



AMERICAN  
BANKRUPTCY  
INSTITUTE

# Joint Program by The Financial Advisors and Investment Banking & International Committees

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**International / Cross-Border Disputes and Litigation -  
Judgement Enforcement and Venue Considerations**

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# Moderator



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Kristina Johnson is a partner in the Litigation Practice Group. She provides sophisticated counsel in complex and what are often cross-jurisdictional bankruptcy and creditors' rights, workouts, receiverships, commercial litigation, and collection matters.

Described as "an expert bankruptcy litigator" who is "effective and responsive in tight deadline situations" in Chambers USA, Kristina has represented secured and unsecured creditors, buyers of assets in bankruptcy sales, contract parties, trustees, and unsecured creditors' committees and debtors. Kristina served as co-leader of Jones Walker's bankruptcy, restructuring & creditors'-debtors' rights team from 2012–2020. As the only female attorney in Mississippi selected as a Fellow by the American College of Bankruptcy and one of only six attorneys in Mississippi who are board certified in business bankruptcy law by the American Board of Certification, she provides strong advocacy, focused representation, and sophisticated counsel in a wide range of matters involving distressed businesses and assets.

Kristina has a consistent record of success developing and implementing practical solutions to complex and multi-jurisdictional disputes. Over the course of her nearly 30 years in practice, she has handled a broad range of bankruptcy and insolvency litigation in Chapter 11 and Chapter 7 cases, as well as in less-common Chapter 9 and Chapter 12 cases and Chapter 13 class-action adversary proceedings and receiverships. She has represented clients in a multitude of industries, including oil and gas, healthcare (including pharmacies), hotel and hospitality, restaurant, retail, real estate, and banking and financial services.

# Speaker



## **Leyza Blanco**

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Leyza F. Blanco, a shareholder at Sequor Law, has devoted her practice to a wide range of litigation and insolvency matters, with a focus on asset recovery and cross-border bankruptcy and commercial litigation matters. Leyza has also served in several roles including examiner, receiver and special master in federal and state court proceedings and has served as a neutral arbiter in an arbitration proceeding.

Leyza received her Juris Doctor degree magna cum laude from the University of Miami Law School and is Board Certified in International Litigation and Arbitration. She is a Fellow of the American College of Bankruptcy and presently serves as co-chair for the American Bankruptcy Institute's Asset Sales Committee. She is a past chair of the International Women's Insolvency and Restructuring Confederation (IWIRC) and the Florida Bar's Business Law Section and past-president of the Bankruptcy Bar of the Southern District of Florida. Leyza has been recognized in Band 1 by Chambers and Partners, U.S.A.

# Speaker



**Quentin Cregan**

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Quentin is a partner of Maples and Calder's Dispute Resolution & Insolvency team in the Maples Group's Cayman Islands office.

Quentin's practice covers all aspects of corporate and commercial disputes (including banking, crypto, and investment fund disputes (fund, manager, and/or investor-side), insolvency matters, technology disputes (including trade secret, software, licensing, and IP), arbitration, and restructuring matters. He also has extensive experience in relation to family offices and advising ultra high net worth individuals on contentious trusts matters.

Quentin is English, Australian, and Cayman Islands law qualified. He holds a D.Phil (Ph.D) in law from the University of Oxford, and is a Fellow of the Chartered Institute of Arbitrators.

# Speaker



**Shane Donovan**

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Shane is a Partner in Mourant's BVI Litigation practice.

He's a commercial litigation lawyer with specialist experience in complex international litigation, including fraud and asset recovery, insolvency, and corporate and shareholder disputes. He's also experienced in obtaining urgent injunctions such as worldwide freezing orders and anti-suit injunctions, and Norwich Pharmacal (disclosure) orders.

Prior to joining Mourant Ozannes, he worked for Martin Kenney & Co in the BVI. He has also worked for PCB Litigation in London and Thynne & Macartney in Brisbane.

# Speaker



**Rick Rein**

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Rick is a partner at HMB and a member of the firm's Litigation Group. He concentrates his practice on secured creditors' rights, bankruptcy representation, loan enforcement and international litigation to recover claims and assets.

Rick regularly advises financial institutions, hedge funds, privately-held companies, bankruptcy trustees, receivers, non-bank lenders and high-net-worth individuals on a broad range of discovery and recovery matters, often arising from multi-jurisdictional misconduct.

Rick frequently serves as special counsel to corporations, individuals and their advisors as they navigate complex international banking and fraud matters. He was among the first U.S. counsel to obtain Norwich Pharmacal relief in Vancouver, British Columbia, and enforce consent directives, issued out of bankruptcy court in the state of Washington.

Rick develops customized recovery models to return value to stakeholders and assist in their actioning.

# Introduction

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International and cross-border disputes often times involve collections issues and venue considerations. This panel featuring experts in cross-border and international litigation issues will share their professional experience and insights on how to best to approach these types of claims and ways to collect on them.

# The United States (“U.S.”) Perspective



# Recovery is the Key

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- Evaluate strengths/weaknesses of case for evidence procurement, liability, damages, and misappropriated funds/assets.
- Understand wrongdoers involved, their profiles and their asset production preferences.
- Identify jurisdictions that may potentially be involved.
- Analyze discovery and recovery for those jurisdictions. Evaluate stability of the courts, jurisprudence on pre- and pending action disclosure, third-party/facilitator liability, issues of legal reciprocity and mutual assistance between jurisdictions. Decide not suitable forum(s) for recovery.

# International Asset Recovery Requires Persistence, Commitment and Experience

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- Need to reverse the litigation paradigm to approach multi-jurisdictional recoveries
- Too often, recovery given little thought at the beginning
- The prerequisite for recovery is discovery.
- Ease or difficulty with which recovery can be obtained influences investigation and discovery decisions.
- Use search and seizure orders, third-party orders to reveal concealed and hidden assets and freezing orders to prevent asset removal.
- Need to coordinate legal action in multiple jurisdictions.

# Common Misconceptions

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- Victim should rush to file suit/obtain judgment.
- Judgments can easily cross borders.
- Pre-judgment discovery is unlikely/unavailable.
- Focus should be on tracing assets.
- Can only freeze and seize assets after judgment.
- Criminal proceedings and restitution orders will help a victim to recover its loss.
- Bankruptcy will enable a victim to more efficiently recover its loss.
- RICO claims are a forceful way to achieve recovery.
- Laws of each country offer the same amount of protection.

# Asset Tracing

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- Common tactic to look at assets historically known to have been owned by debtor and attempt to ascertain where those assets are now
  - Known as forward tracing
  - Does not often yield actionable results and takes enormous time and expense
    - Historical information often dated
    - Liquid assets change character quickly.
    - Process could involve multiple jurisdictions and take many months.

# Asset Tracing

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- Backward tracing by looking at patterns of consumption today and tracing backward to find sources of assets used
  - Finding bank account for which attorney retainer was paid
  - Finding bank account for payment of mortgage or utilities
  - Locates assets beneficially owned now by debtor
  - Present use provides strong presumption of ownership

# Discovery

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- Informed investigation through public databases and records
  - Registries of real estate, ships and aircraft
  - Court records
- Judicial discovery presents assembling verifiable evidence of assets.
  - *Norwich Pharmacal*
  - In France, with an exequatur order, can apply to Bailiff to search for bank accounts
  - In Switzerland, pursue criminal proceedings and apply for prosecutor to search for assets.

# Discovery

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- In the U.S., pursue discovery under 28 U.S.C., Section 1782
  - USD wire transfers are processed through correspondent banks in U.S. for wire messages which typically disclose which bank the subject used and often the account number and will help the creditor to “follow the money.”
- Consent directives direct debtor to sign form directing holder of assets to produce records.
- Letters Rogatory seek discovery through central authority of treaty countries.

# Enforcement of Money and Non-Money Foreign Country Judgments in the U.S.



# Uniform Foreign Country Money Judgments Recognition Act

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Florida perspective (§ 55.603, et seq.) on a “uniform” law:

- “Final and conclusive and enforceable where rendered”
  - May be recognized even when an appeal is pending, or the judgment is subject to appeal
- File judgment and certified translation with clerk of court and record it among county records
- Affidavit with debtor information
- Notice of recording of judgment sent to debtor, who has 30 days to file notice of objection
- Circuit court hearing upon application of any party
- Certified copy of order may be recorded and then enforced like any Florida judgment

# Uniform Foreign Country Money Judgments Recognition Act

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A Foreign Country *Money* Judgment may not be recognized if:

- Insufficient notice given to the judgment debtor/lack of due process;
- Judgment obtained by fraud;
- Claim repugnant to public policy
- Conflicts with another final and conclusive order
- Proceeding in foreign country was contrary to agreement between parties to settle dispute outside of court proceedings;
- Jurisdiction was based only on personal service and foreign court was “seriously inconvenient forum for trial;”
- Foreign jurisdiction would not recognize similar state law judgment;
- Defamation judgment (in Florida, unless Florida court determines that foreign law applied provides at least as much protection for freedom of speech and press as U.S. and Florida law)

# Uniform Foreign Country Money Judgments Recognition Act

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## **Potential issues:**

- Statute of limitations applicable to judgments
- Currency/exchange rate
- Varying jurisdictions from state to state require service
- Grounds for non-recognition

**Comity is an alternative basis for enforcement of foreign decrees that are not money judgments.**

- Interlocutory or temporary injunctions
- Recognition of English receivership and administratorship orders

# Tiered, Phased, Multi-Disciplinary Approach

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The best approach to managing costs and finding the best path to victory in a cross-border judgment collection and asset recovery matter is to use a phased and tiered approach.

## **Phase 1 – Factual and Legal Claim Analysis**

- Collaboration with the client and forensic and legal teams to achieve an in-depth review and understanding of the facts is required. Success depends on assembling a multi-disciplinary, multi-faceted team with expertise in cross-border matters early on. The team should have a designated leader with experience in team management in cross-border cases. Modern-day “asset” or “value” recovery involves developing strategies early on to identify assets and targets/facilitators who are the life blood of the proceeds concealing process.

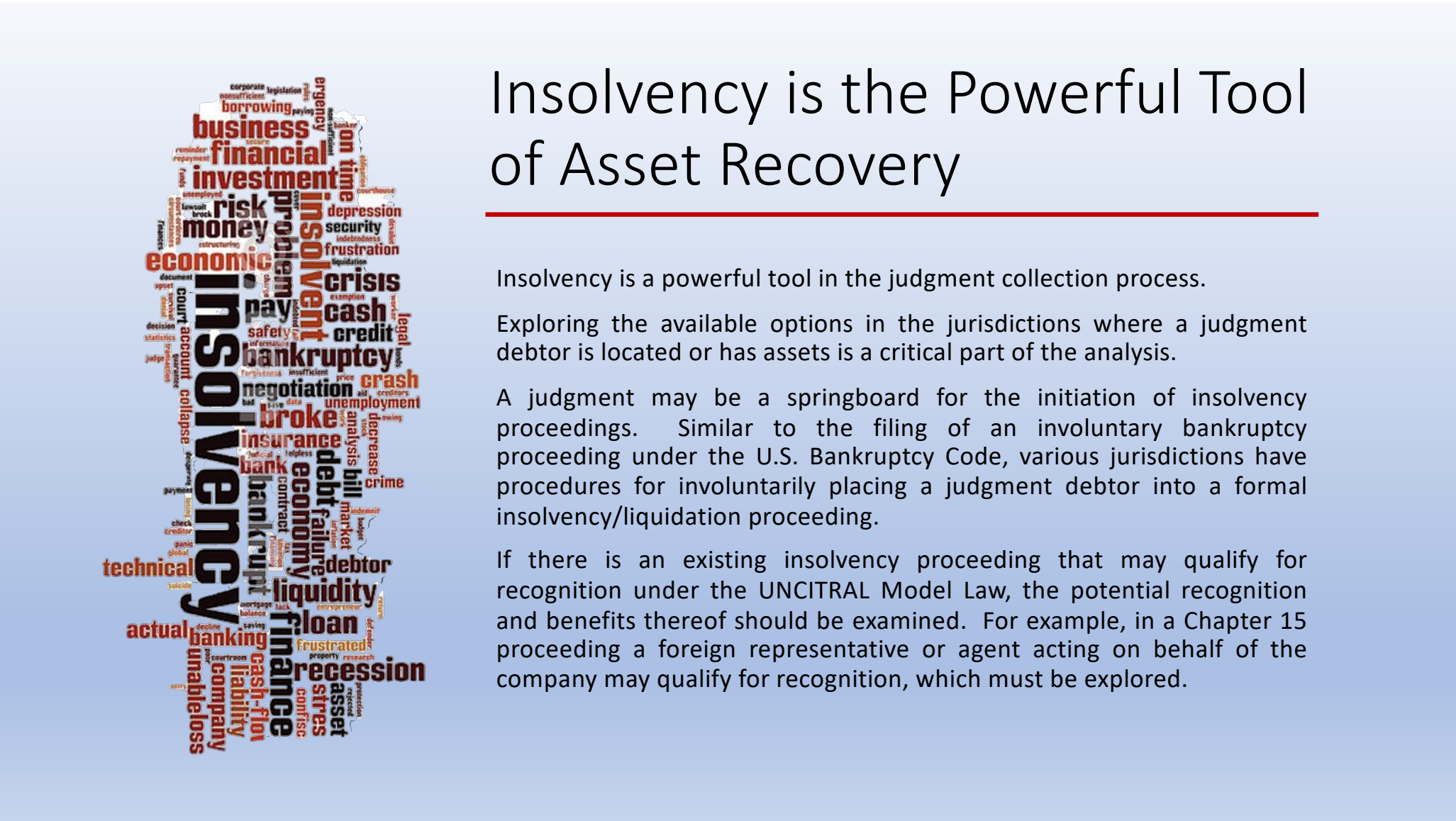
## **Phase 2 - Investigative/Discovery Phase**

- The lack of available records/evidence, including as a result of sabotage, may be mitigated through the use of international legal processes.
- Conduct discovery and investigate to be able to formulate a plan to deploy. A variety of discovery tools may be deployed in aid of litigation efforts and to assist in identifying additional claims against parties. Discovery orders such as Norwich Pharmacia/Bankers Trust Orders or orders under 28 U.S.C. § 1782.

## **Phase 3 - Deployment Phase**

- Develop strategies for pursuit of legal claims based on discovery and investigative yield.
- Commence proceedings/claims in strategic order. The timing and order of the process are critical to achieving success.

# An Insolvency Perspective



# Insolvency is the Powerful Tool of Asset Recovery

Insolvency is a powerful tool in the judgment collection process.

Exploring the available options in the jurisdictions where a judgment debtor is located or has assets is a critical part of the analysis.

A judgment may be a springboard for the initiation of insolvency proceedings. Similar to the filing of an involuntary bankruptcy proceeding under the U.S. Bankruptcy Code, various jurisdictions have procedures for involuntarily placing a judgment debtor into a formal insolvency/liquidation proceeding.

If there is an existing insolvency proceeding that may qualify for recognition under the UNCITRAL Model Law, the potential recognition and benefits thereof should be examined. For example, in a Chapter 15 proceeding a foreign representative or agent acting on behalf of the company may qualify for recognition, which must be explored.

# CHAPTER 15: WHAT IS IT?

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Chapter 15, Title 11 of the Bankruptcy Code is modeled after the Model Law on Cross-Border Insolvency developed by UNCITRAL.

Chapter 15 provides a mechanism for obtaining recognition and other relief in the U.S. in aid of:

- foreign bankruptcy;
- foreign insolvency;
- foreign liquidation; or
- foreign debt restructuring.



# BENEFITS OF RECOGNITION

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Recognition as a main proceeding triggers the "automatic stay," which stays execution on debtor's assets or on actions against debtor's assets, rights, obligations, or liabilities. 11 U.S.C. §§ 1519, 362.

Upon recognition, a foreign representative:

- Has the capacity to sue and be sued in the U.S.
  - adversary proceedings asserting U.S. law claims against third parties.
  - fraudulent transfer and clawback claims under foreign law.
- May take extensive discovery of the debtor's assets, affairs, rights, obligations, and liabilities. 11 U.S.C. § 1521(a)(4) and Fed. R. Bankr P. 2004.
- May administer the debtor's assets. 11 U.S.C. § 1521(a)(5).
- May apply directly for appropriate relief; and
- Shall be granted comity or cooperation by U.S. courts.





# KEY DEFINITIONS

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## **“Foreign proceeding”**

A collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. See 11 U.S.C. § 101(23).

Examples of what could be considered a “foreign proceeding” include an assignment for the benefit of creditors (available under U.S. state laws); an administration proceeding (under English law); an insolvent probate proceeding (in jurisdictions where the wind up or commercial insolvency laws apply under operation of law); liquidation of a failed insurance company or banking institution (otherwise not eligible to be debtors under the U.S. Bankruptcy Code).

## **“Foreign representative”**

A person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding. See 11 U.S.C. § 101(24).

## Consider § 1782 when:

- Corporations or individuals *in the United States* have information that is useful or necessary to a case (either ongoing or under preparation) in a court or tribunal *outside the United States*;
- The evidence sought includes:
  - *documentary evidence* such as contracts, financial records, ESI, and correspondence; or
  - *testimonial evidence* that can be obtained via depositions and interrogatories;
- It is difficult to use a foreign court system to obtain evidence located in the United States;
- There is an extraordinary circumstance that may warrant the request for a gag and/or seal order.

## Consider an Insolvency/Chapter 15 strategy when:

- A stay is necessary to protect assets or stop pending litigation;
- An insolvency proceeding is already pending in one or more foreign jurisdiction(s) and to promote uniformity, cooperation, and communication between courts and parties in cross-border asset recovery efforts;
- The potential exists for using a judgment or other proceeding as a springboard to initiating a “foreign proceeding”;
- There is information and/or assets in multiple states within the United States or various foreign jurisdictions where recognition may be obtained;
- Where there is no concern relating to the public nature of the strategy employed;
- Where potential claims under U.S. and foreign law exist against targets in the United States.



# Political Risk & Strategies to Manage It

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- In certain jurisdictions, political risk must be accepted as part of the legal topography that must be overcome. Political risk and the risk of corruption of the legal landscape is sadly a reality.
- As a result, legal strategies must be sensitive to such risks to combat, minimize, and even eliminate them to the extent possible.
- These strategies include creative staffing, outreach efforts, and the use of existing organization pressures.

# Funders

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Funders typically require a detailed memorandum analyzing the claims, basis of and possible defenses to claims, damage quantum analysis, and collectability analysis in order to evaluate the case with regard to their interest in providing litigation funding.



Then, funder will provide the client with a funding proposal that may vary from funder to funder based on their view of the likelihood of success and collectability.



Usually, funders will want multiples of their investment from any recovery after they get their principal investment back, which multiple may vary based on their view of the likelihood of success and collectability. This is expensive money.

The Offshore Perspective:  
British Virgin Islands (“BVI”)  
and  
the Cayman Islands

# BVI and Cayman Islands

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- Both the BVI and Cayman Islands are British Overseas Territories.
- Put generally, they broadly apply English / Commonwealth common law principles with domestic amendments passed by local legislatures, operating under a Governor appointed sovereign (in practice, the UK Government).
- The final court of appeal for both jurisdictions is the Privy Council in London (normally comprised of sitting UK Supreme Court judges).
- Both BVI and the Cayman Islands have stable, highly developed legal sectors, and effective judiciaries with a depth of experience in corporate, fund, and insolvency matters. They approach these matters in highly similar ways.
- Both jurisdictions are very familiar with aiding US (or other foreign parties) in uncovering, tracing, and/or freezing assets, along with enforcing foreign judgments and arbitral awards.

# Recognition and Enforcement of Foreign Judgments (BVI & Cayman)

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In **both** BVI and the Cayman Islands, there are two procedures for obtaining recognition and enforcement of a foreign judgment, depending upon where the foreign judgment was obtained:

- A simplified statutory process of registration for a small number of Commonwealth jurisdictions;
- For judgments from all other jurisdictions (including the US), it is necessary to bring a common law claim for enforcement of the judgment. This is normally a relatively summary process (i.e. the claim is not re-litigated).

# Recognition and Enforcement of Foreign Judgments (BVI & Cayman)

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## General Requirements:

- The foreign court had jurisdiction over the parties (e.g. presence, claimant/counterclaimant, voluntary appearance, jurisdiction clauses);
- Judgment is for a debt or fixed monetary sum, though Cayman is increasingly giving effect to non-monetary judgments, subject to *Moçambique*-type issues;
- Final and conclusive.



# Recognition and Enforcement of Foreign Judgments (BVI & Cayman)

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BVI and Cayman Islands Courts may refuse to enforce a US judgment if:

- That sum of money is tax, fine, or penalty related;
- The judgment was obtained by fraud;
- Enforcement would be contrary to public policy; or
- There was a denial of natural justice.

# Recognition and Enforcement of Foreign Arbitral Awards (BVI & Cayman)

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- BVI and Cayman Islands are New York Convention countries, so will provide for the ready enforcement of convention awards of arbitral tribunals (and refuse to enforce on New York Convention grounds (i.e. incapacity, invalid agreement, lack of notice, award outside of scope of arbitral agreement, etc)).
- In the Cayman Islands this is provided for under the Foreign Arbitral Awards Enforcement Act (As Revised).
- In the BVI, this is provided for by the Arbitration Act, 2013.
- Both BVI and the Cayman Islands will enforce foreign arbitral awards from non-New York Convention states.

## *Norwich Pharmacal* (Disclosure) Orders (BVI & Cayman)

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Per Lord Reid in *Norwich Pharmacal Co and Others v Customs and Excise Commissioners* [1974] AC 133:

*“... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.”*

## *Norwich Pharmacal* (Disclosure) Orders (BVI & Cayman)

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- Both BVI and Cayman will apply the following threshold requirements:
  - Arguable wrongdoing;
  - The respondent must have become mixed up in the wrongdoing.
- Even if the threshold requirements are satisfied, the Court retains a discretion over whether to grant a *Norwich Pharmacal* order, and it will only exercise that discretion where it is a necessary and proportionate response in all the circumstances.
- An applicant will normally be expected to indemnify the respondent in respect of its costs.

## *Bankers Trust* (Disclosure) Orders (BVI & Cayman)

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- Principle: these orders are made against a defendant or innocent third parties for the purpose of protecting a plaintiff's substantive beneficial rights to a fund.
- This principle is used to justify interlocutory orders made at any stage of the proceedings requiring those who may have information (including documents) about what has happened to particular assets, and who has been involved in their disposal, to provide that information to the plaintiff.
- The plaintiff must demonstrate a "real prospect" that the information sought may lead to the location or preservation of assets to which he is making a proprietary claim, and it is sufficient if there is a possibility that if an order to be made, assets may be identified and preserved.
- These are very helpful in proprietary tracing situations.

# Freezing (*Mareva*) Orders (BVI & Cayman)

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- A form of injunction that restrains a defendant from disposing of or dealing with its assets other than in the ordinary and proper course of business.
- Its primary purpose is to prevent the dissipation or concealment of assets that would otherwise be available to satisfy a judgment or prospective judgment.
- In both BVI and Cayman – these can be granted where proceedings have been or are about to be commenced in BVI/Cayman or in a foreign jurisdiction.

# Freezing (*Mareva*) Orders (BVI & Cayman)

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## Requirements:

- A good arguable case
  - One that is more than barely capable of serious argument but not necessarily one which has a better than 50% chance of success;
- Risk of dissipation;
  - Solid evidence is required.
  - Delay.

# Freezing (*Mareva*) Orders (BVI & Cayman)

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- Other considerations:
  - With/without notice - full and frank disclosure;
  - Cross-undertaking in damages;
  - Ancillary orders relating to disclosure of the respondent's assets;
  - Enforceability;
  - “*Spycatcher*” effect on those with notice of the freezing order.



# Liquidation (Bankruptcy) (BVI & Cayman)

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- It is not necessary for a foreign judgment or award to first be enforced before a statutory demand can be served, or an application to appoint a liquidator issued, in reliance on it.
- A liquidator of a BVI or Cayman Islands company has a duty to take possession of, protect and realise the assets of the company.
- A liquidator can bring claims on behalf of the company with the sanction of the Court, e.g.:
  - Breach of fiduciary duty against directors;
  - Claims in dishonest assistance and those who assist in a breach; and
  - Claims in knowing receipt against those who have received company assets or their traceable proceeds.

# Liquidation (Bankruptcy) (BVI & Cayman)

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- In the BVI, there are specific office holder remedies also available under the Insolvency Act, 2003
  - Unfair preferences; Undervalue transactions; Voidable floating charges; summary remedies against directors for misfeasance or breach of fiduciary duty.
- There are similar provisions in the Cayman Islands under both the Companies Act (as revised), and the *Fraudulent Dispositions Act (1996 Revision)* regarding preferences, undervalue transactions, and other voidable transactions.
- Rights of secured creditors are generally unaffected.
- The *Parri Passu* distribution principle.

# Collection of Evidence in Support of Foreign Proceedings (BVI & Cayman)

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- The Hague Evidence Convention has been given statutory effect in the BVI and in the Cayman Islands.
- The BVI and Cayman Islands Courts will both entertain applications for orders for evidence to be obtained in the BVI/Cayman if:
  - The application is made in pursuance of a request issued by an authorised court in a foreign jurisdiction (the requesting court); and
  - the evidence to which the application relates is to be obtained for the purposes of civil proceedings:
    - that have been instituted before the requesting court; or
    - the institution of which before that court is contemplated.

# Collection of Evidence in Support of Foreign Proceedings (BVI & Cayman)

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- The Court has the discretion to make such order as it considers appropriate for the purpose of giving effect to a request including making provision for:
  - the examination of witnesses, either orally or in writing; or
  - the production of documents.
- In the usual course, these applications and the orders related to them have to be drawn with great care (and with reference to the receiving Court's limitations) **before they are requested and issued by the US Court.**
- It is often the case that US attorneys will ask US Courts to issue letters of request in terms for broad US-style subpoena orders and only involve BVI/Cayman counsel after the letter of request has been sent. This often leads to orders that either will not be granted in BVI/Cayman, or will be a serious risk of being set aside / unenforceable, leading the whole process to need to be restarted.

Questions?