



AMERICAN
BANKRUPTCY
INSTITUTE

2022 Winter Leadership Conference

Asset Recoveries in Foreign Lands

*Hosted by the Asset Sales
and International Committees*

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Asset Recoveries in Foreign Lands



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Asset Recoveries in Foreign Lands

Panel will cover:

- Locating assets in the US, the Cayman Islands and beyond: effective tools
- Taking Control: in and out of court options
- Monetising Assets: practical steps and court blessings



Locating Assets: Cayman

Norwich Pharmacal Relief

- Third-party discovery order, which takes its name from English case *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] A.C. 133
- May be granted where a third-party has been “innocently mixed up in the wrongdoing” of another
- Invaluable tool in cases where one has suffered loss at the hands of others, but lacks certain information needed to bring proceedings to address those wrongs
- In an offshore context, it is often obtained against banks and registered office providers for asset tracing purposes and more recently to assist enforcement



Locating Assets: Cayman

Norwich Pharmacal Relief

- Summarised by Lightman J in *Mitsui & Co Ltd v Nexen Petroleum Ltd* [2005] 3 All ER 511 at [21]:
“a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued”
- Scope of the relief has expanded beyond mere identification of the wrongdoer, and is no longer limited to enabling actions or lawsuits, but also includes other legitimate redress for wrongdoing



Locating Assets: Cayman

Statutory Assistance Available to Foreign Representatives

- Not the UNCITRAL Model Law (but similar)
- Part XVII of the Companies Act (2021 Revision): sets out available assistance to foreign appointed office holders of foreign debtor

Discretion to provide assistance for purposes of:

- recognising office holder's authority to act on behalf of the foreign entity
- enjoining the commencement or staying the continuation of legal proceedings
- staying the enforcement of any judgment against the foreign entity
- requiring a person in possession of information relating to the business or affairs of the foreign company to be examined by and produce documents to its foreign representative
- ordering the turnover to the foreign representative of any property belonging to the foreign entity



Locating Assets: Cayman

The Cayman Court's discretion guided by "matters which will best assure an economic and expeditious administration" of the foreign entity's estate, consistent with Cayman policy objectives, and which include:

1. the just treatment of all stakeholders wherever they may be domiciled
2. the protection of Cayman creditors against prejudice and inconvenience in the processing of claims in the foreign proceeding
3. the prevention of preferential or fraudulent dispositions of property from the estate
4. the distribution of the estate amongst creditors substantially in accordance with the order of distribution applicable to a liquidation commenced in the Cayman Islands
5. the recognition and enforcement of security interests created by the foreign entity
6. the non-enforcement of foreign taxes, fines and penalties
7. comity

Even if the foreign proceeding is recognised, the Cayman Court may decline to provide assistance if the relief sought by the foreign representative would be likely to produce or contribute to an economic result which is inconsistent with the policy objectives of Cayman Islands corporate insolvency law (*Picard v Primeo*).



Locating Assets: United States

Chapter 15 Discovery Tools

- Section 1521(a)(4) and Bankruptcy Rule 2004 authorize broad discovery related to a foreign debtor's affairs
- Bankruptcy Courts may also issue letters rogatory to assist in the collection of evidence abroad

Section 1782 Applications

- Discovery may be requested from the District Courts in aid of foreign legal proceedings
- Foreign proceedings can include anticipated civil proceedings and foreign criminal proceedings
- Although the law was not enacted as an asset tracing tool, in some circumstances it can reveal relevant assets



Monetizing Assets in Chapter 15

Section 1520(a)(2)

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

(2) sections 363, 549, and 552 apply to a transfer of an interest of the debtor in property that is *within the territorial jurisdiction of the United States* to the same extent that the sections would apply to property of an estate

Section 1502(8)

For the purposes of this chapter, the term—

(8) “within the territorial jurisdiction of the United States”, when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.



Monetizing Assets in Chapter 15

Section 363(b)(1)

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate

Section 1521(a)(5)

Upon recognition of a foreign proceeding... the court may... grant any appropriate relief, including... (5) entrusting the administration or realization of all or part of the debtor’s assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner; authorized by the court;

Section 1521(b)

Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in the United States to the foreign representative or another person, including an examiner; authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected



Asset Sale Decisions in Chapter 15

Need for Section 363 Approval

- *In re Fairfield Sentry Ltd*, 768 F.3d 239 (2d Cir. 2014) (“[T]he sale of the SIPA Claim is a ‘transfer of an interest of the debtor in property within the territorial jurisdiction of the United States’ within the meaning of 11 U.S.C. § 1520(a)(2). The language of the statute makes it plain that the bankruptcy court was required to conduct a section 363 review. Deference to the BVI Court was not required.”)
- *In re Elpida Memory, Inc.*, 2012 WL 6090194, at *7 (Bankr. D. Del. Nov. 20, 2012) (“Chapter 15’s legislative history leads to the same conclusion as the plain meaning analysis—the sound exercise of business judgment test is applicable.”)

Recent Application

- *In re Crystallex Int’l Corp.*, No. 11-14074, 2022 WL 17254660, at *6 (Bankr. D. Del. Nov. 28, 2022) (requiring U.S. bankruptcy court approval of transfer outside the U.S. of proceeds of stock in a Delaware corporation)

Faculty

Jennifer Fox is a dispute-resolution partner with Ogier in Grand Cayman, Cayman Islands. She has been practicing in the Cayman Islands since 2009 (and in the BVI since 2008), and has experience in all contentious issues coming before the Cayman Islands courts. Ms. Fox's practice spans all off-shore aspects of complex commercial litigation, fraud and asset-tracing, contentious insolvency and restructuring, and contentious private client work. She is a member of both the firm's global Restructuring and Corporate Recovery team and its Trust Advisory Group. Ms. Fox has been listed in the *Legal 500 Caribbean* for 2023 and in *Chambers Global* and *Who's Who Legal* for Asset Recovery in 2022. She regularly appears in the Financial Services Division of the Grand Court and acts for all participants in the offshore financial services market, including insolvency office-holders; investment managers and directors of Cayman vehicles; creditors, shareholders and limited partners; and all other parties to large scale commercial; fraud, and insolvency litigation. Ms. Fox holds a First Class Bachelor of Laws (with Honours) from Keele University and obtained a postgraduate diploma in law at the Inns of Court School of Law in London, and she was a Major and Pegasus Scholar of the Inner Temple.

Adam M. Lavine is a lawyer with Kobre & Kim LLP in New York, where he represents debtors, creditors, board members and other stakeholders in insolvency-related disputes and investigations, often serving as special litigation counsel to participants in cross-border chapter 11 and chapter 15 proceedings. He also represents distressed debt funds, private-equity funds and other institutional investors in high-stakes civil disputes concerning distressed transactions, secured and unsecured debt, and other litigation in the financial markets. In cases involving fraud, misconduct or asset-concealment, Mr. Lavine frequently works with the firm's asset-recovery specialists on the monetization and pursuit of high-value claims against principals and stakeholders, often on behalf of bankruptcy trustees or other insolvency administrators. Before joining Kobre & Kim, he practiced in Weil, Gotshal & Manges LLP's restructuring group, where he focused on representing debtors in out-of-court and chapter 11 restructurings and advised on distressed M&A transactions. Mr. Lavine is a member of the International Insolvency Institute's NextGen Leadership Program, Legal Services NYC *Pro Bono* Associate Advisory Board and the New York City Bar Association. He received the New York State Bar Association's President's *Pro Bono* Service Award in 2012. Mr. Lavine received his B.A. from the University of Pennsylvania and his J.D. from New York University School of Law.

John Royle is a director with Grant Thornton LLP in Grand Cayman, Cayman Islands, and has more than 22 years of receivership and asset-recovery/insolvency experience in both the U.K. and the Cayman Islands. His work includes acting as official liquidator or receiver of entities/assets by appointment of the Grand Court of the Cayman Islands, typically in contentious or alleged fraudulent activity matters. He also acts as a voluntary liquidator of numerous Cayman Islands entities (and Irish) and led local forensic assignments. Mr. Royle's notable assignments include Saad Investments Co. Ltd., Axiom Legal Financing Feeder and Master Funds, Various Madoff feeder fund exposure, EMPGI Group (education sector) and GFP Dunas (Global HoldCo for Peruvian electricity distribution plants). Previously, he was a manager with Begbies Traynor Group. Mr. Royle has a Certificate of Proficiency in Insolvency Education from BPP Professional Education.