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2019 Annual Spring Meeting

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How to Find Hidden Foreign Assets Here and There

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How to Find Hidden Assets Here and There

By Ryan Blackney, Adam Crane, Ian De Witt and Patricia Redmond

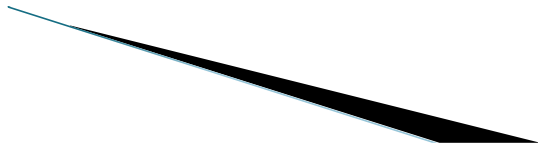
American Bankruptcy Institute
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Chapter 15

Discovery in Ancillary Proceedings

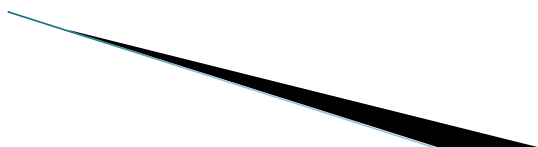
Chapter 15

- ▶ Ancillary proceedings to aid a recognized foreign insolvency proceeding.
 - Examine witnesses under oath
 - Obtain information about the Debtor's assets, affairs, rights, obligations, liabilities.
 - Application of Hague Convention on Taking of Evidence in Civil or Commercial Matters

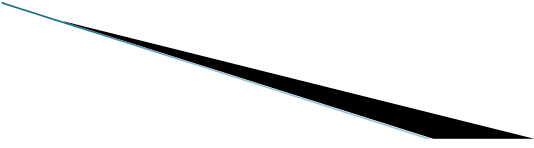


Chapter 15

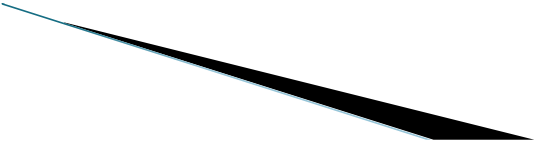
- ▶ Discovery in Chapter 15
 - Interrogatories, document requests, requests for admissions
 - Turnover by attorney, accountant or other person holding information about the Debtor's property
 - Depositions and document discover under Rule 2004.




Chapter 15

- ▶ Section 1521(a)(4)
 - Court may grant relief “providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs and other matters that are connected with the U.S.
 - Discovery need not concern assets in the U.S. to be permissible under law.
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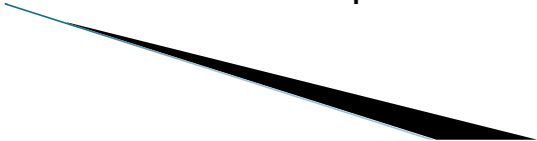
Chapter 15

- ▶ Discovery Limitations
 - Relief may be granted only if the interest of the creditors and other interested parties are sufficiently protected.
 - Fairness considerations
 - Will the relief reasonably assure just treatment to creditors and interest holders?
 - Public policy exceptions
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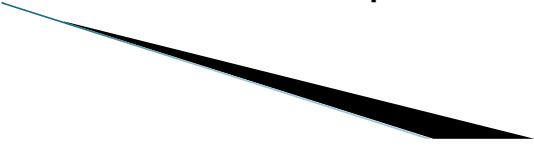
U.S. Liquidators

- ▶ Protocol to commence an ancillary proceeding
 - ▶ Retention of professionals
 - ▶ Evaluate costs of recovery
 - ▶ Local counsel, representatives, appraisers
 - ▶ Obtaining discovery
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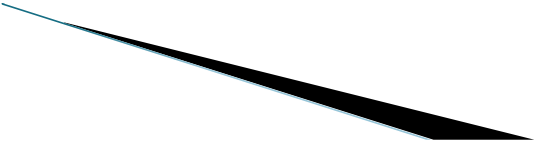
USA Title 28 USC Section 1782 Discovery

- ▶ Apply to U.S. Federal Court to obtain evidence for use in foreign proceedings
 - ▶ Threshold Requirements:
 - a) Individual seeking discovery from “resides or is found” in the district of the court relief sought
 - b) Evidence sought for use in a proceeding in a foreign or international tribunal
 - c) Letters rogatory/request issued by foreign or international tribunal OR by application by any interested person
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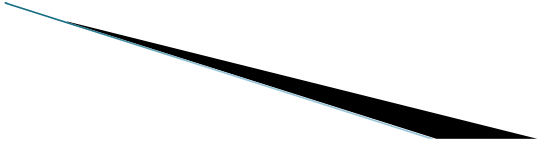
USA Title 28 USC Section 1782 Discovery

- ▶ Court may order target to give testimony, provide a statement or to produce a document or other thing
 - ▶ Order may prescribe the practice and procedure (could be practice and procedure of foreign or international tribunal)
 - ▶ Federal Rules of Civil Procedure apply if Order is silent on practice and procedure
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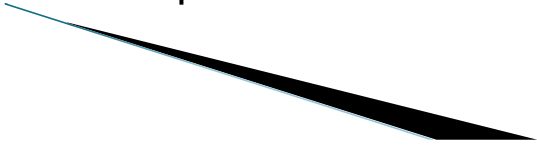
Discovery Under Hague Convention

- ▶ Article 1 – Procedure for discovery requests by “Contracting States”
 - Limited by constraints placed by signatory nations on what discovery may be obtained
 - Can be a cumbersome and overly complicated
 - Procedure in the United States is to file a Motion for Issuance of Letters of Request International Judicial Assistance in the bankruptcy court
- 

Discovery Under Hague Convention

- ▶ If bankruptcy court grants motion, then moving party forwards bankruptcy court-approved request to the applicable central authority
 - ▶ Central authority typically will forward the letter to the applicable judicial authority
 - ▶ Article 9 of Hague Convention directs judicial authority to apply its own law to the methods and procedures to be followed
- 

Discovery Under Hague Convention

- ▶ Procedures can vary depending on the “law and methods” of the receiving jurisdiction
 - ▶ Waiting time issues regarding translation of discovery requests, when the receiving jurisdiction will act on the request, and how discovery materials are then transferred back to the propounding party in the United States
 - ▶ U.S Department of State counsels that routine time delays up to a year or more in execution of requests
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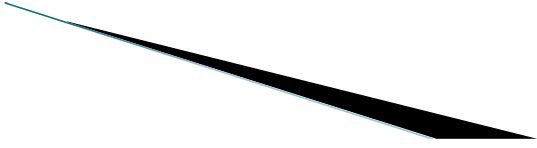
Cayman Islands

Discovery and Insolvency Proceedings


Discovery Under Hague Convention (Cayman Islands)

- ▶ Given effect in the Cayman Islands pursuant to the *Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978* (S.I. 1890/78)
- ▶ Letter of Request from U.S. or other foreign court
- ▶ Application made to Grand Court of the Cayman Islands (Rule 70, GCR)

Discovery Under Hague Convention (Cayman Islands)

- ▶ Must be for “civil proceedings”
 - ▶ Not for insolvency proceedings
 - ▶ Not for pre-trial discovery (fishing expeditions)
 - ▶ Letter of Request must contain sufficient particulars of documentation/information sought
- 

Discovery Under Hague Convention (Cayman Islands)

- ▶ Grand Court has power to order the following:
 - Examination of witnesses (orally or in writing);
 - Production of documents;
 - Inspection, photographing, preservation, custody or detention of any property;
 - Taking samples of any property and carrying out any experiments on or with any property;
 - Medical examination of any person; and
 - Taking/testing of blood samples from any person.
- 

Liquidators' Powers (Cayman Islands)


- ▶ *Companies Law (2018 Revision)*
- ▶ Liquidator may require a Statement of Affairs (s. 101)
 - Include: assets/liabilities, names and addresses of persons having possession of company assets, assets of the company held by those persons, etc.
- ▶ Power to investigate and prosecute (s. 102)
- ▶ Apply to Court for examination (orally or by affidavit in reply to interrogatories or both) and disclosure of documents/property (s. 103) from/by “relevant persons”:
 - Persons having sworn/concurred with Statement of Affairs
 - Directors and officers
 - Professional service providers
 - Controllers, advisors, liquidators or receivers of company
 - Persons involved with promotion or management of company



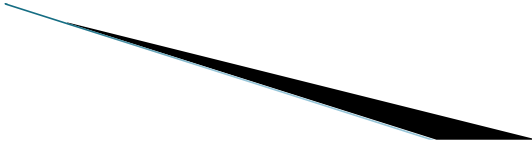
Limitations to Liquidators' Powers (Cayman Islands)

- ▶ Auditors are not “relevant persons” for purposes of s. 103 and may not be able to obtain auditor files
- ▶ Seek recourse through other venues
 - Chapter 15 proceedings
 - 28 U.S.C. 1782
- ▶ Platinum Partners Value Arbitrage Fund LP
 - Chapter 15 / Rule 2004 discovery of auditor's files

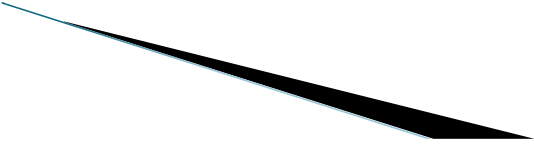
Platinum Partners Arbitrage Fund, L.P.

- ▶ Chapter 15 recognition Cayman Islands liquidation proceedings as “foreign main proceedings”
 - ▶ Sought informal discovery then served subpoena to obtain auditor file/working papers
 - ▶ Liquidators brought motion to compel discovery under Rule 2004
 - ▶ Court ordered discovery of U.S. auditor’s file
 - ▶ Comity: Relief in U.S. is “comparable” to Cayman Islands and “foreign laws are not repugnant to our laws and policies”
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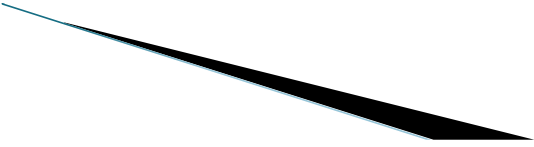
Foreign Recognition in Cayman Islands

- ▶ Cayman Islands not a signatory to UNCITRAL Model Law on Cross-Border Insolvency
 - ▶ Similar to Chapter 15 – Ancillary orders to aid a recognized foreign insolvency proceeding
 - ▶ Part XVII – International Co-operation provisions of the *Companies Law*
 - ▶ *Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2018*
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Foreign Recognition in Cayman Islands

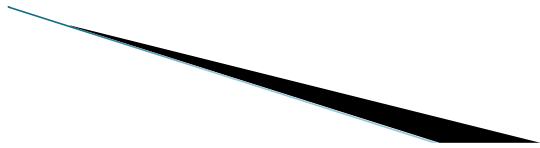
- ▶ Application by a Foreign Representative to the Grand Court for ancillary order to:
 - Enjoining commencement or staying continuation of legal proceedings against debtor
 - Staying enforcement of judgement against debtor
 - Requiring person in possession of information relating to business/affairs of debtor to be examined by and produce documents to Foreign Representative
 - Turn over any debtor property to Foreign Representative
- 

Foreign Recognition in Cayman Islands

- ▶ Procedure for Examination
 - Under oath
 - Conducted by Foreign Representative or person acting with authority of Foreign Representative (attorney or foreign lawyer)
 - Examination take place in private (out of court)
 - Examinee obligated to take all steps as reasonably necessary to inform themselves about matters of which they will be examined
 - Examination conducted in form of questions/answers and recorded by a court reporter
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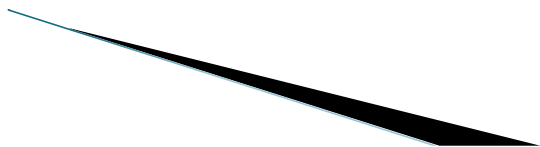
Foreign Recognition in Cayman Islands

- ▶ Discovery Limitations
 - Ancillary order for examination under oath and production of documents made only against debtor or a “relevant person” under s. 103 of the *Companies Law*

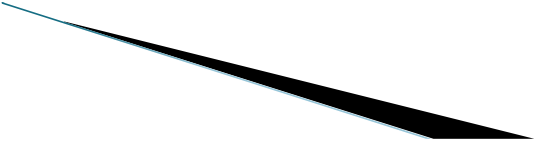


Other Relief (Cayman Islands)

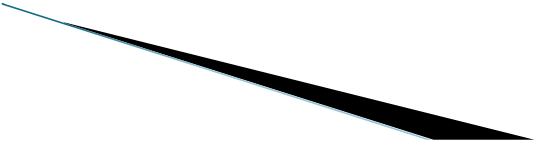
- ▶ Jurisdiction to make orders appointing a receiver or for interim relief in relation to foreign proceedings pursuant to Section 11A of the *Grand Court Law (2015 Revision)*
- ▶ Requirements:
 - 1) Proceedings commenced or to be commenced
 - 2) Proceedings capable of giving rise to judgment which may be enforced in Cayman Islands



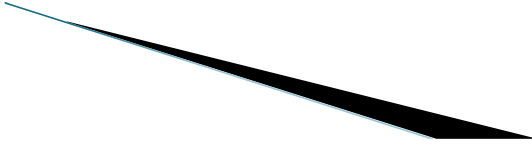
Other Relief (Cayman Islands)

- ▶ *Norwich Pharmacal* Order (NPO)
 - Pre-action, during action, post-judgement against a third party
 - Gagging order
 - *Norwich Pharmacal v Commissioners of Customs & Excise*, [1974] UKHL 6
 - ▶ Bankers Trust Order
 - Variation of NPO where fraud is likely/obvious
 - Power tool to circumvent banking confidentiality rules to race, recover and preserve assets
 - *Bankers Trust Co. v Shapira*, [1980] 1 WLR 1274 CA
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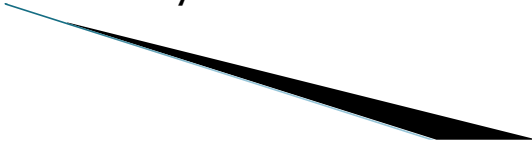
Other Relief (Cayman Islands)

- ▶ Mareva Injunction
 - Freezing assets in relation to Cayman Islands or foreign proceedings
 - Must show real risk of removal or dissipation of assets
 - Potential for worldwide freezing order
 - *Mareva Ltd. Naviera v International Bulk Carriers, S.A.* CA 1 Feb 1975
 - ▶ Anton Piller Order (APO)
 - Search for and seize documents/property/assets
 - *Anton Piller KG v Manufacturing Process Ltd*, [1976] Chancery 55
- 

Post-Judgment (Cayman Islands)

- ▶ Once judgment is obtained/all necessary steps to register foreign judgment complied with:
 - Judgment Debtor Examination (Order 48, GCR)
 - Charging Order over land or other assets (Order 50, GCR)
 - Writ of Execution, Sequestration, Fieri Facias (Orders 46 & 47, GCR)
 - Appointment of receiver (Orders 30 & 51, GCR)
 - Committal for contempt (Order 52, GCR)
- 

Where to Look for Information (Cayman Islands)

- ▶ Public Registries (Land Registry, Department of Vehicle Registry, Shipping Registry, Aircraft Registry)
 - ▶ Court Records
 - ▶ Company/Partnership Registry
 - Beneficial Ownership: not publically available (yet) but discoverable through *Norwich Pharmacal* relief
 - ▶ Cayman Islands Monetary Authority (securities)
- 

Hong Kong

Discovery and Insolvency Proceedings

Hong Kong



Image source: wikipedia.org

- ▶ Southeast coast of China
- ▶ Former Crown Colony
 - Trading hub for mainland China between South China Sea and Pearl River
- ▶ Special Administrative Region (1 July 1997)
 - Autonomy in economic, legal and administrative systems
 - Independent judiciary

Hong Kong

- ▶ Stock Exchange in Hong Kong
 - 4th largest stock markets in the world
- ▶ Foreign holding companies
 - 1,587 out of 1,794 Listcos were overseas companies (2017)
 - 843 – Cayman Islands
 - 475 – Bermuda



Image source:
www.hkex.com.hk

Discovery Under Hague Convention (Hong Kong)

- ▶ *Evidence Ordinance (Cap 8) ("EO")*
 - Order 70 of the *Rules of the High Court*
 - Covers requests by non-parties to Hague Convention
- ▶ Mainland China
 - Both party to the Hague Convention
 - However, no jurisdiction for Court to rely on Hague Convention as not "inter-state" and not a "foreign jurisdiction"
 - Fall back on the wide powers of the EO

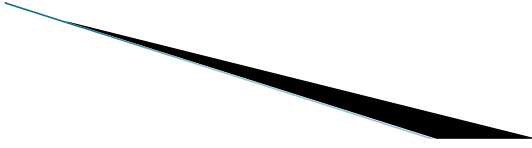
Discovery Under Hague Convention (Hong Kong) – scope of discovery

- ▶ Generally recognise the request in line with requesting Court
- ▶ Subject to Statutory and common law rules
 - Prohibition against pre-trial discovery and general discovery
 - Requires foreign applicants to specify the evidence sought
- ▶ Blue-pencil rule
 - *Re Moreno and the District Court for the Eastern District of Virginia* [1987] 3 HKC 279

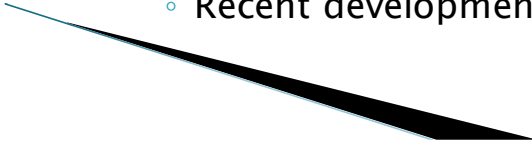
Ancillary applications for tracing, preservation and recovery of assets

- ▶ Norwich Pharmacal Order – *disclosure*
- ▶ Mareva Injunction – *restrain*
- ▶ Gagging Order – *confidentiality*
- ▶ Section 21 L, M and N – *High Court Ordinance*
 - Court's power to grant interim relief ancillary to proceedings commenced in a foreign jurisdiction
 - **Even** if the court would not otherwise have had jurisdiction

Recognition and Assistance to Foreign Liquidators

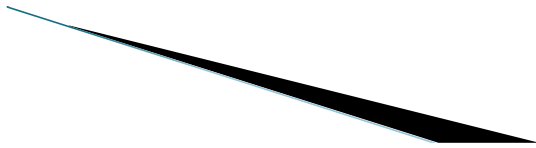
- ▶ Hong Kong is not party to any international treaties or bilateral agreements on cross-border insolvency
 - ▶ Mostly common law
 - ▶ Issue legal proceedings:
 - Recognition and leave not required for foreign appointed liquidators
 - Including ancillary applications
 - Potential security for costs applications
- 

Recognition and Assistance to Foreign Liquidators

- ▶ Exercise of powers under the Hong Kong regime in Hong Kong: *CWUMPO (Cap 32)*
 - Require recognition of appointment
 - Streamlined approach: applications often granted on paper on the basis of a **letter of request** from a jurisdiction with similar substantive insolvency law
 - *Joint Official Liquidators of A Co v B & C* [2014] 5 HKC 152
 - *Re BJB Career Education Co Ltd* [2017] 1 HKLRD
 - Most common: Cayman Islands, BVI
 - Recent development: recognition of Japanese Trustee
- 

Recognition of Orders in Foreign Insolvency Proceedings

- ▶ General rules in recognition of foreign judgments
 - Statutory Recognition – limitations
- ▶ Common law rules
- ▶ Insolvency Orders
 - *Rubin v Eurofinance* – recognition of foreign insolvency orders is the same as other foreign judgments



How to Find Hidden Assets in the Cayman Islands

Adam D. Crane

HSM Chambers

George Town, Grand Cayman, Cayman Islands

Foreign Discovery under Hague Convention in the Cayman Islands

The *Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970* is given effect in the Cayman Islands pursuant to the *Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978* (S.I. 1890/78) (“**EPIOJ**”).

A party seeking evidence in the Cayman Islands must ask a court in the United States or another jurisdiction (“**Requesting Court**”) to send a Letter of Request to the Grand Court of the Cayman Islands seeking an order for evidence to be obtained in the Cayman Islands.

An application is made to the Grand Court under Order 70 of the Grand Court Rules, 1995 (Revised) (“**GCR**”) in pursuance of the Letter of Request from the Requesting Court. The evidence sought to be obtained in the Cayman Islands is required to be for the purposes of a civil proceeding(s) which has either been instituted before the Requesting Court or contemplated to be instituted before the Requesting Court.¹

The application may be made on an *ex parte* basis, and must be supported by an affidavit with the Letter of Request (and a translation thereof if the request is not in English) as an exhibit.

Section 2(1) of the EPIOJ states that the Grand Court shall have the power to “... make such provision for obtaining evidence in the Cayman Islands as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made.”

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The Grand Court has the power to order the following:

1. Examination of witnesses (orally or in writing);
2. Production of documents;
3. Inspection, photographing, preservation, custody or detention of any property;
4. Taking of samples of any property and the carrying out of any experiments on or with any property;
5. Medical examination of any person; and
6. Taking and testing of blood samples from any person.²

The Grand Court cannot require a person to give any evidence:

- 1) Which they could not be compelled to give in civil proceedings in the Cayman Islands or in civil proceedings in the country or territory of the Requesting Court; and
- 2) If the evidence would be prejudicial to the security of the United Kingdom, Cayman Islands or any other territory the United Kingdom is responsible for under international law.

¹ EPIOJ, section 1

² EPIOJ, section 2(2)

The Grand Court considered whether or not Receivership proceedings in Canada constituted “civil proceedings” in the case of *In The Matter Of A Request From The Superior Court Of Ontario, Canada*³ holding that:

Re International Power Indus. NV is still binding and persuasive authority that bankruptcy proceedings are not considered by the courts to be civil proceedings and it is my view that there is no inherent jurisdiction of this court to exercise its discretion outside the statutory requirements. A further issue that has to be answered is whether the request can be said to be in pursuance of assistance to a foreign court in obtaining evidence for the purpose of a justiciable issue as recognized by the Hague Convention. (emphasis added)

The Grand Court found that that the appointment of a receiver does not constitute civil proceedings.

Outside of meeting the specific requirements set out in the EPIOJ, there are limitations to obtaining evidence in the Cayman Islands for use in foreign proceedings:

1. The intent of the EPIOJ is to assist foreign courts and not for pre-trial discovery/fishing expeditions; and
2. A Letter of Request should contain the specifics of the information and documentation sought as:
 - a. The Grand Court cannot modify the testimony or documents sought if the modifications would change the nature of the request;
 - b. The Grand Court may reject the request as a fishing expedition if it is overly broad or vague; and
 - c. Cross-examination/further questioning may not be permitted if the line of questioning is not confined within the bounds of the Letter of Request.

The EPIOJ does not contain any provisions that oust the equitable jurisdiction of the court.⁴ Such relief can be in the form of a *Norwich Pharmacal* order where the circumstances are appropriate.

Discovery in Insolvency Proceedings

1) Foreign Insolvency Proceedings

Section 241 of the *Companies Law (2018 Revision)* (“**Companies Law**”) permits the Grand Court, upon application by a foreign representative (trustee, liquidator or other appointed official for the purpose of a foreign bankruptcy proceeding) to make orders ancillary to the foreign proceeding for the purposes of:

1. Recognizing the right of the foreign representative to act in the Cayman Islands on behalf of or in the name of the debtor;
2. Enjoining the commencement or staying the continuation of legal proceedings against the debtor;
3. Staying enforcement against the debtor;
4. Requiring persons in possession of information relating to the business or affairs of the debtor to be examined by and produce documents to a foreign representative; and

³ *In The Matter Of A Request From The Superior Court Of Ontario, Canada*, 2006 CILR 460, at para. 25

⁴ *Miller v Condoco Grand Cayman Resort Ltd.*, 2006 CILR Note 26

5. Requiring the turnover of any of the debtor's property to the foreign representative.

Section 242 of the *Companies Law* sets out the criteria the Grand Court must consider in determining whether or not to use its discretion to make an ancillary order:

1. The just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
2. The Protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
3. The Prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
4. The distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed within the *Companies Law*; and
5. The recognition and enforcement of security interests created by the debtor.

The assistance of foreign insolvency proceedings is also governed by the *Foreign Bankruptcy Proceedings (International Co-operation) Rules 2008* ("FBPR") and the Grand Court Rules.

The FBPR sets out the procedures to be followed when seeking foreign recognition:

- 1) The application is to be made by petition setting out the following:
 - a. Particulars of the debtor's incorporation;
 - b. Nature and place of the debtor's business;
 - c. The court or other authority by which the foreign representative was appointed;
 - d. The powers and duties of the foreign representative under the law of the place of their appointment; and
 - e. The reasons for seeking a declaratory order.
- 2) The application is to be verified by an affidavit sworn by the foreign representative, attaching as an exhibit a copy of the order by which the foreign representative was appointed;
- 3) The application shall also be supported by an affidavit of foreign law setting out the powers and duties of the foreign representative under the law of their place of appointment; and
- 4) The declaratory order shall be published in the Gazette within 7 days of the making of the declaratory order.

One important item recently added to the FBPR is that no order for security for costs can be made against a foreign representative with respect to any application under section 241.

The FBPR also sets out the procedure of examinations under section 241:

1. The examination may be conducted by the foreign representative or by a person acting with the authority of the foreign representative (including their attorney or foreign lawyer);
2. The examination shall be carried out under oath;
3. The examination shall take place in private and at a time specified in the order or otherwise agreed between the examinee and foreign representative;
4. The examinee is entitled to have their attorney/foreign lawyer present, but the attorney/foreign lawyer are not permitted to participate in the examination by putting questions to the examinee unless permitted by the foreign representative or person conducting the examination;

5. The examinee is obligated to take all steps as reasonably necessary to inform themselves of the matters they will be examined on. The examination can be adjourned by the foreign representative or examiner to allow the examinee to inform themselves;
6. The examinee is to be given an opportunity, in advance of the examination, to review all of the documents intended to be put to the witness;
7. The examination is conducted in the form of questions and answers;
8. The examination is to be recorded by a court reporter and the court reporter must prepare a certified transcript of the examination.

An examinee is required to answer all questions put to them which are within their knowledge or means of knowledge, subject to any objections on the basis of self-incrimination or legal professional privilege. The examinee can be compelled to give the names and addresses of all persons who might reasonably be expected to have knowledge.

Ancillary orders for examinations under oath and production of documents can only be made against the debtor or “relevant persons” under section 103 of the *Companies Law*.

“Relevant persons” are defined as persons who are resident in the Cayman Islands or elsewhere who:

1. Have made or concurred with the statement of affairs;
2. Are or have been a director or officer of the company;
3. Are or have been a professional service provider to the company;
4. Have acted as a controller, advisor or liquidator of the company or receiver or manager of its property; and
5. Are or have been concerned or taken part in the promotion or management of the company.

2) Plenary Insolvency Proceedings in the Cayman Islands

If insolvency proceedings are commenced in the Cayman Islands by a winding-up petition and a liquidator is appointed under the *Companies Law*, a liquidator has a number of statutory powers that can assist in locating hidden assets.

One of the central roles of an official liquidator is to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to anyone else entitled to the assets.

Pursuant to section 101 of the *Companies Law*, a liquidator may require certain individuals to prepare and submit to the liquidator a statement containing the following information:

1. Particulars of company assets and liabilities, including contingent and prospective liabilities;
2. Names and addresses of persons having possession of company assets;
3. Assets of the company held by those persons;
4. Names and addresses of creditors of the company;
5. Securities held by those creditors;
6. Dates when securities were granted to the creditors; and
7. Further information as required by the liquidator.

The individuals that can be compelled to provide information to the liquidator include persons who:

1. Are or have been directors or officers of the company;
2. Are or have been professional service providers to the company; and
3. Are or have been employees of the company, during the period of one year immediately preceding the date in which a provisional liquidator is appointed or a winding up is commenced.

Liquidators are given the power pursuant to section 102 of the *Companies Law* to investigate:

1. The causes of a company's failure (if it has failed); and
2. The promotion, business, dealings and affairs of the company.

Subject to obtaining directions from the court, a liquidator has the power to:

1. Assist the Cayman Islands Monetary Authority and the Royal Cayman Islands Police Service to investigate the conduct of individuals referred to in section 101(3); and
2. Institute and conduct a criminal prosecution of persons referred to in section 101(3).

All relevant persons as defined in section 103(1) are obligated to co-operate with an official liquidator. Such requests for co-operation from an official liquidator are typically made on an informal basis to a relevant person.

An official liquidator may, at any time before the dissolution of a company, apply to the Grand Court for an examination of a relevant person or to compel a relevant person to transfer or deliver company property or documents to the official liquidator.

Pursuant to section 103(5), the Grand Court can order that a relevant person swear an affidavit in response to written interrogatories, attend for oral examination by the official liquidator, or both.

Section 138 provides a more expansive reach to recover property of a company as the Grand Court can order **any person** who has in their possession property or documents belonging to the company to pay, transfer or deliver such property or documents to the official liquidator.

Other Avenues to Obtain Information

1) Assistance to Foreign Proceedings

In 2014, the *Grand Court Law (2008 Revision)* (now referred to as the *Grand Court Law (2015 Revision)*) ("**Grand Court Law**") was amended to provide interim relief in relation to foreign proceedings where a defendant was not located in the Cayman Islands.

Section 11A of the *Grand Court Law* provides the Grand Court with the authority to appoint a receiver or grant interim relief in relation to foreign proceedings upon being satisfied of the following criteria:

1. That the proceedings have been or are to be commenced in a court outside of the Cayman Islands; and
2. The proceedings are capable of giving rise to a judgment which may be enforced in the Cayman Islands under any Law or at common law.

Interestingly, section 11A does not require the cause of action in the foreign proceeding to be a cause of action known to or within the jurisdiction of a court of the Cayman Islands. The foreign proceedings must result in a judgment that would be enforceable in the Cayman Islands.

The Grand Court may refuse to grant an application for the appointment of a receiver or for interim relief if it would be unjust or inconvenient to grant the application.

Worldwide freezing orders may be issued in the Cayman Islands in relation to foreign proceedings where the respondent is a non-resident of the Cayman Islands and even where the respondent's assets are located outside of the Cayman Islands.

"Interim relief" is defined as including an interlocutory judgment. However, the Grand Court has the power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted pursuant to section 11A. This includes disclosure orders as "disclosure orders ordinarily followed freezing orders as the purpose was to police the injunction."⁵

2) Post-Judgment Procedures

There are multiple options to enforce Cayman Islands judgments and to obtain further information about or to recover assets from a judgment debtor.

Judgment Debtor Examination (Order 48, GCR): This is a useful tool where a party has successfully obtained a judgment against a defendant. A judgment creditor can obtain an order to conduct a judgment debtor examination, compelling a judgment debtor to attend court to answer questions and provide information/documentation relating to their financial means and assets. The judgment debtor examination is under oath and a record is made by the court. The order requiring the judgment debtor to attend a judgment debtor examination can set out the particulars of the documents they are required to bring to the examination. Any officer of a corporate judgment debtor can be subjected to an examination. Failure to attend the judgment debtor examination can result in a bench warrant for the arrest and committal of the judgment debtor.

Writ of Execution, Sequestration and Fieri Facias (Orders 46 & 47, GCR): Once information has been obtained about a judgment debtor's assets, a judgment creditor can apply to the court for an order directing the court bailiff to seize assets to satisfy the judgment debt.

Garnishee Proceedings (Order 49, GCR): An application can be made to the court requiring a third party to pay money to the judgment creditor. The primary example is the garnishment of the bank account(s) of the judgment debtor, requiring the bank to turn over funds in the judgment debtor's bank account(s).

Charging orders over land or other assets (Order 50, GCR): A judgment creditor can apply to the court for a charging order to impose a statutory charge over a judgment debtor's real property, securities, interests in certain trusts, and funds paid into court. A charging order can be enforced by an order of sale of such property.

Appointment of a receiver (Orders 30 & 51, GCR): A receiver can be empowered to assist in the gathering and preservation of the judgment debtor's property.

⁵ *Classroom Investments Incorporated v. China Hospitals Incorporated and China Healthcare Incorporated*, 2015 (1) CILR 451 and *Ahmad Hamad Algosaibdi & Bros. C. v Saad Invs. Co. Ltd.* (3) (2010 (1) CILR 553)

Committal for Contempt (Order 52, GCR): A judgment debtor can be imprisoned for failing to comply with a court order upon the application of a party or upon the court's own motion. Such contempt can include failing to appear in court for a hearing, failing to turn over property as ordered or even for failing to pay a judgment debt as ordered to be paid (if the judgment debtor has defaulted in payment, has the means to pay the judgment debt in full or by installments and is willfully refusing or neglecting to satisfy the judgment in the matter in respect of which the court is satisfied they have the means).

3) What information is available and where can you go to search for information?

There are a number of sources of publically available information in the Cayman Islands, some of which may prove to be more fruitful than others. These can be a springboard to locating further information.

It is worth noting that assets found in these registries may be owned by companies or other entities and the public record of the beneficial owners of those assets may not be publically available. However, information on beneficial ownership may be obtained through *Norwich Pharmacal* Orders.

Cayman Islands Land Registry: The Land Registry is open for public inspection for a fee. Publically available information includes current and historical land/lease registers, executed instruments (i.e. deeds, charges), powers of attorneys, etc. This information can be used to determine ownership and conveyances of real property.

Department of Vehicles Registry: This is open for public inspection for a fee. A request can be made to the Department of Vehicles for a "System Search" to determine vehicle ownership.

Cayman Islands Shipping Registry: All information held on the Cayman Islands Shipper Register is open to the public inspection for a fee. Records may be inspected in person and are also available for purchase in the form of a Transcript of British Registry.

Cayman Islands Aircraft Registry: An active aircraft register is available online for public inspection and includes information on the name of the registered owner, date of registration, serial number, model and manufacturer.

Companies Register: This is open for public inspection for a fee. However, the information available is limited to general information about the company, including name, formation date, company type, place of incorporation, registered agent and address. Certain companies are required to keep a register of beneficial ownership that is not publically available. As noted above, this information may be obtained through a *Norwich Pharmacal* Order. The UK Government has recently passed legislation threatening to impose a publically available beneficial ownership registry in the British Overseas Territories such as the Cayman Islands, if such public registries were not voluntarily established by December 31, 2020.

Cayman Islands Monetary Authority: Limited information is available for public access on certain companies registered with CIMA.

Court records are available for inspection by any party to a proceeding upon payment of the necessary fees. However, the court may order a court file relating to a specific proceeding and any specific document(s) within a proceeding to be closed and not open to inspection by any party or other person

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without leave of the court. If a non-party wishes to inspect a court file, the non-party must apply to the court for permission to inspect the court file or to take a copy of any documents in the court file.

Discovery in Foreign Proceedings - Hong Kong

by Ian De Witt
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Hong Kong, China

A. Hong Kong

Location: Southeast coast of China

Size: about 1100 sq. km

1. Former British Colony: strategic location as a trading hub with excellent to Mainland China through the Pearl River Delta the rest of the world through South China Sea
2. Since 1997: Special Administrative Region of China
 - a. Hong Kong is responsible for its own domestic affairs including the judiciary and legal system
 - b. Courts in Hong Kong continue to use the English common law and most of the laws applied in Hong Kong today have followed the English legal system
3. International Financial Centre
 - a. Proximity to China
 - b. Hong Kong Stock Exchange:
 - i. Fourth single largest stock market in the world and third in Asia
 - ii. 2,315 listed companies (31 December 2018)
 - iii. Number 1 global IPO venue in 2018 (and 6 out of the last 10 years)
 - iv. In the last 8 years, over HK\$2 trillion (approximately US\$255 billion) was raised by issuers in IPO funds.
 - c. Foreign companies
 - i. In 2017, 1,587 out of 1,794 (88.5%) of the companies listed on the Hong Kong Stock Exchange were overseas companies

B. Discovery Under Hague Convention

4. Hong Kong is a party to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.
5. Sections 74 to 77A in Part VIII of the *Evidence Ordinance (Cap. 8)* provides the substantive basis of the court's jurisdiction in this relation and Order 70 of the *Rules of the High Court (Cap 4A)* provides the procedure framework supporting the provisions in the Evidence Ordinance.

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- a. *ex parte* application, with a supporting affidavit exhibiting the request pursuant to which the application is made
 - b. applicants are recommended to set out a list of questions and/or the subject matter of the evidence requested
6. Wide application
- a. Section 76 of the Evidence Ordinance: “*request issued by or on behalf of a court or tribunal exercising jurisdiction in a country or territory outside Hong Kong*”
 - i. Not limited to states that has agreed any civil procedure arrangements with Hong Kong.
7. Application to Mainland China
- a. Both parties to the Hague Convention
 - b. However, Hong Kong courts do not have jurisdiction to execute a request between the Hong Kong and Mainland because the Hague Convention is an inter-state international convention between “states”
 - c. Apply *Evidence Ordinance*
 - d. Recent development: *The Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters between the Courts of the Mainland and the Hong Kong SAR*” – hopefully provides further certainty
8. Scope of discovery
- a. Hong Kong courts will generally recognise the request in line with the requesting court, which governs the case before it.
 - i. *Predwave Corporation v. New World Tmt Ltd* [2007] 4 H.K.C. 207: as “*the US proceedings were issued in California and are to be tried there by Judge Komar ... all matters of procedure including the requirements of pleadings are to be governed by the laws of California and not Hong Kong*”
 - b. Subject to statutory and common law rules
 - i. Section 76(3) of the Evidence Ordinance: prohibition against orders requiring any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the Hong Kong courts.

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- ii. Section 76(4) of the Evidence Ordinance: precludes an order requiring general discovery
 - iii. Foreign applicants generally required to state and show prima facie that the documents are in the possession, custody or power of the person required to produce it.
- c. Blue-pencil rule
- i. Court has the discretion to refuse request if parts of them contravene Hong Kong rules
 - ii. Rarely exercised – normal course of action involves the request to be redacted or “blue-pencilled”: *Re Moreno and the District Court for the Eastern District of Virginia, United States of America* [1987] 3 H.K.C 279

C. Other applications

9. Available ancillary to foreign proceedings:

- a. Norwich Pharmacal Order: an order for the disclosure of documents or information.
 - i. Usually against innocent third parties, such as banks, requiring them to disclose documents, such as the accounting documents of the wrongdoer
- b. Mareva Injunction: an order restraining the Defendant from disposing of or dissipating his assets before a judgment is delivered by the court.
 - i. Allows the Defendant’s assets to be secured so that the judgment, once it is obtained, can be satisfied
- c. Gagging Order: an order often accompanying the above orders to prohibit information to be made public
 - i. For example, where a bank has been compelled by a Norwich Pharmacal order to produce accounting documents of an alleged wrongdoer, under a gagging order, it is prohibited from informing the alleged wrongdoer.

10. These applications are particularly popular in fraud cases – where it would be easier for the victim to put forward a strong case on the substantive claim against the wrongdoer

11. Ancillary interim relief:

- a. Sections 21L, M and N of the High Court Ordinance empowers the court in Hong Kong to grant the above interim relief ancillary to proceedings that have been commenced in a foreign jurisdiction.

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- b. This is so even if the Hong Kong court would not otherwise have had jurisdiction over the case.
- c. This is particularly useful in cross-border fraud cases where foreign companies wish to take action to recover stolen funds which have been transferred to Hong Kong bank accounts.
- d. In these cases, the above orders would be sought to prevent onward transfer of funds and secure the funds until recovery

D. Recognition and Assistance to Foreign Liquidators

12. Hong Kong has not adopted the UNCITRAL Model Law and is not a party of any international treaties or bilateral agreements that deal with cross-border insolvency

13. Mostly rely on Common Law as Hong Kong does not have any statutory framework that deals with cross-border insolvency

14. Legal Proceedings

- a. Foreign liquidators are entitled to commence proceedings in Hong Kong without first obtaining recognition of their appointment or leave from the court.
 - i. Includes application for ancillary relief (see previous section)
- b. Security for costs
 - i. The fact that the company is registered in a foreign jurisdiction and that it is in liquidation means that the Company would be more susceptible to order for security for costs.
 - ii. The company Plaintiff would be required to pay a “deposit” into court

15. Recognition of liquidators

- a. Required if the foreign liquidators enjoy the same powers as a liquidator appointed by the court in Hong Kong
 - i. Companies (Winding Up and Miscellaneous Proceedings) Ordinance (Cap 32)
- b. In the past, foreign liquidators had to petition to wind up the foreign company in Hong Kong and then appoint themselves as local liquidators before they can exercise these statutory powers

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by Ian De Witt

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Hong Kong, China

- c. *Joint Official Liquidators of A Co v B & C* [2014] 5 HKC 152
 - i. Court granted a recognition order to Cayman Island appointed liquidators pursuant to a letter of request from the Cayman court
 - ii. See also: *Re Centaur Litigation SPC* (unreported, HCMP 3389/2015, 10 March 2016) and *Re BJB Career Education Co Ltd* [2017] 1 HKLRD
- d. The court has developed a more streamlined approach whereby recognition orders would be granted on the basis of a letter of request from a foreign court in a jurisdiction with a similar substantive insolvency law
- e. The recognition order allows foreign liquidators to exercise powers which are available to a provisional liquidator or liquidator under Hong Kong's insolvency regime provided that the same power is available to the foreign liquidation in the jurisdiction of his or her appointment.
 - i. For example for disclosure orders against banks and companies for accounting records, and conduct private examination on directors of the company who might be in the jurisdiction.
- f. There are very few reported cases on recognition as most of them are now granted on paper.
- g. Most common with BVI and Cayman Island appointed liquidators, as many companies operating in Hong Kong are incorporated in these offshore jurisdictions and/or have holding companies that are.
- h. Recently – the application of this streamlined approach extended to the recognition of a Japanese trustee.

16. Recognition of Orders in foreign insolvency proceeding

- a. Registration of foreign judgments under statute
 - i. Only judgments from certain countries can be registered; and
 - ii. Such judgments must be judgment for a sum of money.
- b. Judgments from other jurisdictions, including the USA and non-money judgments and orders, e.g. insolvency orders must be recognised under Common Law
- c. Special regime for insolvency orders?
 - i. *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*: the Privy Council considered that there

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should be a different regime for the recognition of orders in insolvency proceedings;

- ii. However, this case overturned in *Rubin v Eurofinance* where the Supreme Court decided that enforcement of insolvency proceedings are to be treated in the same manner as other foreign judgments and “insolvency orders” as such were not given “better recognition”.
- iii. Position in Hong Kong: recognised as an issue to be clarified in *Re CW Advanced Technologies Limited* [2018] HKCFI 1705 but the court did not rule on it. Therefore, as of now, there is no Hong Kong authority on the issue.

[28 USCS § 1782](#)

Current through PL 115-391, approved 12/21/18, with a gap of PL 115-334

United States Code Service - Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART V. PROCEDURE > CHAPTER 117. EVIDENCE; DEPOSITIONS

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter [[28 USCS §§ 1781](#) et seq.] does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

History

(June 25, 1948, ch 646, [62 Stat. 949](#); May 24, 1949, ch 139, § 93, [63 Stat. 103](#); Oct. 3, 1964, *P.L.* 88-619, § 9(a), *78 Stat.* 997; Feb. 10, 1996, *P.L.* 104-106, Div A, Title XIII, Subtitle E, § 1342(b), *110 Stat.* 486.)

Prior law and revision:

1948 Act

Based on [title 28, U.S.C., 1940 ed., §§ 649-653, 701, 703, 704](#) (R.S. §§ 871-875, 4071, 4073, 4074; Feb. 27, 1877, ch. 69, § 1, [19 Stat. 241](#); Mar. 3, 1911, ch. 231, § 291, [36 Stat. 1167](#); June 25, 1936, ch. 804, *49 Stat.* 1921).

Sections 649-652 of title 28, U.S.C., 1940 ed., applied only to the District of Columbia and contained detailed provisions for issuing subpoenas, payment of witness fees and procedure for ordering and taking depositions. These matters are all covered by *Federal Rules of Civil Procedure, Rules 26-32*.

Provisions in sections 649-652 of title 28, U.S.C., 1940 ed., relating to the taking of testimony in the District of Columbia for use in State and Territorial courts were omitted as covered by section 14-204 of the District of Columbia Code, 1940 ed., and *Rules 26 et seq., and 46 of the Federal Rules of Civil Procedure*.

Only the last sentence of *section 653 of title 28, U.S.C., 1940 ed.*, is included in this revised section. The remaining provisions relating to depositions of witnesses in foreign countries form the basis of section 1781 of this title.

28 USCS § 1782

Sections 701, 703, and 704 of title 28, U.S.C., 1940 ed., were limited to "suits for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest."

The revised section omits this limitation in view of the general application of the last sentence of *section 653 of title 28, U.S.C.*, 1940 ed., consolidated herein. The improvement of communications and the expected growth of foreign commerce will inevitably increase litigation involving witnesses separated by wide distances.

Therefore the revised section is made simple and clear to provide a flexible procedure for the taking of depositions. The ample safeguards of the *Federal Rules of Civil Procedure, Rules 26-32*, will prevent misuse of this section.

The provisions of *section 703 of title 28, U.S.C.*, 1940 ed., for punishment of disobedience to subpoena or refusal to answer is covered by Rule 37(b)(1) of Federal Rules of Civil Procedure.

The provisions of *section 704 of title 28, U.S.C.*, 1940 ed., with respect to fees and mileage of witnesses are covered by *Rule 45(c) of Federal Rules of Civil Procedure*.

Changes were made in phraseology.

1949 Act

This amendment corrects restrictive language in *section 1782 of title 28, U.S.C.*, in conformity with original law and permits depositions in any judicial proceeding without regard to whether the deponent is "residing" in the district or only sojourning there.

UNITED STATES CODE SERVICE

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