



AMERICAN
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INSTITUTE

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Follow the Money: Bankruptcy as a Tool to Fight Fraud and Recover Assets

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(IWIRC)

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Bankruptcy as a Tool to Fight Fraud and Recover Assets**



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In re Apollo Hotels

For decades, Apollo Hotels, was one the most luxurious hotel groups of the world, built in the most desirable locations within a country valued in over US\$1 Billion Dollars. Investors from all over the world had invested in the Apollo Hotels. Large sums were capitalized to undergo deep renovations in the Hotels in Latin America. Then the Covid-19 pandemic came and the company, incorporated and with its headquarters in the U.S. went into liquidation (Chapter 7).



Debtor

Apollo Hotels has subsidiaries in Colombia, Mexico and Chile.

The subsidiaries own and operate hotels in their respective jurisdictions.



The trustee's initial investigation

A trustee is appointed in the U.S. The trustee's review of the company's records reveals that the subsidiary's hotels have been transferred to third parties shortly before bankruptcy. The trustee suspects that these transfers were made without fair market consideration and to recently incorporated companies, possibly controlled by insiders.

The trustee has discovered that the buyers of the hotels are all controlled by a Panamanian company.

At the same time, Apollo's main shareholder purchased a lavish new home for his family and newspaper reports say that he purchased a significant stake in an oil and gas company.



United States - Discovery Tools

- Rule 2004 of the Federal Rules of Bankruptcy Procedure: permits a party in interest, including the trustee, to obtain documents and testimony relating to "acts conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate"
- Nationwide jurisdiction
- The subsidiaries are property of the debtor
- Subpoenas to those involved in the sale of the subsidiaries
- How does the trustee discover whether the shareholder improperly siphoned off money from the debtor for use in his recent purchase of assets



United States - Substantive Consolidation.

Test for substantive consolidation requires a showing

- (1) that there is substantial identity between entities to be consolidated; and
- (2) that consolidation is necessary to avoid some harm or to realize some benefit;

once this prima facie showing is made, burden then shifts to objecting party to show it relied on the separateness of one of the entities in extending credit, or that it will be prejudiced by the consolidation.



Mexico

Apollo has a Mexican subsidiary with hotels in many cities of Mexico, including Mexico City and Cancun, which apparently were transferred to third parties shortly before the Chapter 7 was filed in the U.S.

The trustee is looking for legal advice for the recovery of assets in Mexico and determining the advantages of pursuing recognition of the foreign insolvency proceeding or starting one in Mexico.



Mexico

Mexican Insolvency law provides for a clawback action:

- Ordinary look back period: 270 days
- Transactions with insiders: term doubles
- May go back up to 3 years

Unwinds transactions at undervalue or for no consideration
Presumption of fraudulent conveyance if made with insiders



Mexico

Clawback action is under Mexican insolvency law (*concurso mercantil*)

To declare the Mx subsidiary in *concurso mercantil*:

- a) 35% of debts overdue for at least 30 days, or
- b) Lack of liquidity to cover at least 80% of its debt

A foreign judgment on a clawback action on the hotels located in Mexico
would not be enforceable in Mexico (real estate)



Mexico

Recognition of foreign insolvency proceeding (“Interim measures”):

- Stay on enforcement or execution proceedings
- The appointment of an administrator of the assets
- Request information and evidence regarding the assets, business, rights and liabilities of the subsidiary

Upon recognition the foreign representative would have standing to:

- Intervene in local proceedings involving the Mexican subsidiary
- Initiate clawback actions / forbid transfer of assets
- Make petitions concerning protection, realization or distribution of assets



Mexico

2 possible issues with recognition of a foreign proceeding:

- 1) If Mx debtor has an establishment in Mexico, recognition of the foreign proceeding is conditioned to a Mexican insolvency proceeding of the Mexican debtor (may be challenged)
- 1) Main / ancillary foreign proceeding (Main insolvency proceeding takes place where debtors have their COMI)



Colombia

The trustee is now determining the actions in Colombia. Apollo subsidiaries have hotels in the beautiful beaches of Cartagena and in the Colombian Amazon rainforest.

Is recognizing the foreign proceeding the best way to proceed? What other options are available for the trustee?



Colombia

1. Recognition of the Chapter 7 in Colombia
 - Law 1116 incorporated the UNCITRAL cross-border insolvency model law in 2006.
 - Section 108 of Law 1116 - upon recognition, the foreign representative may file claw-back actions “according to the rules set forth in this law” [Section 74 of Law 1116]



Colombia

2. No Recognition of the Chapter 7 in Colombia

2.1. Claw-back in the U.S. and exequatur (homologation)

- U.S. judgment issued in the Chapter 7
- Exequatur (homologation) in Colombia
 - Before the Supreme Court of Justice
 - Limitation: *In rem* rights in Colombia



Colombia

2. No Recognition of the Chapter 7 in Colombia

2.2. Civil Claw-Back Action - Section 2491 of the Civil Code

- Transaction over the debtor's assets
- Debtor's estate is insufficient to pay all creditors (*eventus damni*)
- Fraud (*consilium fraudis*)



Colombia

3. Local insolvency proceeding under Law 1116 (recognition or no recognition)
 - 3.1. Must fulfill the requirements (insolvency or imminent insolvency)
 - 3.2. File an article 74 claw-back action.
 - The act affected the bankruptcy estate or altered the priority payment order
 - The bankruptcy estate is insufficient to pay all the claims
 - The act took place during the applicable preferential period [18 months]
 - Burden to prove good faith



Chile

Apollo Hotels in Chile are located in the Patagonia in a prime location within the glacial fjords, which is a great success and very profitable business.

The trustee is seeking for legal advice in Chile to determine how to proceed.

Should the U.S. proceeding being recognized in Chile?

Should a local proceeding be initiated? Which one?

How are the credits going to be collected?

Precautionary measures

Claw-back actions



Panama: Following the money

The trustee in the U.S. has requested information about the shareholders and the final beneficiaries of the Panamanian company.

Is it possible to pierce the corporate veil? What are the elements that must be proven?

