

KEY TRENDS IN CROSS-BORDER ASSET RECOVERY

FALL CONFERENCE 2022 | 19 OCTOBER 2022





Common asset recovery approach

1. Gather information, undertake enquiries and investigations
2. Identify jurisdictions of interest
3. ****Reach for support of local professionals that can provide advice on strategy and legal steps****
4. Secure assets
5. Maximise asset realisations
6. Return to creditors

Setting the scene

Fraud uncovered



Victims



Bank accounts



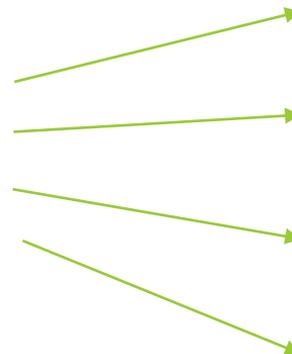
Companies



Properties



Assets



UK

Cayman

Switzerland

Brazil

METHODS AVAILABLE IN EACH JURISDICTION



UK JUDICIAL

1. STRATEGY
2. OPTIONS

Provisional Liquidations	<ul style="list-style-type: none">- Section 135 of the Insolvency Act 1986- Part 7 Chapter 5 of The Insolvency (England and Wales) Rules 2016
Liquidations	<ul style="list-style-type: none">- Part IV of the Insolvency Act 1986- Parts 5 to 7 of The Insolvency (England and Wales) Rules 2016
Receiverships	<ul style="list-style-type: none">- Court Appointed Receiverships CPR 69- Fixed Charge/LPA Receivers
Personal Bankruptcy	<ul style="list-style-type: none">- Part IX of the Insolvency Act 1986- Part 10 of The Insolvency (England and Wales) Rules 2016
Other	Freezing injunctions and Norwich Pharmacal Orders

UK JUDICIAL CONT.



- Non-compliance with the provision of books and records
- Application to Court for examinations and compelling information to be provided by directors, bankrupts and other persons
- Challenging antecedent transactions
- Bringing claims and legal actions, for example:
 - Transactions at undervalue
 - Preferences
 - Claims against directors, including misfeasance
 - Fraudulent and wrongful trading
 - Transactions defrauding creditors

UK NON-JUDICIAL

- Open-source research
- Companies House
- Land Registry
- Other databases Gather books and records
- Interviews of directors, bankrupts and other persons





CAYMAN ISLANDS JUDICIAL

- Disclosure
- Subpoena
- NPO
- Request for Assistance

- Insolvency
- Freezing Order

- Chapter 15 US/ Canada
- Swiss Mini Bankruptcy



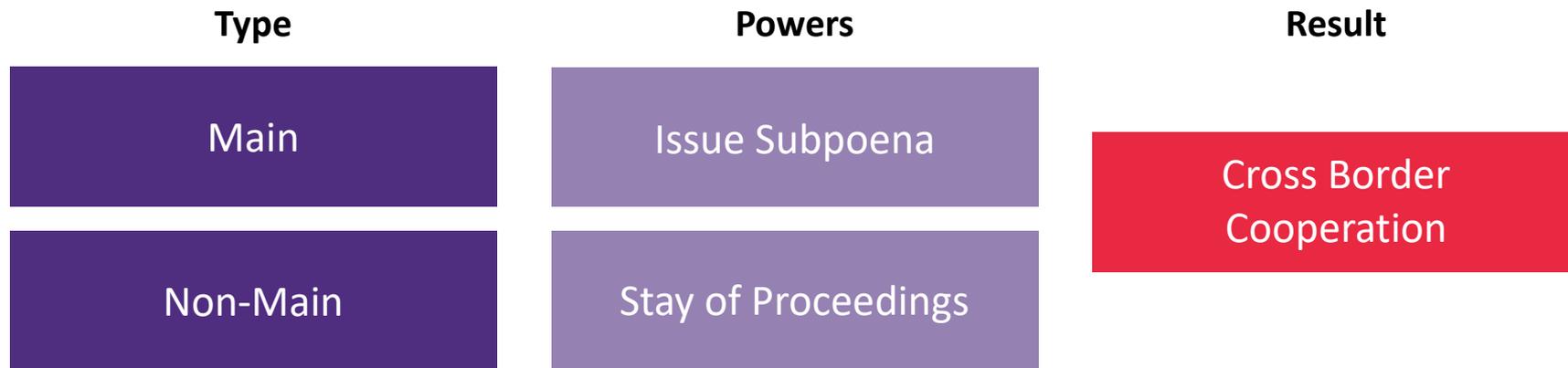
Common Tools

Cayman Insolvency Appointment

Fiduciary (Court Appointed)	<ul style="list-style-type: none">• Cayman court appoints over Trust Company, Individual
Powers	<ul style="list-style-type: none">• Secure and protect• Bring Litigation• Information gathering• Powers to examine directors• Xxx parties
What They Do	<ul style="list-style-type: none">• Carry out Forensic Investigations
Result	<ul style="list-style-type: none">• Find Assets and gain Control

Common Tools Recognition

Chapter 15 – need to be able act on foreign soil (where the assets are)



Common Tools

Cayman Freezing Order

Make an Application

Features include:

1. Good arguable case
2. Assets in the jurisdiction
3. Risk of dissipation

Potential Output

- Court may find 'just and convenient'
- Granted over world-wide assets
- Useful for secured creditor
- Section 11A of Amendment Law

Common Tools

Enforcement of Foreign Judgements in Cayman

Judgement against a Cayman company – having it recognised and enforced in Cayman

Criteria

Court that issued
the judgement had
jurisdiction over
Cayman Entity

Foreign Judgement
is final & conclusive

Can Recognise &
Enforce in Cayman

No defence to
enforcement



Letters

- Mareva Letters
- XXX

Forensic Tools

- Social Media
- XXX

Other Techniques

- Conventional Investigative Techniques

CAYMAN ISLANDS NON-JUDICIAL



BRAZIL JUDICIAL



1. *Cautelar de Produção Antecipada de Provas* - Ordinary civil discovery is available (such as preliminary injunction for discovery, that serves as a type as pre-“main case” filing, although it also is judicial, and the evidence is to be produced before the court and limited to what was asked and granted by the judge). Here, both public and financial (secrecy, under Brazilian law) records could be accessed – problem is convincing the judge to allow it and its extension. A solid fraud suspicion (Brazilian legislative perspective) has to be demonstrated.
2. *Nomeação de Administrador Judicial* - Local liquidator’s appointment – as an insolvency procedure is established, the liquidator is entitled to file for discovery (either in a public, secrecy or *ex parte* secrecy filing, depending on the case), to gather information upon the debtor (and even to consolidate information for a piercing of the corporate veil measure) and reunite assets belonging to the Bankruptcy Estate to pay creditors;
3. Foreign liquidator’s appointment recognition – as of January 2021, UNCITRAL Model Law in Cross-Border Insolvency was integrated into our legal system. It’s redaction is quite the same as the model law.

Previous to that, all foreign decisions were ought to submission for the Superior Court of Justice, where its content would have been analyzed (obedience to Brazilian sovereignty). Over the years, even the simplest recognitions were denied, bringing a sense of un retribution as Brazilian Liquidators have been other jurisdictions for recognition, at least since 2009.

Up until now, there has only been one pledge for recognition on foreign liquidator here: PROSAFE SE (Singapore). It’s been granted under the legislative alteration brought in 2021.

BRAZIL NON-JUDICIAL



- All real estate and corporate registry are of public record (a fee might be applicable, but anyone can access it)
- Start understanding the extent of an Economical Group



SWITZERLAND NON-JUDICIAL



- Federal Trade registry www.zefix.ch but shareholders of LLPs not publicly available – abolition of anonymous bearer shares tough
- 26 cantonal land registries
- Thousands of communal registries of inhabitants
- Official gazettes (cantonal and federal)
- Regulations on private investigations → cautious with Swiss Blocking Statute

SWITZERLAND JUDICIAL



1. IPs in their mission on liquidation of the estate
 - a. Banking secrecy does not apply with respect to the assets of the debtor
 - b. Right and duty to freeze assets of the insolvent company
 - c. Power to request information to third parties holding assets or against whom there might be claims [pre-trial collection of evidence]

Can bring civil claims and represent the company before law enforcement authorities

SWITZERLAND JUDICIAL



2. IPs as civil claimants

- a. Civil law country so no discovery and duty to prove each fact in one go at first submissions – before instruction of the case
- b. ➔ Criminal process as civil tool

SWITZERLAND JUDICIAL



3. IPs as criminal plaintiffs → the Swiss “nuclear weapon”
 - a. No banking secrecy
 - b. Access to the file and right to use criminal evidence
 - c. IPs can represent the insolvent company that is the victim of a crime without prior recognition of the insolvency decree
 - d. IPs can bring civil claims (for torts) in criminal proceedings after recognition and can then be active parties in the criminal proceedings and be remitted with (a part of) forfeited assets in order to compensate the creditors in the main estate
 - e. Criminal settlements

CASE EXAMPLES



UK



Project S

- Appointment over UK entities involved in a fraud against HMRC (UK tax authorities) with funds traced to Switzerland, then British Virgin Island and properties in Italy and Florida.



Cayman Islands



1. **\$40m arbitral award - “Catch me if you can”** – Judgement enforcement in Cayman Islands and identification of assets and recovery to stakeholders
2. **UK Receivership** – Individual perpetrated a fraud against 16 individuals and sentenced to 14 years to prison. Freezing assets from around the world.
3. **SICL** - One of the highest profiled and most complicated insolvency cases in recent years, involving largest Ponzi scheme in recent history with estimated funds churn of over US\$330 billion and direct creditor claims of US\$4 billion.



Brazil

Banco Santos Case. A Brazilian Bank's liquidation, with ramifications in Switzerland (Antonia worked on this), US (Nyana Miller worked on this), Cayman, BVI, UK, Panama and Uruguay.

Challenge here was that we had to seek the Federal Criminal Procedure (Brazil) authorization to entitle the Liquidator (Civil matter, under Brazilian Law) to: (i) grant the Liquidation all assets undertaken by the Criminal offense; (ii) authorize the Liquidator to seize assets belonging to a Cayman Trust beneficially owned by Main Fraudster's eldest son (created with moneys diverted from the bank), located in Switzerland; and (iii) retain/sell art pieces belonging to Main Fraudster's shell companies established in the BVI and Panama, identified in art galleries in the US and UK.



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