

Financial Advisors & Investment Banking/International

Structuring Cross-Border Deals to Protect
Creditor Interests

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STRUCTURING CROSS-BORDER DEALS TO PROTECT CREDITOR INTERESTS

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AGENDA

- Coping with Cross-Border Challenges to Creditor Recoveries
 - Structural Challenges
 - WFOE Example
 - Techniques to Enhance Creditor Recoveries
 - ShengdaTech Precedent
 - Other Techniques
 - Offshore Investigations
 - Cooperation with Offshore Fiduciaries
 - Chapter 15 Tools

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WFOE OVERVIEW

- 100% of equity is held by a company outside PRC
 - Foreign company typically registered in Cayman, BVI or Mauritius
 - Debt issued by the foreign company
 - Ultimate holding company typically designed to be listed company on US, UK or Hong Kong exchanges
- Requires PRC Ministry of Commerce Approval
- Governing law: PRC Company Law and Law on Wholly Foreign-Owned Enterprises

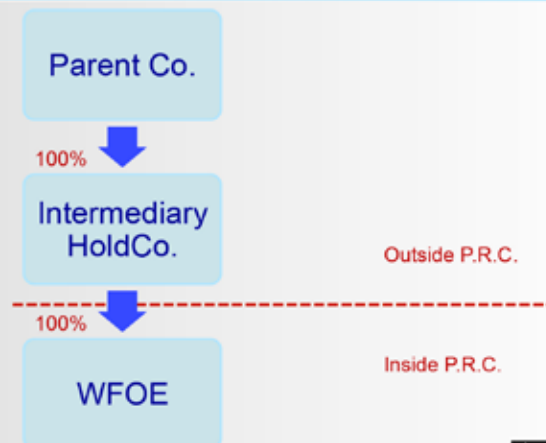
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WFOE STRUCTURE



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DISTRESSED WFOE CHALLENGES

- ❑ **Issue:** Offshore company defaults on note obligations due to breaches of fiduciary duty by onshore officers.
- ❑ These actions decrease the enterprise value of WFOE and creditors are hindered in the ability to obtain a maximum recovery on their legitimate claims.
- ❑ The appointment of a chief restructuring officer, in *In re ShengdaTech, Inc.*, Case No. 11-52649 (Bankr. D. Nev.) (08/19/11), illustrates a possible solution.

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SOLUTIONS TO DISTRESSED WFOE CHALLENGES

- ✓ **Solution:** ShengdaTech's offshore (US) Board of Directors appointed a special committee for an independent internal investigation.
- ✓ ShengdaTech's officers initially frustrated the internal investigation efforts, so the special committee removed all of ShengdaTech's officers, including the officers at the BVI intermediate holding company, filed chapter 11, and appointed a CRO to assist the special committee with the internal investigation, prosecute the chapter 11 and stabilize the underlying assets located in PRC.
- ✓ On Sept. 2, 2011, the court entered a final order approving the appointment.

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TAKEAWAYS FROM SHENGDATECH

- Before the 2008 financial crisis, there was a spate of reverse mergers of PRC companies into US companies like ShengdaTech for purpose of obtaining a US exchange listing
- International reach of automatic stay was attractive to the special committee to stabilize the situation
- Ultimately, cooperation within PRC still required
- Options:
 - There are a handful of foreign companies that are licensed and can be engaged to recover debt and enforce obligations in PRC
 - Alternatively, one can partner with PRC locals to replace existing management at the PRC level (*i.e.*, recover the "chops")

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OFFSHORE INVESTIGATIONS

- In any given insolvency process, powers of discovery, recovery and enforcement are subject to vague comity rules
- Use of ancillary or companion proceedings (like the UNCITRAL model law, or Chapter 15 in the US) can be a useful tool to enhance creditor recoveries
- Most liquidation proceedings will result in appointment of a special liquidator with whom existing liquidators can cooperate to promote coordinated investigations
- Criminal laws of certain countries may also provide a means to assist a liquidator

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ILLUSTRATIVE EXAMPLE: /BRC

- ❑ **Issue:** In a Chapter 15 case, a liquidating bank seeks to recover on a series of loans to insiders, but the insiders pursue various efforts to frustrate collection. The liquidators of the bank discover that the insiders have used various U.S.-operated email accounts to perpetrate their improper scheme of concealing assets.
- ❑ How do the liquidators of the bank discover more information about these concealed assets and the related communications, without alerting the insiders so they may dissipate the assets further?
- ❑ The liquidators' actions in *In re Irish Bank Resolution Corp.* illustrate a possible solution.

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ILLUSTRATIVE EXAMPLE: /BRC (CONT'D)

- ✓ **Solution:** The liquidators, using Rule 2004, proposed to issue subpoenas to the U.S. email providers to discover critical data about the insiders' scheme. The motion was made *in camera* and expressly requested that all of the moving papers remain under seal for 30 days, subject to extension for cause. The court granted the requested order and the liquidators were able to discover critical data about the insiders.
- ✓ By using Rule 2004, *in camera*, and creating a discovery notification process that would temporarily be under seal, the liquidators avoided alerting the insiders so they could dissipate the assets further. *In re Irish Bank Resolution Corp. Ltd.*, Case No. 13-12159 (Bankr. D. Del.) (D.I. 354-356, 05/29/14).

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TAKEAWAYS FROM IBRC

- Chapter 15 is an elastic statute that affords opportunities for creativity.
- Many of the most powerful tools otherwise available in chapter 11 remain available in Chapter 15.
 - Section 363 powers
 - Rule 2004 examinations
 - Other powers may be awarded on request provided that creditors and other parties are "sufficiently protected"
- Other global insolvency and enforcement procedures may be just as effective to give liquidators sufficient reach to drive creditor recoveries.

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CONCLUSIONS

- Q&A
- Final Thoughts
- Thank you!

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