

How to preserve assets controlled by Mainland Chinese entities or individuals within Hong Kong?

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The number of cross-jurisdictional disputes has rapidly increased recently, particularly within the context of the Greater Bay Area and Belt and Road Initiative. Many cross-jurisdictional disputes are resolved by arbitration to save the parties' time and cost. Hong Kong as the interface between China and the globe and being a pro-arbitration jurisdiction, many of the companies would choose Hong Kong as their arbitration seat while drafting the arbitration clause. Yet, some are concerned with whether the assets in Hong Kong can be preserved if the assets are controlled by Mainland Chinese entities or individuals. This article will explain the concept of asset preservation and the methods to preserve assets within Hong Kong.

What is asset preservation?

Asset preservation takes the form of an injunctive measure; it seeks to forbid the party to the proceedings from concealed, transferred or sold any assets under his/ her control. It may also maintain the value of the assets as some of the assets such as shares may be fluctuated. In other words, the goal of asset preservation is to ensure the effectiveness of the judgment or award by ensuring the defendant has sufficient assets to fulfil the judgment or arbitral award.

Jurisdiction of Hong Kong Court

Under section 21L(4) of the High Court Ordinance (Cap.4) of the laws of Hong Kong, if, whether before, or at, or after the hearing of any cause or matter, an application is made for an injunction to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the Court of First Instance ("CFI") thinks fit.

Under section 21M, the CFI's power to grant interlocutory injunctions extends to be in aid of arbitration and foreign proceedings.

The injunctive order may preserve the property in dispute even if the assets are controlled by Mainland Chinese entities or individuals. There are various measures in Hong Kong to attain the goal of asset preservation:-

a. Mareva Injunction

Mareva Injunction is also known as freezing order which originated from *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep. It serves as injunctive relief to forbid the disposal or transfer of assets so as to prevent the winning party gets an 'empty judgment'. Mareva Injunction is almost always urgent, and is made by way of *ex parte*. It is worthy to note that Mareva Injunction may freeze the asset in co-operation with a third party directly, such as the bank.

To obtain a Mareva Injunction, the applicant must show (1) a good arguable case against the respondent; (2) the respondent has assets within the jurisdiction; and (3) that there is a real risk of dissipation of assets which would defeat its judgment.

Practically, the court will also issue a disclosure order requesting the party to the injunction order to disclose the assets and reveal relevant documents to assist the court to come to a decision as to whether the Mareva Injunction would be granted.

There is also “worldwide” Mareva injunction which covers the respondent’s assets outside the jurisdiction. The applicant must show (1) sufficient assets outside jurisdiction to satisfy judgment but insufficient assets within the jurisdiction; (2) there is a real risk that the respondent may take steps to dispose of or conceal such foreign assets as to render the judgment nugatory by the time that it is given.

The application of Mareva Injunction has manifested in the case of *China Shanshui Cement Group Limited v Mi Jiangtian & others* [2018] HKCFI 1553. The plaintiffs consisted of a group of companies where 1st and 2nd plaintiffs companies incorporated and listed in Hong Kong. The 3rd plaintiff was a company that generates 80% of the assets of the group. Even though they were three separate companies, they shared the same shareholders as the 1st plaintiff was the parent company of the 2nd plaintiff while the 2nd plaintiff was the parent company of the 3rd plaintiff. On the other hand, the defendants were the directors of the 2nd plaintiff. In the case, the court had an adjourned hearing for the interlocutory application one of which was the continuation of the Mareva Injunction. As mentioned above, in applying for the Mareva Injunction, the burden lies with the applicant. The court held that the Mareva Injunction would be continuous as the defendants had misapplied and misappropriated the funds of the 3rd plaintiff which it revealed a real risk of dissipation of assets. Hence, the court extended the Mareva Injunction to safeguard the plaintiffs from empty judgment.

It is worthy to note that Mareva Injunction is an interlocutory application where the court will not consider the substantive issue that is outside the standard of granting the injunction. For instance, the court will not substantively comment on whether the applicant will succeed in his case. The standard is relatively low as the applicant is only required to show a good arguable case.

However, it does not mean that Mareva Injunction could be easily obtained. In *Zhang Caikui v Zhao Yongkui and others* [2020] HKCFI 1170, the plaintiff sought leave to serve the writ out of Hong Kong and on the other hand, the defendants challenge the jurisdiction of the Hong Kong courts. While in the defendants’ application to set aside the leave to serve out of Hong Kong, the judge commented that the scope of Mareva Injunction in Hong Kong was broader than the restraining order elsewhere. The court thought that a Mareva Injunction, even granted, would not serve any purpose as the assets would have been long gone already, given the fact that the writ has been issued some time ago.

b. Appointment of Receivers

The purpose of the receivers is to safeguard the assets so that it will not be disposed of. Under s. 21L(1) of the High Court Ordinance (Cap.4) of the laws of Hong Kong, the Court of First Instance may appoint a receiver in all cases should they think just or convenient. In reality, if there are receivers involved in a petition, the party can no longer deal with the assets freely since the receiver would become the manager of the assets of the party prior to the final judgment.

Conclusion

There are various ways in preserving assets within Hong Kong jurisdiction. Mareva Injunction has been a popular “weapon” in Hong Kong to preserve the party’s assets as it freezes the assets in a worldwide context. Once it could be obtained, it stops the defendant from making himself “judgment-proof”, i.e. getting rid of assets to prevent the plaintiff from getting money under judgment, even if the assets are controlled by the Mainland Chinese entities or individuals.