

Mechanism and Legal Practice of Cross-border Dispute Resolution Involving Mainland China and Hong Kong

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Chapter 2-Property Preservation

Litigants should be aware of the importance of property preservation during litigation or before litigation in order to ensure the future enforcement of winning judgments where enforcement difficulties are commonly faced by judgment creditors. Then a few issues may arise, i.e. how litigants in cross-border legal proceedings apply for property preservation in the Mainland; whether the parties concerned can still apply for preservation in the Mainland courts when the parties have entered into a choice of Hong Kong court agreement; alternatively, whether the parties concerned can apply for preservation in Hong Kong courts in aid of litigations in the Mainland. This chapter will analyze these issues briefly.

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1. Property preservation mechanism in Mainland China

Preservation in the Mainland usually include preservation prior to litigation and during litigation.

1.1 Preservation prior to litigation

Article 101 of the Civil Procedure Law of P.R. China (amended in 2017, the “Civil Procedure Law”) provides that “Where the lawful rights and interests of an interested party will be irreparably damaged if an application for preservation is not filed immediately under urgent circumstances, the interested party may, before instituting an action or applying for arbitration, apply to the people's court at the place where the property to be preserved is located or at the place of domicile of the respondent or a people's court having jurisdiction over the case, for taking preservative measures. The applicant shall provide security and, if the applicant fails to provide security, the people's court shall issue a ruling to dismiss the application.

After accepting an application, a people's court must issue a ruling within 48 hours; and if it rules to take a preservative measure, the measure shall be executed immediately.

Where the applicant fails to institute an action or apply for arbitration in accordance with law within 30 days after the people's court takes a preservative measure, the people's court shall lift the preservation.”

1.2 Preservation during litigation

Article 100 of the Civil Procedure Law provides “For a case where, for the conduct of a party or for other reasons, it may be difficult to execute a judgment or any other damage may be caused to a party, a people's court may, upon application of the opposing party, issue a ruling on preservation of the party's property, order certain conduct of the party or prohibit the party from certain conduct; and if no party applies, the people's court may,

when necessary, issue a ruling to take a preservative measure.

A people's court may order the applicant to provide security for taking a preservative measure and, if the applicant fails to provide security, shall issue a ruling to dismiss the application.

After accepting an application, a people's court must, if the circumstances are urgent, issue a ruling within 48 hours; and if it rules to take a preservative measure, the measure shall be executed immediately.”

1.3 Form of security

Usually applicants for property preservation in the Mainland shall provide security for the application. The security can be in the form of cash deposit or a letter of guarantee. Cash deposit refers to depositing a certain sum of money in an escrow account designated by court or the freezing of a certain sum of money in the applicant's bank account.

However, in practice in the Mainland few applicants provide cash security as this will occupy a large amount of money. Another form of security, i.e. a letter of guarantee, involves a third party acceptable to Mainland courts issuing a letter of guarantee as security for property preservation. Currently issuers or guarantors whose letters of guarantee are acceptable to Mainland courts are mainly guarantee companies, insurance companies and banks and reputable commercial companies, who are believed to have no solvency problem as far as the guarantee liability is concerned.

Nevertheless, in each specific case, the Mainland court will still scrutinize the letter of guarantee to be issued and the guarantor's eligibility. Some courts may even go so far as to accept only letters of guarantee issued by guarantors in its approved shortlist and require the production of all requisite documents. In practice Mainland courts normally demand insurance companies who act as guarantor for plaintiff's property preservation the

following documents:

No.	Documents to Furnish
1	Letter of Guarantee in the Form of Insurance Policy
2	Declaration of Good Faith
3	Certificate of Competence of Person in Charge
4	Power of Attorney
5	Copy of Identity Card of Legal Representative
6	Business License
7	License for Operating Insurance Business
8	Liability Insurance Premium Tariff for Litigation Property Preservation
9	Insurance Terms of Property Insurance Company and Premium Tariff for Record
10	Schedule of Policies of Litigation Property Preservation Insurance
11	Copy of Identity Card of Authorized Person
12	Employment Contract of Authorized Person
13	List of Insurance Companies Eligible to Be Guarantors For

	Judicial Preservation in Guangdong Province
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2. Whether the parties concerned can apply for preservation in Mainland courts if there is a choice of Hong Kong court agreement between them

The law in effect currently in the Mainland does not stipulate whether or not the parties concerned can apply for property preservation against the defendants' assets in the Mainland when there is a choice of Hong Kong court agreement between them or any party has filed the lawsuit in Hong Kong. In judicial practice in the Mainland, some Mainland courts took a negative stance, such as the court in Zhongfu Investment Group Co. Ltd. v. IBL Enterprise Co. Ltd. (case No.: (2019) Qiong Cai Bao No.5).

In this case, Clause 12 of the Share Transfer Agreement dated 28 August 2013 concluded among Zhongfu Investment Group Co. Ltd., IBL Enterprise Co. Ltd. and the latter's shareholders Zhuang Tiandao, Zhuang Dengyun, Zhuang Dengmin and Cai Peiqin stipulates that any dispute arising therefrom shall be resolved by amicable negotiation; if no settlement can be reached through negotiation, any party can file a lawsuit in the Hong Kong court where the share transfer is executed. Subsequently, the applicant Zhongfu Investment Group Co. Ltd. submitted an application for property preservation in the Mainland prior to litigation, requesting to freeze 10% shares held by the respondent in Hainan IBL Tourism Co. Ltd. The court which entertained the application, i.e. Hainan High Court, held that since the dispute arising in connection with the Share Transfer Agreement shall be under the jurisdiction of Hong Kong courts, the parties thereto have agreed to submit to the jurisdiction of Hong Kong courts to the exclusion of Mainland courts, so Mainland courts do not have jurisdiction to hear disputes related to the Share Transfer Agreement. Consequently, the court dismissed the applicant's application.

3. Whether the parties concerned can apply for preservation in Hong Kong courts

if disputes between them shall be resolved by litigation in Mainland courts

The judicial practice in Hong Kong in *Bank of China v. Yang Fang* (HCMP/1797/2015) may have some reference value to this issue.

In this case, the plaintiff sued the defendant and several others at Shandong Provincial Higher People's Court and Rizhao Intermediate People's Court. The plaintiff applied with Hong Court High Court for a Mareva Injunction to freeze the defendant's assets in Hong Kong, and for continuing the Injunction before its expiry in aid of the Mainland lawsuits. The defendant opposed and requested to discharge the Injunction based on the argument that the choice of court agreement is not an exclusive jurisdiction agreement and that the Mainland judgments to be rendered do not comply with the requirement of them being final and conclusive under Hong Kong common law, so eventually they cannot be recognized and enforced by Hong Kong court.

The Hong Kong High Court allowed the plaintiff's application, pointing out that it is not a matter for the court to decide whether or not the Mainland court judgments to be obtained will be final and unalterable, and the court only needs to decide whether such judgments will be final and conclusive under the Mainland Judgments (Reciprocal Enforcement) Ordinance.

This is a case of interlocutory proceedings involving whether a Mainland plaintiff can seek a Mareva injunction to freeze the defendant's assets in Hong Kong pursuant to section 21M of the High Court Ordinance of Hong Kong. The case cited above confirms expressly that parties who have taken legal proceedings in the Mainland can apply for a Mareva injunction by virtue of the High Court Ordinance of Hong Kong to protect their rights and interests.

In summary, property preservation mechanism, as a measure that ensures the effective enforcement of judgments, plays an essential role in cross-border dispute resolution. As

such, commercial parties doing business in the Mainland and Hong Kong are suggested to understand property preservation mechanism respectively in the Mainland and Hong Kong as well as the judicial practice in mutual preservation involving both sides in order to stay proactive in future cross-border dispute resolution.