances where the Hong Kong Courts would not easily allow a party to challenge the enforceability of an award.

Given the role of China Mainland in the Belt and Road initiative, many parties may choose to resolve disputes before China Mainland arbitral tribunals. The Government of the Hong Kong SAR has entered into a bespoke agreement with the Chinese government (Arrangement Concerning Mutual Enforcement of Arbitral Awards between China Mainland and Hong Kong (the “**Arrangement**”)). This provides that certain arbitral awards made in China Mainland will be eligible for enforcement in Hong Kong. As mentioned in Tip 2, the new Supplemental Arrangement also amended the previous arrangement to permit the Hong Kong Court to enforce any arbitral award made under the China Mainland arbitration law (previously only awards made by certain designated Chinese arbitral institutions were eligible for enforcement under the Arrangement). The time limit for an applicant to apply to the Hong Kong Court for enforcement of a China Mainland arbitral award is 6 years.

As at the date of this article, Hong Kong is one of the over 170 contracting parties to the New York Convention. The New York Convention allows enforcement of arbitral awards between contracting parties. The Arbitration Ordinance provides a simple and straightforward process for enforcing arbitral awards made in other New York Convention contracting states in Hong Kong.

As for arbitral awards made in a jurisdiction which is not a party to the New York Convention, 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 the need to bring

fresh proceedings, which makes this method much quicker and cost-effective. 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 from 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 arbitral award is either registered under statute or is successfully sued upon under the common law process, the resulting recognised 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 should not be underestimated. Below are some of the more commonly used means of enforcement.

Garnishee proceedings

Garnishee proceedings are the ideal enforcement means against money sitting in a judgment 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 the debts to the judgment debtor, be obliged to pay such debts directly to the judgment creditor. Banks are commonly named as garnishees. In such cases, 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 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 judgment debtor must be the sole and beneficial owner of the debt. A debt due to the judgment 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 properties held by a person as trustee, and beneficially owned by the judgment debtor.

By obtaining a charging order over the judgment debtor's assets, a charge will be created on the judgment debtor's assets which prohibits them 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 subject to the charging order and the proceeds of such sale will 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.

KEY TAKEAWAYS

This publication outlines the asset preservation method and means of enforcing judgment / arbitral awards in Hong Kong available to participants of the Belt and Road initiative to protect their legal interests in Hong Kong. From our experience in these areas, early planning, careful analysis and formulation of practical strategies before commencing legal actions would significantly increase the chance of success in recovering losses in a dispute. You are strongly encouraged to seek early legal advice whenever a dispute may arise. In disputes involving multiple jurisdictions, an international law firm with experience handling disputes in different jurisdictions is preferred and may bring about tactical advantages.





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