# Following The Money

## Trends in cross-border asset recovery

Virtual Round Table Series
Insolvency Working Group 2018

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## Trends in cross-border asset recovery

Technology and globalisation have proved extremely effective at improving cross-border investment during the last decade. Trade barriers between countries and continents have been lowered everywhere, allowing money to flow freely across borders in search of profitable investments.

The result is that most companies with an international outlook, even those of a relatively small size, have assets located in multiple jurisdictions. On the face of it, this seems a positive development, but it does throw up interesting complications, particularly where insolvency or bankruptcy is concerned.

Enforcing a judgment against a debtor can be difficult enough in a home country, but when it encompasses assets in foreign jurisdictions the situation can become complicated. Having the judgment accepted by a foreign court is crucial, and there are a number of initiatives designed to make that acceptance easier.

The UNCITRAL Model Law on Cross Border Insolvency seeks to streamline acceptance of foreign judgments between the countries who have signed up to its framework. In practice few jurisdictions around the world have signed up to it, but it is recognised as a global standard.

Elsewhere, the European Union has the EC Regulation on Insolvency Proceedings, which requires each member state to recognise insolvency proceedings commenced in another member state. This, coupled with the Judgment Regulation facilitating collection of debts, makes it much easier to initiate successful cross-border asset recovery.

In the absence of these overarching frameworks, recovery can be more difficult, however most jurisdictions will accept judgments from recognised foreign courts as long as a number of criteria are met. Many common law jurisdictions have reciprocal legislation allowing acceptance of foreign judgments.

Once a judgment is acknowledged by a foreign court, creditors and their appointed representatives will have full access to the recovery tools available in the jurisdiction in question. Failure to have a judgment recognised will always make asset recovery more difficult and could, in countries which follow a strict principle of territoriality, make it impossible to recover funds.

In the following discussion, we will hear from insolvency and bankruptcy lawyers in six different jurisdictions around the world. Each are expert in helping foreign creditors trace and recover assets in their country, and will highlight the full range of tools available to achieve this. We will discuss remedies and strategies used to secure and realise assets, assess what a typical asset recovery investigation looks like, and ask whether it is possible to keep the process secret from targeted debtors. We will look at the application of various legal structures such as Norwich Pharmacal orders, Mareva injunctions and Anton Piller orders.

Finally, we will review the key trends in cross-border asset recovery observed by our experts during the last 12 months.

## The View from IR

### Tom Wheeler

MANAGING DIRECTOR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

CAYMAN ISLANDS

## Kyle Broadhurst

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Kyle is a Director and Head of Litigation of Broadhurst LLC an offshore corporate and litigation boutique operating in and from the Cayman Islands. He is a respected and leading advocate in complex civil litigation. He represents plaintiffs and defendants in a wide variety of disputes including bankruptcy and insolvency, negligence and fraud claims, construction and property disputes. He also maintains an active commercial and general practice providing advice with respect to company formation and management, estates and trust, real estate (including lending, security and enforcement), and strata law. Kyle has acted in numerous significant disputes at all levels of court and has appeared in over thirty reported cases.

Kyle trained as a barrister at the Inns of Court School of Law in London, England and was called to the bar of England & Wales in 2000. He commenced his law practice in the Cayman Islands in 2001.

ENGLAND

## David Foster

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David is the Head of Dispute Resolution at Barlow Robbins, a leading UK law firm. His areas of practice include professional negligence, commercial litigation, insolvency, property disputes and inheritance disputes.

David regularly handles cases in the higher courts for clients of all sizes, including banks, insurers and educational institutions. He has handled more than 200 mediations across the UK with a success rate of over 90%.

He has wide mediation experience, lecturing on mediation in Kenya and is a member of the Commercial Litigation Association, the Professional Negligence Lawyers' Association and the International Bar Association.

He is also a member of the standing conference of Mediation Advocates and a mediator member of a number of mediation groups including the ADR Group, Expedite Resolution and Law South Mediators. He is actively involved in a number of charities and organisations, including as trustee.

A recent independent guide to the UK Legal Profession named him as a 'very good lawyer' who 'gets down to the heart of an issue'. Karen Schuman, Counsel of 1 Chancery Lane said that David has a 'calm authority' and can 'find the solution' in a difficult case.

US – WASHINGTON DC

## Jeffrey Liesemer

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Jeff focuses his practice on complex business reorganizations, cross-border insolvencies, creditors' rights, and commercial litigation. He advocates for his clients at the trial and appellate levels of both state and federal courts.

Jeff has broad experience advising and representing business debtors, secured and unsecured creditors, creditors' committees, shopping-center landlords, and other interested parties in large chapter 11 reorganisations and liquidations.

He has also defended clients in avoidance or "claw-back" proceedings to recover alleged preferential transfers and fraudulent conveyances. Jeffrey has been involved in a number of notable bankruptcies throughout the United States, including W.R. Grace & Co., Pittsburgh Corning, G-I Holdings (formerly GAF Corporation), Chemtura Corporation, Garlock Sealing Technologies, Durabla Manufacturing, and Essar Steel.

Jeff earned his Bachelor of Arts summa cum laude from Bucknell University and his Juris Doctor magna cum laude from the University of Pittsburgh School of Law, where he was a member of the Order of the Coif and managing editor of the University of Pittsburgh Law Review.

SWITZERLAND

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Armand Brand advises debtors and creditors in all aspects of restructuring and insolvency cases as well as in national and international enforcement law.

He acts as liquidator and bankruptcy administrator (as well as investigating agent) for the Swiss Financial Market Supervisory Authority FINMA and as commissioner for companies undergoing debt restructuring proceedings (composition with creditors).

He acted as associate and partner of a medium-sized corporate law firm in Zurich for eight years and has been a partner and head of legal since the beginning of 2017. Treuco Ltd provides legal, tax and corporate services to national and international clients.

CANADA

## S. Fay Sulley

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Fay is a partner at Torkin Manes, and head of the Banking, Finance and Insolvency Group. She acts extensively for institutional and private lenders and borrowers in a wide range of financing transactions, derivative products, factoring arrangements, asset securitisations and securitised loans.

She advises banks with respect to regulatory and other issues that may arise under the Bank Act, or other similar legislation, including a broad range of issues of concern, such as cost of borrowing disclosures, privacy, identification of clients, money laundering, electronic banking and other day-to-day issues affecting banks and other financial institutions.

Fay is involved in corporate restructurings, insolvency and related litigation

matters of all sizes. She offers expertise under the Bankruptcy and Insolvency Act, Companies Creditors Arrangement Act, Personal Property Securities Act, and Financial Administration Act.

Fay works closely with other members of her firm's Banking, Finance and Insolvency Group to assure clients that someone is always available to provide the advice they need, when they need it.

AUSTRALIA

## James Conomos

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James was admitted as a solicitor in 1987, having completed a year in 1986 as associate to the then Chief Justice of the Supreme Court of Queensland, The Honourable DG Andrews. In his early years, he gained experience in a wide range of areas but quickly settled into litigation. By 1990, he was established as a commercial litigation lawyer with a keen interest in insolvency matters. He established James Conomos Lawyers on 1 July 1992 as a specialist practice in commercial litigation and insolvency.

Since 1990, he has practised as a solicitor primarily in commercial litigation, dispute resolution and insolvency matters. James has acted in and advised various parties in many insolvency administrations, both corporate and individual. He has advised a range of clients including financiers, insolvency practitioners, creditors and regulators.

James has also acted in hundreds of litigious matters, in a range of disputes from land valuation, contract disputes, breaches of fiduciary duties, fraud claims, building disputes and debt claims. He has acted in all courts throughout Australia, and represented his clients in many cases, some of which have changed the law.

QUESTION 1

# What remedies do you use to identify, secure and realise assets in your jurisdiction, in order to maximise returns to creditors? What are the advantages and disadvantages of each?

England – David Foster (DF) The obvious remedy is that one can put a debtor into liquidation, which is particularly advantageous if there is recalcitrance and assets.

The other things to look at are freezing orders, which operate to preserve assets on a UK or worldwide basis. They don't provide security, but they do preserve. The courts look at what is just and convenient, using real discretion in their decisions, so it's not a foregone conclusion that one will be successful in obtaining an order.

Other than that, we can use Law of Property Act (LPA) receiverships over property, or general administrative receiverships where a creditor holds security, possibly a floating charge. Under those circumstances they are able to take custody of the charged assets, which might involve controlling a company while assets are disposed of.

S. Fay Sulley – Canada (SFS) When a client has a judgment against a Canadian entity granted in a foreign jurisdiction, they have to get a court to recognise that judgment. In Ontario, we have something called reciprocal legislation, which means that a judgment obtained in a jurisdiction such as the UK, US or Australia can be registered in Canada.

Once it is registered, we go through a similar process to bring an injunction preventing the dissipation of assets. We would need to show there was probable cause that some assets could go missing, in order to ask for an asset freeze. There are very high tests to achieve these orders, so you would need some evidence to show the assets were at risk if not frozen.

Once this is done, we can bring an application to have a receiver appointed to sell the assets. We don't use confiscation or forfeiture, although we can get monitoring orders.

Once a receiver or monitor is appointed the rights of directors to take action are normally restricted.

Cayman Islands – Kyle Broadhurst (KB) The Cayman Islands is a Commonwealth jurisdiction so the remedies that are available here are similar to those available in England and Canada.

If the debtor is a Cayman company an application could be made to place the company into liquidation. There are different grounds upon which such an application can be brought but a common basis is where it can be established that the company is unable to pay its debts. Upon a winding up order being made the company would be under the control of Court appointed liquidators who are obligated to investigate the affairs of the company, realize its assets and apply those assets in satisfaction of the company's liabilities.

Freezing orders are also available in Cayman if you can establish a good arguable case and a real risk that absent an injunction being granted the defendant will remove or dissipate the assets. These applications are often obtained on an urgent basis, without notice to the defendant, in order to ensure that the resulting order is effective. It is common to also obtain as part of the freezing order an order requiring the defendant to provide an affidavit disclosing all of their assets.

Turning specifically to enforcement, once assets have been identified there are a number of different enforcement options available including the appointment of a receiver, garnishee proceedings, and charging orders.

Switzerland – Armand Brand (AB) The remedies we have in Switzerland to secure assets are similar, but we distinguish between monetary and non-monetary claims. With monetary claims a creditor can apply for an attachment. An attachment order will be granted without the debtor being heard (the debtor, however, can object against the attachment order subsequently). The attachment order must be validated by immediate commencement of debt enforcement proceedings (unless the creditor has already obtained a ruling in his favour). Statutory requirements for the attachment need to be met, and the assets need to be located in Switzerland and owned by the debtor.

It's the creditor's obligation to define those assets, because fishing expeditions in Switzerland are not allowed, so you need a good understanding of what assets are available.

We also have interim measures for non-monetary claims, including blocking of the land register and commercial register in order to avoid the transfer of property rights.

James Conomos pictured at the 2017 IR Annual Conference in Berlin

The concept of receivership is under restrictive circumstances also applied in Switzerland.

It is worthwhile mentioning, that in Switzerland debt enforcement proceedings can be initiated at any time (even before having obtained a court judgement). In case a creditor is in possession of a debt acknowledge from his debtor the realisation of the debtor's asset can be achieved in a timely manner.

Australia – James Conomos (JC) If you have a foreign judgment to register in Australia, its much like Canada. You can apply to the court to register it and then, assuming it's accepted, you can look towards implementing freezing orders.

You require a good arguable case with established Australian assets at risk of dissipation. The test is reasonably high, but you can get worldwide restraining orders, although they will have to be heard by all parties at some stage.

For unsecured assets we can use liquidations, and if assets are difficult to find, you can bankrupt parties and use the UNCITRAL model law, depending on where the main jurisdictions of influence are.

We have seen a significant rise in the Australian Federal courts of people trying to seize assets in other countries using UNCITRAL model law. This is particularly true for assets in places like the US, UK, Europe and Canada.

We don't recognise the concepts of confiscation or forfeiture, unless the assets are subject to restraint due to serious offences under Government legislation.

Australia has no form of repatriation or monitoring of assets, other than the usual receiverships or liquidations. The concept of replacing directors isn't something that has been used in Australia yet, but it has been talked about.

US – Jeffrey Liesemer (JL) Secured creditors in the US holding liens or charges, can exercise their rights against collateral to recover the debt owed to them.

Creditors with unpaid, unsecured debt must often obtain a judgment against the debtor and then enforce the judgment through, for example, levy and sale of the debtor's non-exempt assets or garnishment of bank accounts or wages. To aid execution of a judgment against a company, the appointment of a receiver to take possession of the company's assets and financial records can be a potentially valuable tool.

Each state has its own statutes or rules for enforcing judgments, and federal courts use the statutes or rules of the state in which they sit. In addition, before a judgment rendered in a foreign country can be enforced in a US state, recognition of that judgment must be obtained, and the various states have their own statutes or decisional law governing recognition. Unfortunately, the US is not a party to any international convention providing for the recognition of foreign judgments.

Even without a judgment, creditors have remedies to secure or recover assets. These include provisional remedies, such as prejudgment attachment of assets. In addition, most fraudulent transfer laws in the US permit creditors without judgments to pursue avoidance and recovery of transferred assets.

With respect to foreign insolvency proceedings, the US has enacted Chapter 15 of the Bankruptcy Code, which is based on the UNCITRAL model law and provides for recognition of those proceedings. Such recognition can pave the way for foreign representatives to secure and sell assets sited in the US for the benefit of creditors. Apart from Chapter 15, creditors should weigh the pros and cons of filing an involuntary bankruptcy petition against the debtor so that a bankruptcy trustee can take possession of the debtor's assets and seek to unwind voidable transactions. Usually, the filing of an involuntary petition requires at least three petitioning creditors, whose claims are not subject to a bona fide dispute, or the foreign representative of an estate in a foreign insolvency proceeding.

QUESTION 2

# What does a typical asset recovery investigation look like in your jurisdiction? What discovery tools are at your disposal to assess a judgment debtor?

Canada – SFS Once you have a foreign judgment recognised in Canada, the full list of discovery tools will be made available. Debtors, directors and officers can be called in for examination for discovery and lawyers usually negotiate a time and place, although you can apply for a subpoena.

It is possible to undertake examinations with officers located overseas, by video link if necessary. We have had court proceedings where the judge takes part in the video conference, which is an example of the judicial system making it easier for us to question people. Examinations can be done by judgment creditors if there is a receivership in place, or a bankruptcy trustee.

As part of the review we can analyse all payments made by the company under investigation in the 12 months prior to the insolvency, judgment or improper act. Where we find payments to related persons, the courts will pursue them as improper, whether they are fraudulent conveyances, preference payments or transactions under value.

We do have ways of going after money and repatriating it to the company for distribution to creditors. We can ask for orders giving full access to banking records, and we have reciprocal legislation with many countries, especially the US, allowing foreign courts to assist us in locating assets outside Canada. We have a team of forensic professionals in our network, who will travel all over the world looking for hidden assets.

As far as criminal or prosecutorial investigations are concerned, the police won't voluntarily get involved in a normal insolvency, unless there is a suspicion of money laundering, or a situation where multiple creditors have been defrauded. Ordinarily, trustees are on their own and it is unlikely there will be any prosecutions.

US – JL Information gathering is often critical to an effective asset recovery effort.

A typical asset recovery investigation will involve some combination of searching the internet and public records to obtain documents, and live testimony from the debtor, its agents or affiliates, or third parties.

Many states in the US have some form of post-judgment procedure for obtaining information on collectible assets. For example, my home state of Virginia has a form of post-judgment discovery known as debtor interrogatories, in which a judgment debtor is required to appear before a court or commissioner in chancery to answer questions on the type, amount, and location of all assets in which the judgment debtor has an interest.

On a more global level, non-US tribunals or litigants can ask a federal district court to order a person within the district to provide documents or testimony in aid of a proceeding before a foreign or international tribunal. The Hague Evidence Convention and a mutual legal assistance treaty to which the US is a party, can also serve as potential channels for obtaining discovery. With respect to foreign insolvency proceedings, Chapter 15 of the US Bankruptcy Code enables foreign representatives, on recognition of the foreign proceeding, to examine witnesses and obtain information about the debtor's assets and affairs. Thus, recognition through Chapter 15 can offer a potentially valuable tool for tracing assets.

Switzerland – AB It depends on what stage of the process you have reached, and whether you have already initiated bankruptcy proceedings.

Starting with recognition of foreign judgments, you would initially have to distinguish whether the judgment came from somewhere within the European Community. In such a case the recognition process is pretty straightforward and there are only limited (mainly formal) objections a debtor can raise against the recognition. The merits of the ruling won't be reviewed by the Swiss courts.

If the judgment was obtained outside the European Community, then Swiss private international law applies. In any event, if the judgment has been obtained through normal formal processes there are only limited objections that can be made by the Swiss courts.

After a judgment is recognised, you can enforce it. With a monetary claim, we start with debt collection proceedings, conducted by official authorities, who will look for any assets the debtor has located in Switzerland. The debtor is under obligation to provide information about their assets, which can then be seized and used for enforcement of the monetary claim.

The burden of evidence collection falls on the creditor in a civil claim. A useful method of shifting the burden of evidence collection, is to put criminal proceedings at the centre of your claim. That can help to source documents, particularly where

Swiss banking secrecy is concerned, since it can only be lifted under a criminal investigation.

Pre-trial discovery is alien to Swiss civil procedure. The Swiss Code of Civil Procedure allows the taking of evidence by the court before the initiation of legal proceedings exclusively in cases where evidence is at risk, where the applicant has a justified interest or the law grants such right.

In regard to foreign insolvency proceedings, Switzerland follows the principle of territoriality. A foreign bankruptcy administrator cannot go after assets in Switzerland; they have to initiate auxiliary proceedings in Switzerland through recognition the foreign bankruptcy decree. Such auxiliary proceedings are conducted by an official bankruptcy administrator (often public officers).

Cayman Islands – KB As Armand said, this does depend on where you are in the process.

With respect to foreign judgments, Cayman does have specific legislation for foreign judgment recognition, but a unique wrinkle is that Australia is the only country currently to which the legislation has been extended. It is, however, possible to have other foreign judgments recognized in accordance with common law principles. This is done through legal proceedings commenced based upon the foreign judgment. In order to be enforceable, the judgment must meet certain criteria, including that it is final and conclusive and has been made by a court of competent jurisdiction.

Foreign insolvency proceedings are also capable of recognition in Cayman, but do require a separate application to the Cayman courts. Once recognized a foreign liquidator can seek other useful relief such as orders requiring the disclosure of assets, provision of documentation, examination of debtors or even the turnover of assets.

Leaving aside insolvency proceedings, information can be obtained through a number of different methods. An order can be obtained requiring the debtor to produce their books and records and to submit to examination with respect to their assets. Other methods to obtain information from third parties include Norwich Pharmacal orders (a disclosure order against a third party involved in the wrongdoing) and Banker Trust orders (where there is a prima facie case of fraud and information is required to recover, trace or preserve assets).

The Cayman Court also regularly grants letters of request from overseas courts. This requires the applicant to demonstrate that evidence sought to be obtained is in the Cayman Islands, the application is made pursuant to a request issued by a Court or tribunal exercising jurisdiction outside the Cayman Islands, and the evidence to which the application relates will be used in active or contemplated proceedings before the requesting Court.

Australia – JC We have a piece of legislation in Australia that allows us to recognise foreign judgments from numerous jurisdictions. There is a process that must be followed, but once you have the judgment there are different ways to obtain the debt in question.

Oral examination in court can be used to investigate debtors or facilitate individual bankruptcy, or winding up orders. Liquidators and trustees have extensive powers to procure documents from parties under investigation and their connected parties. This can extend beyond the borders of Australia, via letters introduced to foreign courts asking for assistance.

We can also apply for Anton Piller orders, if we suspect parties are trying to destroy or hide documents. They allow us to search premises and seize evidence without prior warning, and are a useful tool if there is a real risk that assets or documents related to the case are about to move offshore.

There is also the issue of unreasonable director-related transactions, as defined under the Corporations Act 2001. These transactions are voidable under insolvency proceedings if proven to be made for the benefit of a director.

Regulators also have the capacity to pursue individuals under breaches of the insolvency law, if their misconduct is serious involving large scale enterprises. This would involve issues of a quasi-criminal nature emanating from significant debt claims

England – DF Assessing a judgment debtor will vary on whether the judgment is from the EU, the Commonwealth or elsewhere.

The courts generally grant freezing orders in aid of proceedings overseas. That can be anywhere in the world, but it will only be done where they feel it's expedient, since case law suggests a cautious approach. Once we have the judgment then examination of the debtor by the courts can begin. Liquidators, trustees and regulators have similar powers, as already discussed.

As far as criminal prosecutions are concerned, the police and prosecution authorities have a real squeeze on costs for investigations, so if you have someone who has breached criminal law, it's often a good idea to get a freezing order to stop assets from leaving the jurisdiction. We would then have a conversation with the police fraud team, who usually allow us to collect evidence, without treading on their toes. The threat of a private prosecution can work wonders, because no director wants to be up in a criminal court.

We can get orders for accessing banking records; and then for non-parties to the investigation, we have the option of Norwich Pharmacal orders as well.

We do have to be mindful of data protection laws though in all these areas. People are more sensitive than ever before about this, and we have got some European regulation coming in this year which will tighten things up even more, so that's an issue we have to consider.

QUESTION 3

## Are you able to keep the discovery process secret from the target debtor you are attempting to collect from? If so how?

Switzerland – AB As already set out before, there is no pre-trial discovery process in Switzerland. In civil proceedings it's up to the creditor to collect the evidence to prove his claim. Before the start of proceedings, a creditor can apply to the court to take the evidence and evaluate the chances of a claim succeeding.

Under such circumstances the target debtor would become aware of potential claims brought forward, which is the main difficulty here in Switzerland. This is also one of the main reasons why Swiss creditors try to establish cause for a criminal complaint when going after debtors, and have the prosecutor collect information before the potential debtor becomes aware of it.

Cayman Islands – KB As I referenced earlier it is possible to obtain a freezing order without notice to the defendant and to also obtain at the same time an order requiring disclosure of assets. The freezing order is also binding upon third parties and accordingly anyone who knows of the order and assists the defendant to breach it will be at risk of being held in contempt of Court.

Where there is a prima facie case of fraud and disclosure is necessary from a third party to recover, trace or preserve assets a Bankers Trust order can be obtained. Another option for third party disclosure is a Norwich Pharmacal order, which requires a third party involved in the wrongdoing to turnover information. These orders can be coupled with a gagging order which the Cayman Court has an inherent jurisdiction to grant in order to restrain a third party from communicating with the intended defendant about the disclosure orders.

Canada – SFS You can't get information from third parties without a court order, or the consent of the debtor.

We would go to court under a Mareva Injunction to temporarily freeze assets and obtain a non-dissipation order. We would then ask the courts to issue a gag order.

In most of our cases in Canada, a court would not be willing to grant those types of order, even though they have the same inherent jurisdiction in Canada as they do in other common law countries.

You would really need to show that a fraud had occurred, or was about to occur, to get a court order. We could get a Mareva injunction freezing assets and a non-dissipation order ex parte, but the debtor would have the chance to come back to court to ask why their assets had been frozen.

Once the debtor is aware of the proceedings, they would become fully transparent, and it's very hard to obtain and maintain a gag order in Canada. It is something that our Royal Canadian Mounted Police (RCMP) can do at a judgment debtor stage, but, absent a meaningful fraud on a class of creditors, it would be very difficult to achieve.

Transfer or concealment of targeted assets doesn't happen as much as you would think, because most directors don't want to be a party to these transactions. Even if the RCMP don't charge them, if they are seen to be breaching a court order by transferring assets, the commercial courts can issue orders for contempt. I have seen people in ordinary proceedings thrown into jail until they correct their contempt.

There are new rules that came into place about ten years ago concerning the destruction of documents. Once you are aware that your client is party to litigation proceedings, you have an obligation to preserve all documents, including electronic records. We always advise clients to preserve electronic records, because deleted documents can be discovered. This is taken very seriously by the courts.

The most significant problem in these cases, is often how much a client is willing to pay to chase down dollars. With regular cases involving judgments up to five million dollars, our clients will often say they don't want to spend any more money than is necessary.

England – DF I agree with a lot of what Fay says. I have taken over a number of cases from other lawyers who have been on a big discovery exercise, motivated by the criminal behaviour of a debtor. The amount spent is often disproportionate to the amount the company has lost, and you end up chasing people who are not worth chasing.

We can use Mareva injunctions and Norwich Pharmacal orders, but the law is increasingly geared towards protecting defendants. There are various safeguards required by law, for instance an independent solicitor is required to be present on site when you are taking documents, in order to explain the details of the order to the recalcitrant party (defendant).

One has to be fairly cautious then, and the main technique in the UK is to secure an injunction. On the back of that, there are all sorts of orders for disclosure that can be applied for.

US – JL By and large the fruits of an investigation or discovery need not be filed with the court and displayed on the

public record, unless some or all of this information is introduced as evidence at trial or in connection with a motion filed with the court.

But, even then, there may be grounds for shielding the evidence from public view by placing it under seal. In the US, issues surrounding secret discovery tend to arise not from the discovered information itself, but rather when the investigating party seeks to place subpoenas or discovery demands under seal and to prohibit disclosure of them through so-called 'gag' orders.

Typically, in the cross-border insolvency setting, these seal-and-gag orders are justified as necessary to prevent the further transfer or dissipation of assets, the destruction or withholding of documents, or the intimidation of witnesses. These orders do face a number of legal hurdles, however, chiefly, the presumption in favour of open court records, procedural rules requiring notice of ongoing discovery to debtors or litigants, the freedom-of-speech rights of persons who would be subject to the gag, and the due process rights of the investigation's targets.

These hurdles are discussed in a relatively recent bankruptcy court decision rendered in Petroforte Brasileiro, a Chapter 15 case. Although the Petroforte court mostly sustained a challenge to the seal-and-gag order, it did suggest that future seal-and-gag orders might withstand challenge if they are limited in duration—that is, hours or a couple of days rather than months—and supported with specific evidence of wrongdoing, not speculation of what could happen without the order.

Australia – JC We can get these Anton Piller orders to access documents on an ex parte private basis without the defendant knowing, but the court will always appoint an independent solicitor to encourage independent legal advice for the defendant.

I have been in a number of these situations, where documents were copied by forensic experts using enormous hard drives and then returned before litigation started. If you can establish a real need, those orders can be obtained without the knowledge of the defendant, but within a short period of time the defendant must be made aware of the situation. This is geared to provide fairness to the debtor, but to allow the creditor to apply for protection where warranted.

We can also obtain Mareva orders without notice to the debtor, but only for a short period of time. If you apply without notice, you have an obligation to provide the court with full disclosure, even if is contrary to your best interests.

Gag orders are unlikely, but possible in situations where further transfers or concealment is likely. If that happens, then liquidators and trustees have extensive powers and parties have the risk of jail.

The system is designed to give due process to defendants, but, at the same time, give creditors and their appointees the capacity to put their foot on assets to prevent dissipation.

QUESTION 4

## What key trends have you seen in cross-border asset recovery during the last 12 months? Is demand for such services on the rise in your jurisdiction?

England – DF There are a couple of developments worthy of note. The first thing is the cryptocurrency Bitcoin. We are seeing more cases on that issue and some are a bit frightening. Just recently, a client of ours was owed millions in Bitcoin by a third party, but when we checked out the electronic address there was essentially nothing there.

The other big one in the UK, which will inevitably hit some other countries, is the collapse of Carillion. It is a large British facilities management and construction company that did a lot of government work. It went down to the tune of GBP1.5 billion, operating on 2 per cent margins. The impact will be colossal.

Canada – SFS Speaking of Carillion, we are already involved in some cases, because they provided road clearing services in various Canadian municipalities. They had taken contracts from the Public Service Union, and now we are struggling through the worst winter ever, with no way to get the roads cleared of snow.

Elsewhere, we see the traditional retail model struggling across Canada. Sears Canada has been crushed and is going through liquidation procedures, they used to have 500 locations across Canada, but closed their last store recently. The biggest threat to big box retail is Amazon.

Canada has focused on growth over the last two years. The economy has been growing and unemployment is at a low level, but interest rates are ticking higher. We expect a downturn in our real estate market soon, as interest rates move

Jeffrey Liesemer pictured at the 2017 IR Annual Conference in Berlin

higher. If consumers are paying more for mortgage interest, then they will have less disposable money for other things, which will have a negative impact on the economy.

Switzerland – AB The general observation during the last two years, is that creditors taking part in Swiss bankruptcy proceedings have become more interested in having them assigned potential claims of the bankruptcy estates (inter alia liability claims against the management). In Switzerland, the bankruptcy administration is not obliged to enforce all its potential claims, but can assign such claims to interested creditors.

Voiding actions have also increased in bankruptcy cases and there is a trend for liability claims to be used more often against directors and officers.

With regard to areas where there could be higher bankruptcy risk, I would mention real estate companies. We see that particularly with smaller companies, which are suffering under very low margins in a competitive housing market.

US – JL There are three trends we are seeing in the US. First, recognition of foreign insolvency proceedings, under Chapter 15 or its counterpart statutes in other countries, is being employed increasingly to trace and secure assets sited in other countries.

Second, cross-border asset-tracing and recovery are becoming more prominent in the enforcement of arbitral awards, which is notable because, unlike the situation involving foreign country judgments, the US has entered into international agreements, most notably the New York Convention, to facilitate recognition and enforcement of foreign arbitral awards in the US.

Third, the development of third-party litigation funding should not be overlooked as a way of addressing the sizeable costs of cross-border asset-tracing and recovery, and increasing the likelihood of recoveries for creditors. All of these trends and others have led, and will lead, to increased demand for asset-tracing and recovery services in the US.

Cayman Islands – KB In the Cayman Islands we are frequently involved in cross border asset recovery efforts given the multinational nature of the businesses and investment vehicles here. Foreign judgments and arbitral decisions can be recognized and enforced. There is also a willingness for the Cayman Court to provide assistance to foreign courts upon request.

One of the major components of Cayman's financial industry is the hedge fund industry. The Cayman Islands is the most popular jurisdiction for hedge funds with nearly 11,000 funds registered with the Cayman Islands Monetary Authority. The prevalence of those funds makes decisions relating to the liquidation of such funds extremely important. In a recent decision, the Privy Council considered the position of an investor who had redeemed but have not been paid prior to the suspension of redemptions. The court confirmed that the redeemed investor would be considered a creditor and rank as such in the liquidation (and accordingly rank ahead of the claims of other investors). This determination is important as it ensures that the contractual relationship between the fund and the investor is honoured and in so doing brings certainty to the rights attaching to redeemable shares.

Australia – JC One of the trends that seems to be have occurred in the last 12 months to two years in Australia, is an enormous amount of class actions emanating from insolvency. Small to medium-sized firms are persuing substantial class actions against auditors and other advisors, and they are on the rise.

Secondly, the economy in Australia is quite healthy, but our interest rates are at record lows. While banks haven't been appointing receivers and taking insolvency action as they were a couple of years ago, the market is slightly overcooked.

There is likely to be a significant rise in insolvency cases during the next two years, with class actions a big thing. I would expect significant cases against banks and car manufacturers, for example, arising out of insolvency.

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