



AMERICAN
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2019 International Insolvency & Restructuring Symposium

Diggin' for Gold: Strategic Tools for Realizing and Monetizing Assets Utilizing Third-Party Funding *by IWIRC*

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Grant Thornton UK LLP; London, UK

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Bentham IMF; Toronto, Canada

Diggin' for Gold: Strategic Tools for Realizing and Monetizing Assets Using Third Party Funding



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Innovative and Strategic Tools to Monetize Assets

- Investment by third-party to finance a dispute.
- Investment of time and expertise.
- Can cover legal fees, insolvency practitioner fees, expert reports, arbitration costs and working capital.
- Typically non-recourse.
- Access to justice for impecunious estates/levels the playing field.
- Effectively engages opposing party.



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Litigation Funding: Variations Across the Globe

- Long-established in some countries such as Australia vs. new in others such as Italy.
- Prohibited in some countries including Ireland vs. permitted with guidelines in United Kingdom.
- Acceptable in all cases in Canada vs. only in insolvency matters in Singapore.
- Regulated in Hong Kong) vs. not regulated in the United States.

**See detailed analysis in appendix*



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“Diggin’ for Gold: Using an Excavator” *Investigations, Asset Tracing and Recovery*

Carmel King
Grant Thornton UK LLP



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Diggin' for Gold: Using an Excavator

Project Carbon

- VAT fraud – EUA trader. Three-month period in 1999, £294M in sales, VAT liability of £39M. Jurisdictions include Europe, Middle East, Far East.
- Four strands of litigation against 15 defendants, one to Supreme Court. Timeline from 2013 to 2020.
- Total claims in excess of £100M. Claims of conspiracy, breach of fiduciary duty, dishonest assistance and fraudulent trading. Combined use of CFAs, third party litigation funding, ATE products, Grant Thornton funding has enabled litigation out of impecunious estate.
- Defendants variously overseas, financial institutions, etc.



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Diggin' for Gold: Using an Excavator

Paulo Maluf

- Liquidators of BVI Companies used to dissipate funds in fraud against Municipality of Sao Paulo by Mayor Paulo Maluf and Flavio Maluf.
- Current claims of \$35M, further claims of \$170M.
- Jurisdictions UK, Jersey, Brazil, BVI, Switzerland.
- Funding obtained for investigations, recognition and preparation of claims.
- Groundwork has enabled the replication of powers seamlessly across the globe, facilitated disclosure processes and set the scene for enforcement.



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Diggin' for Gold: Using an Excavator

Boris Berezovsky – Deceased estate in bankruptcy

- Appointed Trustees in Bankruptcy to identify and collect the assets of the estate, and to investigate the liability position.
- Detailed investigations determined assets worth over £130M. Potential further assets worth over £200M.
- Jurisdictions include the UK, France, Russia, various Eastern Europe and various Caribbean Islands.
- Creditor claims exceed £400M.
- Legal proceedings against estate brought by creditors worth over £230M.
- Funding used to bring claims, and, innovatively, to defend claims as Trustees.



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***“Diggin for Gold: Using a Backhoe”
Dig Deep with funding for investigations,
legal fees, disbursements and enforcement***

Naomi Loewith
Bentham IMF LLP



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Diggin' for Gold: Using a Backhoe

Oil Company vs. Sovereign

- Co. invested in oil & gas operations in Eastern Europe
- Government expropriated land, resulting in lost investment and lost future profits
- Agreement governed by arbitration clause
- Company had no assets to pursue claim or continue business
- Partnered with litigation funder to advance claim
- Funder to pay legal fees, arbitration costs, expert fees, and other disbursements
- Funder to provide working capital for company to maintain skeletal operations



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"Diggin' for Gold: Using the Pick-Axe" Restructuring Entity with Valuable Potential Claims

Ingrid Bagby
Cadwalader, Wickersham & Taft LLP



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Diggin' for Gold: Using a Pick-Axe

General Motors

- In 2006, > 400 entities lent GM \$1.5Bn, secured by equipment at U.S. facilities.
- In 2008, GM closed a \$150M loan and, as part of that transaction, terminated financing statements on collateral securing earlier \$1.5Bn loan.
- GM commenced bankruptcy in 2009, leaving the \$1.5Bn loan substantially under secured.
- Avoidance Action Trust created, which brought litigation to claw back payments in satisfaction of the "unsecured" \$1.5Bn loan. Challenges:
 - Avoidance litigation projected to take "years."
 - Trust was underfunded.
 - Litigation was procedurally complex.



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Diggin' for Gold: Using a Pick-Axe

- Trust documents included mechanism to seek additional funding.
- Trust was authorized to grant a lien on the avoidance action or other property of the Trust in exchange for proceeds.
- Trust entered competitive bidding process by soliciting litigation funding proposals from four potential third-party funders.
- After three months of negotiations, Trust arrived at agreement with third-party funder.
- Trust negotiated for the right to terminate Litigation Funding Agreement in the event that GM DIP Lenders agree to provide funding "on terms materially more favorable to the Trust than those provided by" investors under the private/original funding agreement.



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Diggin' for Gold: Using a Pick-Axe

- GM DIP Lenders offered interest free litigation cost advance, and would receive 30% of net proceeds of avoidance action. (In contrast, the Trust would pay interests and fees to the private lender under the litigation funding agreement.)
- On May 13, 2019, the Trust filed a motion requesting the court approve a settlement resolving the avoidance action.
- On June 13, 2019, the Court approved the proposed settlement - Trust to receive \$231M to be distributed to beneficiaries after repayment of its lenders and other expenses.
- On August 16, 2019, the Court authorized distributions to creditors.



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Diggin' for Gold: Using a Pick-Axe

Performance Sports Group

- US and Canadian manufacturer and designer of sports equipment. PSG was profitable and in 2015 reported annual revenue, assets and liabilities of approx. \$569M, \$594M and \$607M respectively.
- In August 2016, audit committee investigated PSG accounting practices, resulting in a delay in filing PSG audited financial statements and precipitating secured debt covenant default.
- PSG was investigated by US and Canadian regulators, and subject to shareholder class action litigation.
- Company negotiated a sale to an investment group (led by a 17% equity holder) of substantially all PSG assets for \$575M plus liabilities. To facilitate the sale, PSG filed chapter 11 in Delaware and filed for protection from its creditors under Canada's Companies' Creditors Arrangement Act in Ontario, Canada.
- Delay in filing audited financials and resulting default potentially gives rise to claims, which could benefit creditors and equity in PSG.



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Diggin' for Gold: Using a Pick-Axe

- Excluded from sale *"all rights of any Seller and the directors and officers of any Seller under any director and officer insurance policies, including any proceeds received or receivable by such Persons thereunder"*.
- Debtors' insurance policies (including those covering D&O) were assumed in plan and become vested in the Liquidation Trust and the Reorganized Parent.
- PSG Liquidation Trust: provided for irrevocable transfer from Debtors to trust of all "Privileges", and all "Retained Causes of Action."
- Liquidation Trustee also could enter into arrangements for financing of litigation, provided that:
 - Such funding may only be furnished by a Holder of beneficial interests in the trust if a majority of disinterested members of the trust's advisory board (among others) determine that any such funding is *"on terms at least as favorable...as those which are available on an arm's-length basis from a disinterested person"* and such financing would be in the best interests of the trust.



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Diggin' for Gold: Using a Pick-Axe

- Audit committee's investigation amassed over 100,000 documents, including employee interviews, and analytics/testing (the **"Investigation File"**).
- Liquidation Trustee requested access to the Investigation File - but PSG's independent counsel asserted privilege. Arguments included:
 - Chapter 11 plan confirmation vested Liquidation Trustee with control of privilege.
 - Audit committee was independent body and PSG plan did not transfer privilege.
- Court Ruled: Investigation File must be produced because *"the trustee appointed as a representative of a corporate debtor controls the privileges belonging to the independent committee established by the corporate debtor. Therefore... the plan transferred control of the audit committee's privileges to the liquidation trustee"*.



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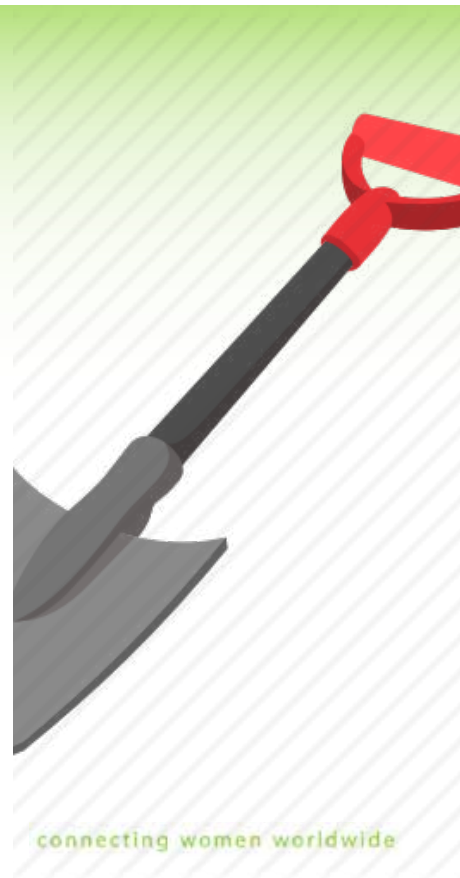
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Diggin' for Gold: Other Monetization Tools

- Sale of claims – either by a creditor, or by a distressed entity.
 - Potential transfer of claim outright or sale of participation interest.
- Use of derivatives to synthetically transfer risk of repayment.
 - Example: Derivative transactions have been used so one party steps into in-the-money interest rate swaps with a distressed entity. Cash flows from swaps were repackaged and passed through to a hedge fund investor, whom otherwise would not have been able to access this risk/return.



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Diggin' for Gold – Tips and Hazards



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Using an “Excavator”: Tips & Hazards

- Always expect a roadblock! Not a linear process and not for the fainthearted.
- Make room for innovation and creativity. Litigation funding is an evolving product and the funders you want on your team will engage.
- Consult with your stakeholders. Relationships are essential for the smooth running of the matter and dealing with inevitable roadblocks.



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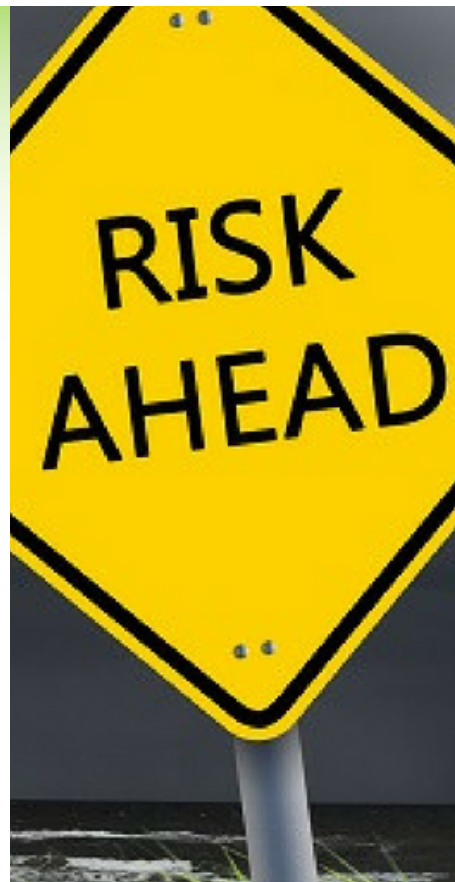


Using a “Backhoe”: Tips and Hazards

- Local permissibility – in jurisdiction of proceeding and place of enforcement.
- Dig deep into the likely budget, incl. expert fees and arbitrator costs.
- Would a non-cash resolution be a better result for the client?
- Investigate assets and enforcement strategy early in process.
- Disclosure to arbitral tribunal - think broadly about conflict.
- Control of litigation.
- Return structure.
- Risk-sharing with professionals.



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Using a “Pick-Axe”: Tips and hazards

- Identify, and to the extent possible, sort out issues relating to possession, control over relevant documents when dealing with a wind-down entity.
- Who controls the applicable privilege with respect to any estate claims? Is a privilege fight potentially part of the process?
- Ensure relevant wind-down or liquidation documents contemplate potential financing needs for both investigation and litigation. Are such provisions sufficiently flexible/broad to adapt to circumstances?
- Trust provisions allow for participation in funding by trust beneficiaries?
- Consider timing of seeking finance to maximize interest.



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Diggin' for Gold – Bios and Firms



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Panel Bios

Michelle Pickett

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Michelle Pickett is a Partner in the Deals Practice of PwC Canada and a member of the Business Recovery Services team.

Based in Toronto, she has nearly 20 years experience in insolvency and restructuring advising management teams, boards of directors, and lenders to companies experiencing various financial or operational challenges.

Michelle has experience across a wide range of industries including retail and consumer products, technology, resources, transportation, bio pharma, hospitality, manufacturing, and logistics and distribution.

Michelle is the Vice-Chair of the International Women's Insolvency and Restructuring Confederation ("IWIRC"). She has also served as chair of the Ontario Network of IWIRC

Carmel King

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Carmel King is a member of Grant Thornton UK's Insolvency and Asset Recovery Team, and the Co-Chair of INSOL Europe's Anti-Fraud Forum.

She has over 13 years' experience in the field of fraud investigations, asset tracing and recovery, and contentious insolvency.

Carmel is proficient in the investigation of corruption and the misappropriation of assets across different jurisdictions.

Carmel has worked in the public and private sectors, having taken instruction from government departments and local authorities in the UK, non-UK governments, and international companies.

Carmel has published a number of articles on fraud and asset recovery.

Naomi Loewith

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Naomi Loewith is the Director of Strategic Partnerships for Bentham IMF Canada. She also serves as an Investment Manager and Legal Counsel, assessing cases for funding, and providing claimants and counsel with thoughtful analysis and strategic advice at all stages of their cases.

Prior to joining Bentham IMF, Naomi was a litigator and conducted trials and appeals before all levels of courts and regulatory bodies.

Naomi is the co-chair of Ontario's Harvard Law School Women's Alliance, serves as a parent mentor for the Bob Rumball Center for the Deaf, and directs risk management as a board member for the Paul Penna Downtown Jewish Day School.

Ingrid Bagby

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Ingrid Bagby is a Partner in the Restructuring practice of Cadwalader.

Based in the New York, Ingrid's practice is concentrated in bankruptcy, restructuring, and related litigation.

She represents debtors and creditors in Chapter 9 and Chapter 11 proceedings and out-of-court restructurings. She also has extensive experience in complex cross-border restructurings and acting for foreign debtors under Chapter 15 of the Bankruptcy Code.

Ingrid is a member of ABI, INSOL, IWIRC, and the Bankruptcy Litigation Committee of the Federal Bar Council. She has also participated in UNCITRAL's working group on proposed additions to the Model Law.

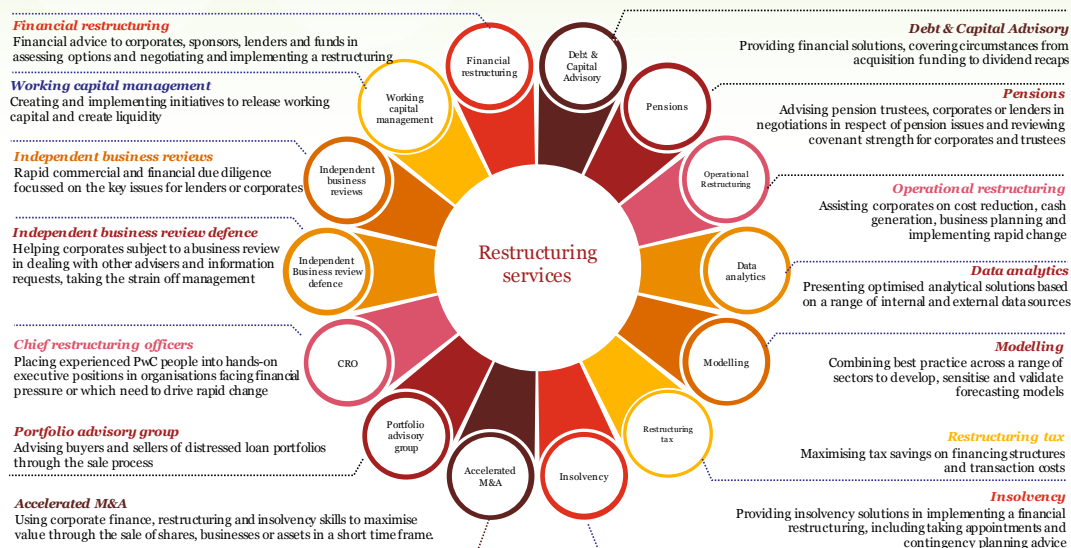


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PwC Business Recovery Services

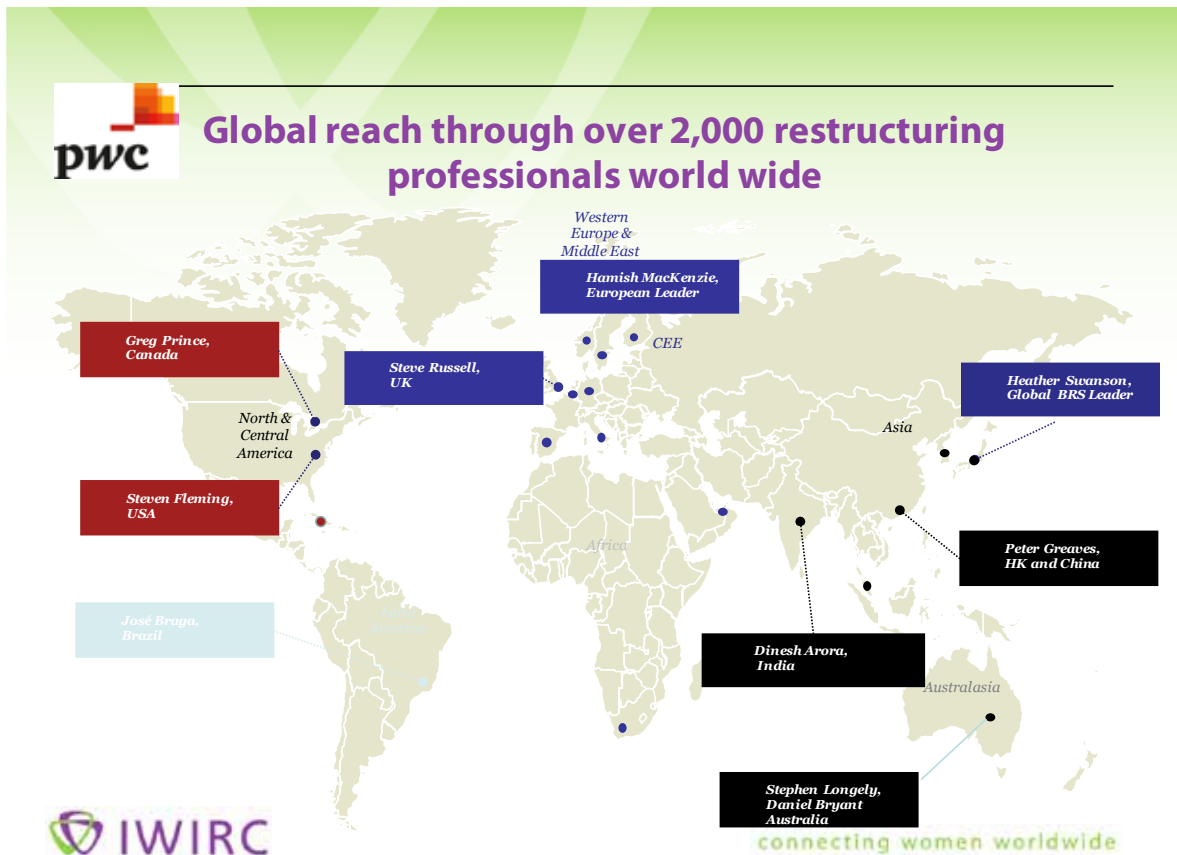
We draw together the experience and specialist skills from the wider PwC restructuring team and across our network to deliver a full suite of services as part of a financial restructuring



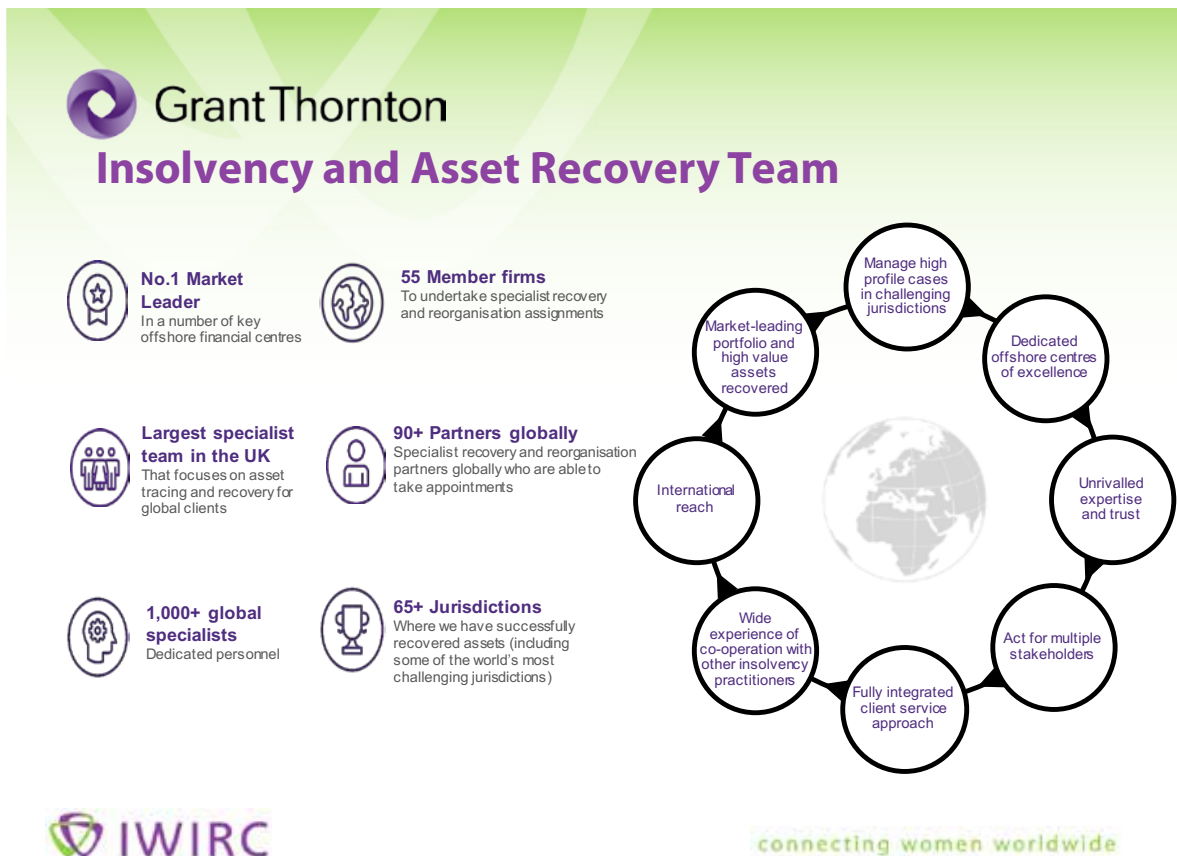
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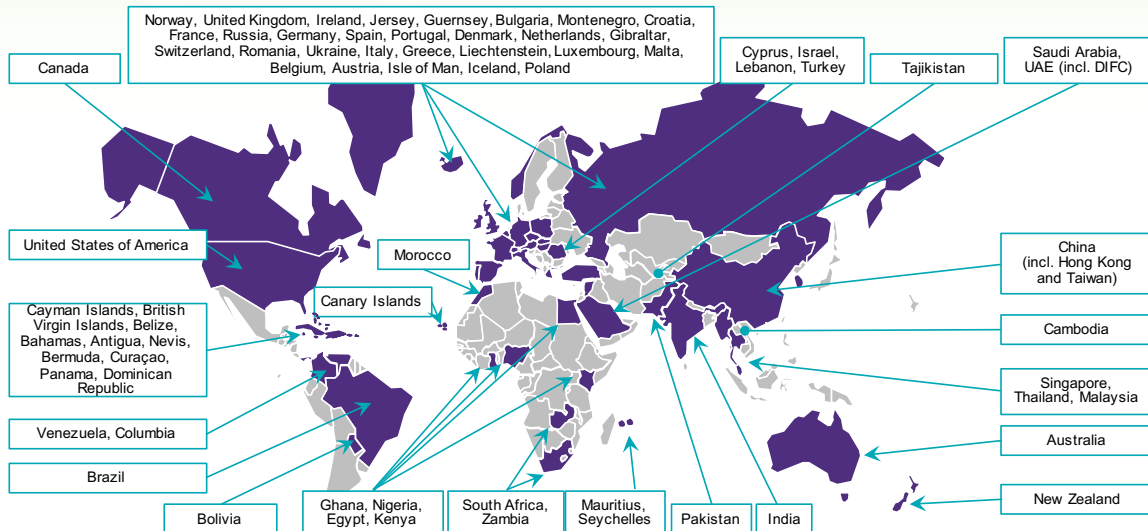
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Grant Thornton

Insolvency and Asset Recovery Team

We have traced and recovered hidden and misappropriated assets from the following jurisdictions:



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Bentham IMF / Omni Bridgeway

Combined team of legal and recovery experts: Global leader in dispute resolution finance, financing disputes from inception through trial, appeal, enforcement and recovery

Unrivalled 33-year track record of funded and recovered claims throughout the world



89% success rate
Delivering results for over 18 years

Over 50
successfully completed
insolvency claims
since 2001

18
Offices

10
Countries

A\$2.3 billion
Funds Under
Management

20+
Languages

145
Specialists



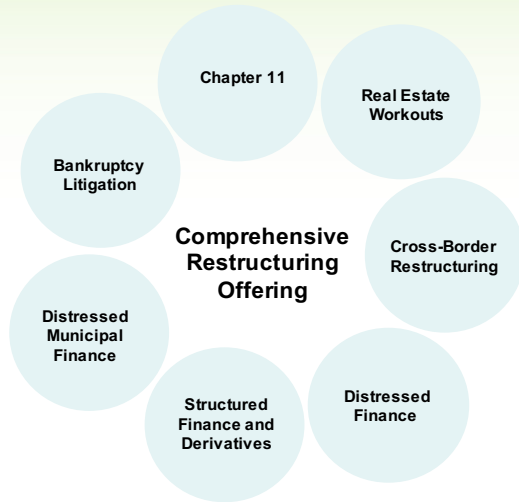
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Cadwalader Restructuring

- Regularly represent agents, noteholders, market participants, official and ad hoc creditor committees, and other creditor constituencies in bankruptcy and insolvency proceedings in the U.S. and worldwide.
- Advise debtors and lenders with respect to debtor-in-possession financing, bridge loans, and exit financing arrangements.
- Advise national banks, large institutional lenders and other market participants on structured finance products, including bankruptcy remote mortgage and mezzanine loans, commercial mortgage backed and other asset backed securitizations, loan restructurings and derivatives and trading contracts.
- Clients include many of the largest financial institutions in the world, including commercial and investment banks, investment management firms, mutual funds, insurance companies and pension funds, as well as Fortune 500 companies and other leading public and private corporations and business entities.

“Cadwalader, Wickersham & Taft LLP’s ‘small but capable group’ competes with the best in terms of expertise and value.”
– The Legal 500 U.S.



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Appendix



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LITIGATION FUNDING ACROSS JURISDICTIONS

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
BRAZIL	Increasingly, especially in international arbitrations.	No.	Not specifically, but Statute of Brazilian Bar Association imposes certain duties on lawyers with regard to their clients, and Brazilian Code of Civil Procedure and Brazilian Arbitration Act impose duties of independence and impartiality on arbitrators.	In the arbitration context only, administrative resolutions proscribe conflicts of interest and recommend disclosure at the earliest opportunity.	Brazilian Bar Association Federal Council does not support conditional fee arrangements, but conditional or contingency fee arrangements have become more accepted in civil law matters.

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BENTHAM IMF

The World's Most Experienced Commercial Litigation Funder

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
USA	Yes. Opportunities abound in both commercial and consumer contexts, as well as insolvency and international arbitration.	Yes, legislation is on the books or has been proposed at the state level and has been proposed at the federal level.	Yes, prohibitions on fee splitting, restrictions on third party interference with lawyers' independent professional judgment and limitations on client's decision-making rights, maintenance and champerty. Maintenance is when a third-party provides financial assistance to help maintain litigation. Champerty takes maintenance one step further and is when a third-party seeks a return for its financial assistance, usually in the form of a portion of the recovery from the lawsuit. While most states have eliminated or interpreted these doctrines to permit funding (i.e., NY's safe harbor provisions), funding is expressly banned in 6 states and subject to varying restrictions in many others.	Trend in courts is against disclosure in commercial cases. Federal and state legislation has been proposed or is pending, but only one state mandates disclosure. Disclosure is required in limited circumstances such as bankruptcy proceedings and class actions.	Yes.

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BENTHAM IMF

The World's Most Experienced Commercial Litigation Funder

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
CANADA	<p>Yes.</p> <p>Long-established in class actions, there is increasing use in insolvency proceedings, international arbitration, and commercial disputes.</p> <p>Can include legal and other professional fees, disbursements, court-ordered costs, including security for costs orders.</p>	<p>Champerly is codified in legislation in some provinces, but courts have found that funding is permissible where the funder does not stir up the litigation, control the litigation, or take a disproportionate return.</p> <p>There is no regulation in Quebec, which operates on the civil code.</p>	<p>Permitted in class actions where, among other things: class representatives received independent advice; funding is necessary; funder meaningfully contributes to access to justice, does not interfere with lawyer-client relationship; and is not overcompensated.</p> <p>Permitted in insolvency context where: necessary to provide the plaintiff access to justice that would not otherwise be available; plaintiff maintains control; funding does not compromise lawyer-client relationship or lawyer's duty of confidentiality; funder's return is fair and reasonable; and funder undertakes to maintain confidentiality.</p> <p>As long as the client controls the litigation, there is no court supervisory role over funding in the commercial context.</p>	<p>In class actions (except Quebec) and insolvency matters, courts must approve funding agreement at the outset.</p> <p>Disclosure is not required in other contexts.</p>	Yes.

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
UK	Yes, endorsed by judiciary and rapidly growing.	No.	No.	No general disclosure requirement, but limited disclosure has been required in the context of an application for security for costs.	Two risk-shifting schemes are available: (1) conditional fee arrangements (CFAs) whereby the lawyer agrees that some or all fees and expenses incurred will only be paid to the lawyer in certain circumstances, and usually only if a client wins the case. (2) damages based agreements (DBAs) - a form of 'no win, no fee' agreement, but with a success element or 'contingency fee' that is based on the amount of damages recovered in the proceedings as opposed to the normal fees of the lawyer.
GREECE	Theoretically but not widely known.	No.	No.		Yes, but cannot be more than 20% of recoveries.

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
FRANCE	New, but increasingly popular, in particular in international arbitrations, as International Chamber of Commerce (ICC) is based in Paris, and since 2017, when Working Committee of Paris Bar Council issued a Report and adopted Resolutions on funding in international arbitration.	No.	Resolutions sets forth rules around conflicts of interest, confidentiality and privilege issues, duty of independence and disclosure, and transparency around use of escrow accounts managed by the Bar to handle funds exchanged between lawyers and clients.	Yes, in international arbitration proceedings.	Pure contingency fee arrangements prohibited, but lawyers may charge success fees that represent a portion of total fees.

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
GERMANY	Widely accepted.	No.	No.	No.	Partial success-based fees only permitted if given in good faith to help a litigant prosecute an action in return for a reasonable interest in the suit, but percentage share in proceeds prohibited. No such limitation for funders.
ITALY	Very new, but becoming more attractive .	No.			As of 2012, success fees are permissible, but not contingency fees. Exceptions may apply for bankruptcy.
SPAIN	Very new. Generally available, but primarily used in arbitration and commercial litigation.	No.	No ethical or professional rules specifically governing funding, but general conflicts rules apply to advising clients on both the underlying case and the funding agreement.	No general disclosure obligation, but court could compel disclosure.	Yes, but uncommon except in labor cases.

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
SOUTH AFRICA	Yes, and condoned since 2004 Court of Appeal decision.	No.			Permitted in certain circumstances.

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INDIA	Very new. Recent investment in international arbitration claims against government agencies in infrastructure industry.	Lawyers themselves may not be involved in funding, but no express restrictions against third party involvement.			No.

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AUSTRALIA	Yes. Almost half of class actions, and majority of shareholder class actions, are funded.	Only with respect to processes to manage conflicts of interest between funders, lawyers and claimants	No.	Generally, no. But in class actions, funding agreement must be disclosed, though terms may be redacted.	Contingent fee arrangements prohibited, but "no win, no fee" conditional costs arrangements are permitted.
NEW ZEALAND	Increasingly common but courts are "cautiously permissive." Greater oversight in "representative proceedings."	No.	No, only common law of champerty and maintenance, whereby court will interfere where there is an abuse of process or an impermissible assignment to a funder.	Disclosure required of existence / identity of funder and terms of withdrawal of funding if terms give funder control over proceedings.	"Conditional fee arrangements" permitted where fee amounts to normal fee that would have been charged or for premium that compensates counsel for risk of receiving no payment / waiting to be paid, or where fee is not proportion of recoveries.

	IS THIRD PARTY LITIGATION FUNDING AVAILABLE	LEGISLATION / REGULATION AROUND FUNDING	ETHICAL RULES AROUND FUNDING	IS DISCLOSURE TO COURT OR OPPOSING PARTY REQUIRED	ARE CONTINGENCY FEE ARRANGEMENTS PERMITTED
SINGAPORE	Permitted since 2017 for qualified funders only. Restricted to international arbitration and related court or mediation, and claims arising out of insolvency matters.	Professional conduct rules require disclosure of existence of funding and identity of funder. 2017 Civil Law Act abolished champerty and maintenance. Regulations proscribe qualifications of funders and categories of proceedings that may be funded.	Yes. Disclosure required to court or tribunal and parties regarding existence of funding / identity of funder and prohibiting lawyers from receiving direct financial benefit from funder.	Yes, disclosure required to court and parties of existence / identity of funder.	Prohibited.
HONG KONG	Yes, but new and subject to limitations. Permitted in limited circumstances, including "common interest" cases, where "access to justice" applies, and in insolvency cases. Recent amendments allow funding for arbitrations and mediations.	Yes.	Lawyers may not enter into conditional or contingency arrangements but may advise clients on selecting funder or using TPLF.	No general obligation to seek court approval over funding or to disclose details of funding arrangement to court or opposing party.	No.