Asset Recovery Magazine

ISSUE 3 - AMERICAS & ASIA FOCUS

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INTRODUCTION

We are very pleased with continuing support of the Asset Recovery Magazine from our readers and especially our contributors and delighted to bring you our 3rd edition.

We welcomed over 400 practitioners from around the world to Singapore, Sao Paulo and our London drinks and you can see the highlights in this issue with a special focus on the Americas and Asia plus indispensable coverage of hot issues from elsewhere in the Asset Recovery world.

The enthusiasm and level of expertise on display continues to demonstrate what an important and fast-moving area we are all involved in.

The Asset Recovery Hub Team

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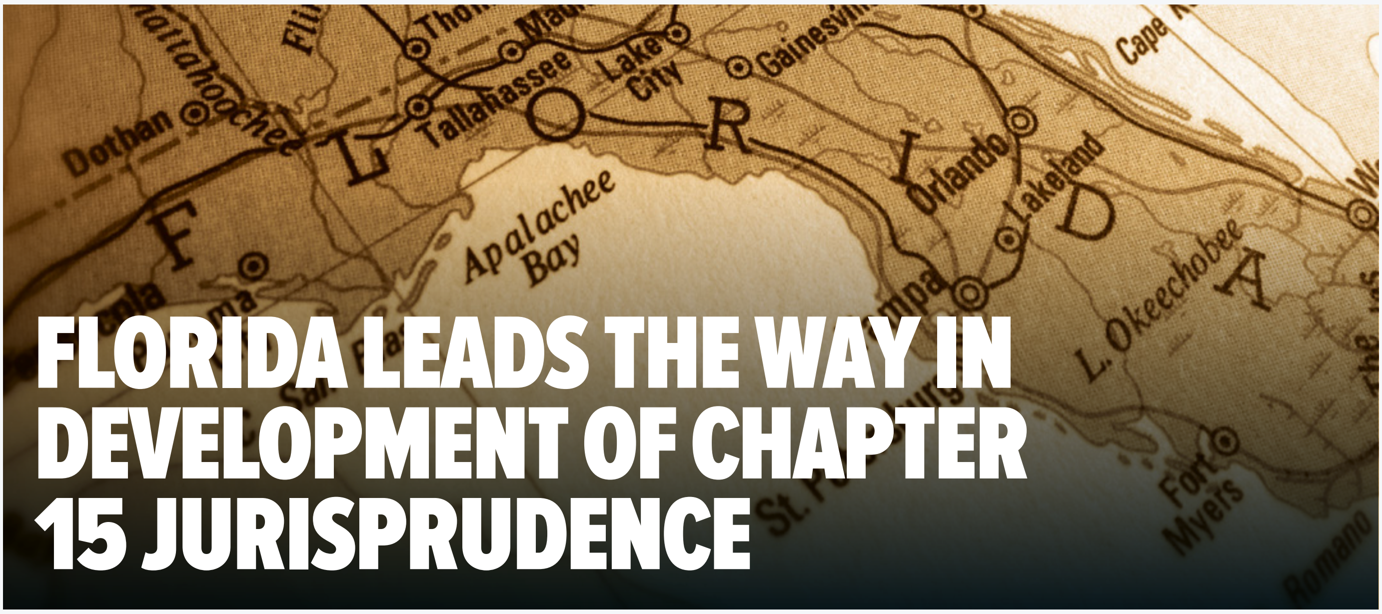

FLORIDA LEADS THE WAY IN DEVELOPMENT OF CHAPTER 15 JURISPRUDENCE

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WHILE CHAPTER 15 IS NOT A NEW TOOL—IT IS APPROACHING ITS FOURTEENTH BIRTHDAY—IT IS, LIKE MANY A TEENAGER, UNDER-APPRECIATED AND AT TIMES MISUNDERSTOOD. THIS IS IN PART BECAUSE CHAPTER 15 IS NOT REALLY "BANKRUPTCY" IN THE SENSE THAT IT DOES NOT CREATE A BANKRUPTCY ESTATE OR APPOINT A TRUSTEE.

Chapter 15 of the Bankruptcy Code has become a powerful asset recovery tool, and the Florida bankruptcy courts have been leading the way in this development. The Southern District of Florida has seen more Chapter 15 filings than any court other than the Southern District of New York, and many of these Florida Chapter 15 cases have been focused on assisting foreign trustees and liquidators track down and recover assets in the United States. Our team at Sequor Law in Miami has alone filed over forty chapter 15 cases.

While Chapter 15 is not a new tool—it is approaching its fourteenth birthday—it is, like many a teenager, under-appreciated and at times misunderstood. This is in part because Chapter 15 is not really "bankruptcy" in the sense that it does not create a bankruptcy estate or appoint a trustee. Instead, Chapter 15 provides a procedure to assist trustees administer foreign insolvency cases whose cross-border estates reach into the United States. The underappreciation also stems in part because Chapter 15's substantive contours remain unknown, as it is primarily a procedural vehicle with minimal substantive constraints.

Finally, because Chapter 15 requires U.S. bankruptcy courts to interface with foreign insolvency proceedings, there has been a great deal of uncertainty as to how open courts would be to cooperating with foreign insolvency proceedings, particularly when those foreign proceedings involve insolvency laws that are importantly different from U.S. bankruptcy law in substance and process. One common concern when Chapter 15 was first enacted in 2008 was that U.S. bankruptcy courts might be reluctant to cooperate with foreign proceedings—or that they would cooperate inconsistently—in the face of foreign insolvency laws.

Florida bankruptcy courts have in recent years played a key role in the development of Chapter 15. It is perhaps no surprise that courts here have been leaders in this arena, particularly as to cross-border insolvencies originating from Latin and South America. These courts have played important roles in establishing precedent for inter-American cooperation and assistance in this still-developing area of law. This article will discuss three recent decisions that highlight developments that may be of particular interest in asset recovery efforts.

Chapter 15: A Bankruptcy without a Bankruptcy Estate

Chapter 15 of the U.S. Bankruptcy Code provides a powerful tool kit for bankruptcy trustees and liquidators, but it is not itself a "bankruptcy" case. It does not open a full bankruptcy proceeding or create an estate, as would happen in a typical corporate bankruptcy case. Instead, Chapter 15 creates a process to assist the representative of a foreign proceeding, whether that be a debtor-in-possession, trustee, monitor, or other official. Chapter 15 permits that foreign representative to open a case in the bankruptcy court in order to seek assistance within the United States, with that assistance ranging from discovery orders to asset turnover orders.

The bankruptcy court's threshold function is to determine whether to recognize foreign proceeding, either a foreign main proceeding (i.e., one filed where the debtor has its "center of main interests") or foreign nonmain proceeding (i.e., one filed where the debtor has an establishment). The court then has discretion to fashion assistance.

Thus, there is no actual "debtor" in the Chapter 15 case and no estate is created. Whereas a traditional bankruptcy case can be a cost-intensive and disruptive endeavor—trustees are appointed, claims must be processed, assets liquidated and distributed, etc. —Chapter 15, in contrast, is not a traditional bankruptcy case. Rather, it is an ancillary case in aid of the foreign bankruptcy proceeding. It is thus more flexible and less onerous than a traditional bankruptcy case.

The main questions in these ancillary cases concern what aid is available to the trustees of the foreign insolvency cases. Chapter 15 provides some very specific procedures designed to facilitate that cross-border assistance, e.g., authorizing judge-to-judge communications, and it provides a non-exclusive list of relief the U.S. bankruptcy court can grant to the foreign representative. As with any relatively new legislation, there is a lot of uncertainty as to the extent of that relief and to the standards for granting that relief. The uncertainty in Chapter 15 has an additional complicating factor due to its cross-border nature: would U.S. bankruptcy courts extend relief to foreign bankruptcy proceedings that differ from U.S. bankruptcy law and procedures?

Three Florida cases brought by Sequor Law on behalf of foreign representatives, illustrate these issues and show how the Florida bankruptcy courts have helped fashion answers and standards.

Who is the Foreign "Debtor": In re Petroforte

The first case is by now well known in the cross-border insolvency world so will receive only a cursory treatment; however, it would be remiss to exclude the case altogether as it has had important ramifications throughout the Chapter 15 jurisprudence.

Petroforte was one of Brazil's largest gas and ethanol distributors before entering bankruptcy. That liquidation had uncovered evidence of fraudulent transfers made to several entities, which provided the basis for the Brazilian court to enter ex parte an order extending the bankruptcy case to include the transferees. The Brazilian trustees commenced a Chapter 15 proceeding in the Southern District of Florida to seek discovery to assist the Brazilian liquidation. Some of these discovery targets objected on two main grounds: first, the argued that the Chapter 15 court should refuse to recognize the Brazilian extension order on public policy grounds; second, they argued that the foreign representative could not use Chapter 15 to order discovery against the transferees because they were not "debtors".

In what is now a widely-cited case (*In re Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899 (Bankr. S.D. Fla. 2015)), Judge Robert Mark rejected the first argument. He noted that U.S. courts grant a similar type of relief under the equitable remedy of substantive consolidation, and thus the Brazilian extension order was not substantively offensive as a matter of public policy. As to the ex parte nature of the proceedings, he acknowledged that this differs from U.S. procedure, which would have provided the remedy of substantive consolidation only upon an open hearing; however, he noted that the parties had the opportunity to be heard at the appellate level in Brazil. Consequently, the Brazilian proceeding did not offend U.S. public policy.

"JUDGE MARK HELD THAT THE ENTITIES THAT WERE SUBJECT TO THE BRAZILIAN EXTENSION ORDER WERE "DEBTORS" SUBJECT TO SECTION 1521'S DISCOVERY POWERS."

As to the scope of discovery assistance under Chapter 15, the court had to interpret the scope of "debtor" under section 1521(a)(4), which provides that a court may authorize the "the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities."

Judge Mark held that the entities that were subject to the Brazilian extension order were "debtors" subject to section 1521's discovery powers. As to third parties who were not subject to the Brazilian extension order, the bankruptcy court in Petroforte held the trustee may be entitled to broad discovery to the extent the debtor is a majority stockholder in the non-debtor discovery target. Such broad discovery "allows the Trustee to determine whether the stock, which is an asset of the estate, has sufficient value to induce the Trustee to take control of the entity, and attempt to derive value by selling or liquidating the entity."

Broad Discovery Relief: In re SAM Industrias, S.A.

In re SAM Industrias, S.A., 2019 WL 1012790 (Bankr. S.D. Fla. March 1, 2019), built upon the foundation laid in Petroforte. In *Petroforte*, Judge Mark also suggested an alternative basis for ordering broad investigation into third party transactions in situations in which the third parties were actually involved in the fraudulent transfer or had otherwise engaged in wrongdoing: "The Trustee's Supplemental Response failed to establish any actual involvement in the Plant Transaction or any wrongdoing by any of the Third Party Targets." The court, though, did not further discuss this alternative ground.

The issue arose in ***SAM Industrias*** when the foreign representative of the Brazilian liquidation filed a Chapter 15 in the Southern District of Florida to investigate potential fraudulent transferees identified by the Brazilian courts. The Brazilian courts had found that the debtor had undisclosed interests in certain corporate entities, which he had concealed by transferring to family members. The foreign representative, accordingly, sought the Chapter 15 court's assistance in examining these family members, who were not themselves debtors in Brazil, and in examining certain non-debtor corporate entities.

The debtor objected to this assistance, arguing that the requested discovery assistance falls outside the scope of Chapter 15's relief because the discovery targets were not debtors in Brazil. As to the family members, the Chapter 15 court examined the Brazilian court record carefully and concluded that discovery was appropriate as to those family members identified as transferees of the debtor's property. The foreign representative, accordingly, was entitled to discover information related to the transferees' corporate and financial affairs.

As to the non-debtor corporate entities, the foreign representative was entitled to broad discovery not only as to those entities in which the debtor had a majority interest but also in those entities found to have participated in the debtor's asset concealment scheme. Again, in defining the scope of relief available to the foreign representative, the Chapter 15 court examined the findings of the Brazilian courts. The Brazilian courts had found that the debtor had concealed assets through certain corporate pass-throughs owned and controlled by the debtor. The foreign representative was thus entitled to discovery related to these corporate pass-throughs. The foreign representative, though, was not entitled to discovery related to the non-debtor entities whose connections to the debtor had not yet been established in the Brazilian courts. Accordingly, the court concluded that the foreign representative is not entitled to "carte-blanche in his inquiries of non-debtors," but that he is entitled to obtain information narrowly tailored "to discover 'the legal entities created in purely fictional form' which are part of a 'complex corporate structure' obscuring" the debtor's ownership of corporate assets.

The Foreign Revenue Rule: *In re Dixon*

In re Dixon (Case No. 16-bk-02453, M.D. Fla. March 23, 2016) illustrates Chapter 15's flexibility, as it required the court to consider a novel application of the Foreign Revenue Rule to a Canadian trustee's request for assistance. The Canadian debtors commenced proceedings in Canada under the Bankruptcy and Insolvency Act. The foreign representative subsequently filed a Chapter 15 proceeding in the Middle District of Florida, seeking discovery assistance related to the debtor's assets in the United States. When the foreign representative sought authorization to sell the debtors' U.S. property in aid of the Canadian liquidation, the debtors filed their own bankruptcy case under Chapter 13 of the Bankruptcy Code and later sought to dismiss the Chapter 15 proceedings. They argued that the Chapter 15 petition would violate the Foreign Revenue Rule.

The Foreign Revenue Rule is "a long-standing common law rule that prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign." Here, the debtors' principal obligations were unpaid tax debts owed in Canada. *Republic of Honduras vs. Philip Morris Companies, Inc., 341 F.3d 1253, 1260 (11th Cir. 2003)*. The issue, as urged by the debtors, was whether a Chapter 15 court could order to liquidate U.S. property for the purpose of satisfying Canadian tax claims.

"THE BANKRUPTCY COURT RULED THAT THE REVENUE RULE DID NOT APPLY BECAUSE IT WAS NOT BEING ASKED TO "ADJUDICATE OR RULE UPON THE VALIDITY OR PRIORITY OF THE CANADIAN TAXING AUTHORITIES' CLAIMS.""

Judge Caryl Delano noted that the application of the Foreign Revenue Rule in the Chapter 15 context was a matter of first impression. Traditionally, in non-chapter 15 contexts, courts would refuse to permit a U.S. proceeding (whether in bankruptcy or not) to adjudicate tax claims under foreign laws. Section 1513(b)(2)(A) states that the language in subsection (a) and paragraph (1) "do not change or codify present law as to the allowability of foreign revenue claims or other foreign public law claims in a proceeding under this title."

Section 1513(b)(2)(B) goes on to say "[a] llowance and priority as to a foreign tax claim or other foreign public law shall be governed by any applicable tax treaty of the United States, under the conditions and circumstances specified therein."

The bankruptcy court ruled that the Revenue Rule did not apply because it was not being asked to "adjudicate or rule upon the validity or priority of the Canadian taxing authorities' claims." That matter, the court noted, would have to be decided in the Canadian proceeding. Second, the court noted that as a general matter, Chapter 15 courts are not in the business of adjudicating the validity of foreign claims. Finally, the court held that the case did not touch on any fundamental U.S. public policies, as it was simply a dispute as between the debtors and the foreign representative. In fact, the court found that it was promoting the public policies underlying not only Chapter 15 but the U.S.-Canada tax treaty. As an aside, the court noted that, to the extent the Canadian case involved more than just tax claims, that would further support its conclusion that the Foreign Revenue Rule does not apply.

Conclusion

These three Florida case descriptions illustrate how Chapter 15 of the Bankruptcy Code has elements of both bankruptcy law and more traditional asset recovery tools. When considering whether Chapter 15's toolbox could help in the asset recovery effort, it appears the sun is shining in Florida's bankruptcy courts.

THE ECONOMIC FREEDOM PROVISIONAL MEASURE AND OTHER TOOLS AGAINST FRAUD IN BRAZIL

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ARISING FROM THE PHILOSOPHICAL LOGIC OF THE SIXTEENTH CENTURY, THE MODERN STATE ASSURES ENTREPRENEURS THAT THE RISKS OF A BUSINESS ACTIVITY WOULD BE LIMITED TO THE SUBSCRIBED AND PAID-IN CAPITAL.

Arising from the philosophical logic of the sixteenth century, the modern State assures entrepreneurs that the risks of a business activity would be limited to the subscribed and paid-in capital. Thus, in return, they receive a favorable environment to reduce unemployment and to grow the tax revenue. However, the same patrimonial autonomy that justifies the organization of a business activity in a corporate form can lend weight to the misuse of legal entities for illicit activities such as money laundering, tax evasion and others.

In order to prevent and/or remedy the misuse of a corporation, modern legal systems started to adopt the *Disregard Doctrine* through which the corporate veil can be lifted. So It becomes possible to access the assets of partners or managers that used the legal entity to defraud creditors or divert assets in their own benefit.

As a *Civil Law* country, Brazil adopted in its legislation similar mechanisms to lift the corporate veil and expand the liability to assets of shareholders or administrators. Those provisions are scattered in *micro-legal-systems* such as the Consumer Code (art. 28 of the Law n.º 8.078 / 90), the Brazilian Competition Policy System (Art. 34 of the Law n.º 12.529/2011) the National Tax Code (CTN) as well as the Brazilian Civil Code (Art. 50 of the Law n.º 10.406/2002) that sets the general bases for the application of the disregard doctrine.

On April 30, 2019 the Executive Branch of the Federal Government of Brazil issued Provisional Measure 881 (the so-called "Economic Freedom Provisional Measure") amending, in part, the provisions of the Brazilian Civil Code defining the requirements to pierce the corporate veil, thereby clarifying the parameters to be used by Courts to make shareholders and managers liable for the debts of a legal entity. The Provisional Measure also added a new Article to Brazil's Bankruptcy Law 11,101/2005 to the effect that the "… extension of the effects of bankruptcy [to the assets of shareholders or managers of a company] shall only be granted when the requirements to pierce the corporate veil are present…".

This Provisional Measure has codified most of the standards that have been developed and applied by Brazilian Courts to reach the assets of the principals of a legal entity who have committed insolvency fraud.

[1] Although the Provisional Measure is effective immediately, it needs to be ratified and converted into Law by the Brazilian National Congress within 120 days, after which it will lose its effectiveness. The National Congress also has authority to propose amendments to the original language.

The current Civil Code of Brazil was enacted in 2002. Since then, the standards of review used to disregard the corporate veil of a legal entity in Brazil have often been considered to be less demanding in contrast to those applied in other jurisdictions such as the United States or England & Wales. According to Article 50 of the Civil Code, in cases involving the abuse of a corporate entity characterized either by (a) a deviation from its stated corporate objects, or (b) the commingling of its assets with the assets of its principals (sometimes translated as "confusion of assets" or "patrimonial confusion"), a judge may disregard the veil and impose an insolvent company's obligations over the assets of illicit corporate managers or shareholders.

For almost two decades, creditors, liquidators and judicial administrators have used this legal mechanism to successfully recover assets diverted fraudulently. Leading cases such as *Banco Santos* and *Petroforte* resulted in over R$1 billion being recovered for the relevant estates as a result of effective transnational investigative work. This was combined with legal measures in

"THE PROVISIONAL MEASURE INCLUDES ANOTHER REQUISITE ELEMENT TO LIFT THE CORPORATE VEIL ON THE BASIS OF FRAUD."

Brazil piercing the corporate veils of the debtor companies and extending the effects of bankruptcy over the assets of the wrongdoers and their asset holding companies.

The Provisional Measure includes another requisite element to lift the corporate veil on the basis of fraud. Article 50 of the Civil Code has been amended to provide that only shareholders or managers of companies who directly or indirectly *benefit from* abusive conduct may be made liable to pay the debts of the legal entity that they manage or own. This element of proof is consistent with most of the decisions of the Superior Court of Justice ("STJ") in Brasilia. It would however appear to have been included in the Provisional Measure in response to a minority of judgments of lower courts holding that a shareholder / manager may be made liable in spite of the absence of any evidence demonstrating that they benefited from wrongdoing. This has been a particular issue with Labour Courts in Brazil which have generally applied a less rigorous standard of review in piercing the corporate veil on the basis of a policy choice favouring labour claims in response to an employer's insolvency. In this sense, the Provisional Measure encourages the formation of capital for entrepreneurial activities by assuring investors, shareholders and managers that they will not be made liable to pay a company's debts. There is an exception, in case they benefit from a fraud perpetrated against the company in which they are invested or whom they serve.

In addition, the Provisional Measure has introduced a statutory definition for the phrase "deviation from a company's stated purpose." To persuade a Court to pierce a corporate veil on this ground, an applicant must adduce evidence proving "the wilful utilisation of the corporate entity for the purpose of harming creditors and for the performance of illicit acts of any nature." With respect to this second form of abuse, the Brazilian Civil Code now provides that the commingling of assets is the "lack of separation of patrimony"[2] , characterized for example by a transfer of assets and liabilities without due consideration or by the repetitive payment of obligations of a company by its shareholders/managers or vice-versa.

Furthermore, there are other provisions established by the Provisional Measure which are particularly relevant in the context of insolvency fraud. Even before the new Bankruptcy Law was enacted in 2005, Brazilian Courts granted applications to extend the effects of a bankruptcy decree to third parties who were somehow involved in fraudulent acts harmful to creditors of an estate. The Provisional Measure incorporates the case law that was developed by leading bankruptcy fraud cases such as Minister Nancy Andrighi's judgment in *Petroforte Brasilero Ltda* (STJ, August 2011), by providing that the "...extension of the effects of a bankruptcy shall only be ordered when the requisite elements to pierce the corporate veil are present".[1]

2 Under Brazilian law, "patrimony" is the net worth of an individual or legal entity at any point in time, similar to the concept of "estate" in common law countries.

The Provisional Measure goes on to state – correctly - that the mere existence of a common economic group per se does not authorize a judge to disregard the corporate veil of a legal entity and make its shareholder / managers pay for the full amount of debts owed by an estate.

However, within the context of an insolvency procedure, it is often noticed that economic groups are created not to maximize the efficiency of the business, but rather to make it harder for a creditor or group of creditors to enforce their rights towards the debtors. Meanwhile the parent company or equity shareholders continue to experience a substantial growth of their individual wealth. In such cases, *bona fide* third parties should not be deprived of their credit rights due to the patrimonial autonomy of a legal entity that, in fact, had the sole purpose to serve as an obstacle to a fair collection.

As a practical example, the abuse of the legal entity often can be materialized together with the following elements:

- the transfer of assets between entities under the same corporate structure and/or management for a vile price or no consideration;
- granting of loans with very low interest rates (or no interest rates) in favor of the parent company on a period close to the filing of an insolvency procedure or next to the maturity of a credit;
- lending of the main means of production to other subsidiaries with no economic justification and/or for an unreasonable price;
- disproportional distribution of dividends in comparation with the actual financial situation of the company;
- mispreparation of the account and tax books;

To illustrate the reach of such tools (disregard doctrine and extension of bankruptcy effects), we can mention the Banco Santos case. The court extended the effect of the bankruptcy decree to the assets of a Panamanian entity, based on an objective demonstration that (i) this entity was used by the former controlling executive of Banco Santos as a shell to divert assets from the estate and defraud creditors, and (ii) the Panamanian company had been managed in Brazil.

"ALTHOUGH THERE IS A HIGH LEVEL OF RECOVERY DUE TO VEIL PIERCING PROCEDURES IN BRAZILIAN INSOLVENCY COURTS, IT´S NOT ALWAYS CLEAR WITCH LEGAL ENTITIES AND/OR INDIVIDUALS ASSISTED ON THE FRAUD."

The Bankruptcy Court found that[3] "considering the evidence provided on the file, there is no doubt that *Offshore X*, formally registered on behalf of Mr. Y it is nothing more than a shell company under the management of Controller Z, created with the sole purpose to hide the artwork acquired with funds diverted from Banco Santos. As *Offshore* X has been manipulated to perform fraudulent acts with the purpose of harming creditors, the legal entity shall be disregarded to extending the effects of the bankruptcy to such corporation, thereby reaching unlawfully diverted assets, especially the artworks."

3 The actual names are omitted to preserve the parties involved.

"THIS PROCEDURE, IN OUR VIEW, IS A VERY EFFECTIVE TOOL TO INVESTIGATE FRAUD ONCE IT PROVIDES THE JUDICIAL MEANS TO GATHER ENOUGH EVIDENCE TO FULFILL THE LAW REQUIREMENTS AS TO THE DEMONSTRATION OF ABUSE OF THE LEGAL ENTITY THAT CAN LEAD TO A VEIL PIERCING ORDER."

Thus, the bankruptcy court in *Banco Santos* found it had jurisdiction to extend the effects of its bankruptcy decree to the assets of a foreign entity in the context of a fraud, once it was demonstrated that the Panamanian company was an instrument used to conceal assets taken from the estate; and that it was managed by Brazilian resident individuals. The Brazilian bankruptcy extension order was recognized abroad (such as in the United States through US Bankruptcy Code Chapter 15 ancillary bankruptcy proceedings), which resulted in the recovery of tens of millions of dollars in assets.

Although there is a high level of recovery due to veil piercing procedures in Brazilian insolvency courts, it´s not always clear witch legal entities and/or individuals assisted on the fraud. The usage of investments funds and several layers of companies incorporated both in Brazil and abroad often creates a complex corporate structure that blurries the tracing of funds and the lines between what is a legitimate or illegitimate operation.

For those situations and inspired by *common law* legal systems, the Brazilian Civil Procedure[4] code introduced the possibility of filing a claim for "anticipated discovery[5]" from which the interested party will be able to examine witnesses, produce evidence and require documents from third parties or the target itself to determine if and to what extent that entity or individual participated in the fraud.

Brazilian courts accepted that this preliminary procedure be filed under seal and without the participation of the defendant at an early stage, once and only if it is fairly demonstrated that the secrecy of the investigation is key to avoiding the destruction of evidences, creation of new corporate layers to evade the enforcement of a court order or the transfer of funds away from the creditor´s reach. It has been ruled that this is not a question of violating the rights of the defendant to counter the applicant, but rather to postpone in honor of the effectiveness of such procedure, due to a plausible justification.

This procedure, in our view, is a very effective tool to investigate fraud once it provides the judicial means to gather enough evidence to fulfill the law requirements as to the demonstration of abuse of the legal entity that can lead to a veil piercing order.

In practical terms, the Provisional Measure does not actually create new law. Instead, it merely codifies the requisite forms of abuse developed by the STJ and clarifies the applicable standard of review for the extension of the effects of bankruptcy. It therefore incorporates into the relevant statues the existing jurisprudence that had been developed by the STJ and a majority of the lower courts since the enactment of the Brazilian Civil Code in 2002. As a result, it is not expected that the recent Provisional Measure will in any way adversely impact the ability of creditors, liquidators and judicial administrators to recover assets diverted by fraud. Instead, it clearly expresses the requisite grounds to support an application to disregard the corporate veil and to extend the effects of a bankruptcy order over all of the assets of those who benefit from fraud. The Provisional Measure places the effectiveness of measures to tackle creditor fraud in Brazilian insolvency proceedings onto a solid and well articulated statutory footing.

4 Article 381, II and III

5 Free translation: "Produção antecipada de provas"

BRAZILIAN HIGH COURT DECISION DISREGARDS CREDITORS' GUARANTEES

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A BRAZILIAN COURT DECISION TO INTENDED TO HELP A MATO GROSSO CAR DEALERSHIP RECOVER FROM ITS FINANCIAL DIFFICULTIES COULD HAVE IMPLICATIONS THAT REVERBERATE ACROSS THE BRAZILIAN ECONOMY.

A Brazilian court decision to intended to help a Mato Grosso car dealership recover from its financial difficulties could have implications that reverberate across the Brazilian economy. The Superior Court of Justice (STJ), the second-highest court of law in Brazil, overturned its own precedent and now allows debtors to unilaterally supress personal guarantees provided by third parties to their creditors in a reorganisation plan, so long as the plan is approved at the creditor's general meeting.

Tried and tested dynamics

Before this landmark decision, Brazilian courts understood that third-party personal guarantees provided to creditors in usual business transactions would not be affected by the terms of the recovery plan, unless the creditors specifically agreed to release such guarantees. Hence, for example, if a company that had provided a bank guarantee to its creditor filed for a reorganisation plan, the creditor could call on the guarantee to secure payment. The bank would then be subrogated into the original debt and would participate in the reorganisation plan in the creditor's place.

This is a familiar dynamic in several jurisdictions, and forms the basis for which instruments such as guarantees were created: to enhance financial transactions by reducing risk. It allows the creditor to carry on its business without the concerns associated with a reorganisation plan and provides it certainty that it will receive its due – whether from the debtor or from the guarantor. However, this may no longer be true for Brazil.

"THE COMPANY'S PLAN INCLUDED THE RELEASE OF ALL GUARANTEES, WHICH WAS APPROVED BY THE MAJORITY OF CREDITORS IN A GENERAL ASSEMBLY."

The STJ's new precedent

In a decision that stunned many legal practitioners and market experts, the STJ analysed the case of *Ariel Automóveis*, a car dealership in the state of Mato Grosso which had filed for a reorganisation plan (known as "judicial recovery"). The company's plan included the release of all guarantees, which was approved by the majority of creditors in a general assembly. However, creditors with secured assets voted against the plan.

These creditors argued that the guarantees could not have been supressed without their approval, as they understood that these obligations could not be affected by the judicial recovery without their consent. Ariel claimed that, as the plan was approved by the required majority, it overrode the creditors rights under the guarantees, given that all debts were novated, i.e., replaced with the debt payment plan under the reorganisation process.

Aftermath

While the STJ award is only binding between the parties involved in the *Ariel* case, the STJ award sent shockwaves through the market in Brazil. Financial institutions, which are usually the largest guarantee holders in corporate reorganisation proceedings, are especially concerned: they could be subject to large losses if their guarantees are deemed unenforceable, given that, after judicial recovery, debts are usually paid with a haircut.

STJ justice Marco Aurélio Bellizze, the author of the majority opinion in the case, stated that his decision was based on the fact that decisions approved by the general assembly of creditors could not be overridden by a minority of interested parties.

Naturally, the increased credit risk has a direct impact in the cost Brazilian companies pay to obtain financing – which is a major concern for the Brazilian government, which has already cut Selic (the Brazilian base interest rate) to 6%, it's lowest-ever level, in an attempt to stimulate economic activity following a four-year recession. However, STJ justice Moura Ribeiro, who joined the majority opinion in *Ariel*, declared that his decision was at least partially intended to protect economic activity, by making it easier for companies to recover from financial hardship. [6]

"FIRSTLY, THE STJ SPECIFICALLY CARVED OUT IN REM GUARANTEES FROM THE DECISION. THEREFORE, THIS TYPE OF GUARANTEE IS STILL PROTECTED FROM UNILATERAL CHANGES IN THE REORGANISATION PROCESS."

How can creditors protect their interests?

While the Ariel award is very recent and may still be appealed, there are some precautions that creditors can take to better protect their interests.

Firstly, the STJ specifically carved out *in rem* guarantees from the decision. Therefore, this type of guarantee is still protected from unilateral changes in the reorganisation process.

Second, and perhaps more interestingly, the court's opinion did not mention on-demand guarantees and letters of credit. Such instruments are usually issued in the context of international trade or large contracts, and are usually favourably seen by creditors given that they can and should be construed to be separate from the transaction or contract itself. As it only comprises a third party's obligation to pay a given amount to the beneficiary once a claim is made, an on-demand guarantee would not be subject to be released.

In any case, interested parties should remain seized of developments in this case. The STJ decision was not unanimous – two of five justices voted against it – which will certainly lead to further tests of the court's new position.

[6] Supressão de garantias no plano de recuperação aprovada em Assembleia atinge todos os credores', Migalhas, 3 April 2019.

THE RISE OF CYBERCRIME IN ASIA PACIFIC AND CONSIDERATIONS FOR ORGANISATIONS OPERATING IN THE REGION

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HFW

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1.
The Asia Pacific **(APAC)** region faces an increasing rate of cybercrime [7] and cases of serious digital asset theft have occurred there in recent years. This vulnerability is due to quicker digital transactions and greater internet connectivity combined with lacking cybersecurity investment and low awareness[8]. As avenues for transnational, digital payments diversify, APAC's digital economy is undergoing significant growth[9]. Asia is also a hub for the investment and trade of valuable digital assets.

As cybercriminals choose to operate within APAC networks, it is unsurprising that the region is a focal point for the development of regulation, legislation and digital asset recovery mechanisms.

7 Financial Sector Cybersecurity Requirements in the Asia-Pacific Region. William A. Carter and William D. Crumpler. April 2019. https://csis-prod.s3.amazonaws.com/s3fs-public/publication/190429_CarterCrumpler_APAC_WEB.pdf

8 Cyber Risk in Asia Pacific. The Case for Greater Transparency. Marsh & McLennan Companies.

9 Is APAC's Desire to Lead Global Innovation in Digital Payments Working? A Tech Research Asia Report Commissioned by Temenos Group AG. https://www.temenos.com/globalassets/mi/wp/is-apac-s-desire-to-lead-global-innovation-in-digital-payments-working-.pdf

Defining cybercrime and its cost

2.
Cybercrime can be broadly defined as computer related crime. The computer either is used as a tool to commit crime or acts as the target of a crime. A particular example is cryptojacking. This type of attack concerns the unauthorised use of a computer to mine cryptocurrencies. Cyberextortion often involves the threat of infection of a device with ransomware to coerce the recipient into submitting to a demand. Cybercriminals have also increased their capacity to launder money, steal digital assets and hijack networks. Digital assets that are usually the subject of theft include personal information and data, trade secrets or more commonly, cryptocurrency.

3.
Cryptocurrency is a sought-after asset. The reported theft of the following values of cryptocurrency took place in 2019 alone[10]:

(a) 4.5 billion yen stolen from the cryptocurrency exchange Binance in Hong Kong, May 2019;

(b) US$4.3 million stolen from Bitrue in Singapore, June 2019; and

(c) 3 billion yen stolen from Bitpoint exchange in Tokyo, July 2019.

4.
A study produced by the Center for Strategic and International Studies reported that the global cost of cybercrime reached US$544.5 billion in February 2018. A figure of US$171 billion is reportedly the damages cost of cybercrime to the APAC region alone[11].

10 "Cryptocurrency thefts and fraud reach $1.2bn in Q1". Nikkei Staff Writers. 23 July 2019. https://asia.nikkei.com/Spotlight/Bitcoin-evolution/Cryptocurrency-thefts-and-fraud-reach-1.2bn-in-Q1

11 Cost of cybercrime continues to soar for Southeast Asian businesses. https://asiancorrespondent.com/2018/04/cost-of-cyber-crime-continues-to-soar-for-southeast-asian-businesses/

Increased regulatory and legal framework

5.
Governmental and regulatory bodies in APAC are recognising the need to balance technological innovation with risk management and user protection. The following countries have made progress in building the foundations of a strong regulatory and legislative framework, in which APAC's digital economy can prosper.

6.
In terms of regulation in Japan, the Japan Network Security Association and Japan's Virtual Currency Exchange Association (JVCEA) are prominent bodies. The JVCEA is a self-regulatory body that applies rules to protect assets and focuses on developing anti-money laundering policy.

7.
From a legislative perspective, Japan has made noteworthy developments. Japan's Parliament adopted the Cybersecurity Basic Act in 2014. The

Act outlines government responsibilities and provides for the establishment of cybersecurity strategic headquarters. In October 2016, the Diet approved an amendment to the Act. The amendment increased the scope of parties which are subject to government evaluation for cybersecurity purposes. Special corporations and authorised corporations now fall within this scope.

"ALONGSIDE AN IMPROVING REGULATORY AND LEGAL ENVIRONMENT, PROGRESS HAS BEEN MADE IN THE REALM OF RESEARCH AND DEVELOPMENT."

8.
In December 2016, the Hong Kong Monetary Authority launched the Cybersecurity Fortification Initiative aimed at banks and financial institutions established in Hong Kong. Three pillars form the foundation of the initiative - a Cyber Resilience Assessment Framework, a Professional Development Programme and a Cyber Intelligence Sharing Platform. Notably, the purpose of the Platform is to store information, data and intelligence on the subject of cyber-attacks. Authorised users can access this information and may find the platform useful as the initiative develops.

9.
In Singapore, the Monetary Authority of Singapore provides a monitoring and regulatory function. The agency's reach expanded to include additional payment activities with the passing of the Payment Services Act in January 2019. This Act regulates payment systems and payment service providers in Singapore. Key objectives of this Act are to streamline the regulation of payment services and to mitigate the risks inherent in the payments value chain.

Mechanisms for recovery of cryptocurrency

10.
Alongside an improving regulatory and legal environment, progress has been made in the realm of research and development.

11.
Developments have been made in tracing stolen monies. The theft of US$534 million worth of NEM (XEM) cryptocurrency from the wallets of Japan-based exchange Coincheck is one of the largest recorded cryptocurrency thefts in history. It occurred in January 2018 and forced the exchange to consider ways of tracking the stolen coins. The NEM team developed an automated tagging system, where stolen funds could be tagged as tainted. Once stolen funds were deposited into regulated trading platforms, these deposits were verified. Accounts that received the funds were tagged and other exchanges could then be notified that they held these accounts on their platform.

12.
Another mechanism for enabling the tracking and recovery of cryptocurrency is the analysis tool "The Taint Chain". This enables the tainting and tracking of stolen bitcoin. Developed by a team of researchers from the Department of Computer Science and Technology at the University of Cambridge, the tool employs an algorithm, which operates according to the FIFO (first in, first out) principle. This is based on a well-known English Chancery Court case[12]. The case considers that the first person to have paid in is the first person to be paid out where funds are withdrawn from a collective account. When applied to bitcoin wallets, the principle holds that if the first bitcoins paid into the wallet are stolen, then, (at least as a matter of English law), the first bitcoins paid out are also considered stolen.

13.
Whilst digital economic activity and growth continues in the APAC region, the regulatory, technical and legal framework must keep pace with rising opportunities for cybercrime. Although rates of cybercriminal activity are high, we believe the aforementioned developments should inspire increasing confidence for organisations within APAC.

[12] *Devaynes v. Noble* 35 E.R. 781 (1816).

ENFORCEMENT OF FOREIGN JUDGMENTS IN DUBAI

Mary Young
Kingsley Napley

Almost six months ago Cabinet Resolution No. (57) of 2018 concerning the Executive Regulations of Federal Law No (11) of 1992 on the Civil Procedure Law ('the Resolution') came into effect in the UAE. The Resolution made significant amendments to the UAE Civil Procedure Code (the Federal Law No (11) of 1992 referred to in its title) including in respect of: service of proceedings; requirements to include in proceedings certain information relating to the identification of the parties (corporate or individual); the establishment of a fast track process for claims below a certain level of value; and the enforcement of foreign judgments and awards. In this article I am going to briefly focus on some of the changes to enforcement and my recent experience of trying to enforce a judgment of the Courts of England and Wales in Dubai.

Enforcement of Foreign Judgments, Orders and Instruments

Articles 85 – 88 of the Resolution cover enforcement of foreign judgments and orders and specify that the provisions apply to arbitral awards as well as judgments. Article 85 provides that an order for enforcement shall be applied for by way of a petition directly to an Enforcement Judge and that the Enforcement Judge shall issue an order within three days of the submission of the petition without notice to the defendant. That is, however, on the condition that the following can be verified:

1. That the UAE Courts do not have exclusive jurisdiction over the dispute;
2. That the order being enforced was made in accordance with the law of that country and certified as such;
3. That the parties were summoned and represented;
4. That the order is final and binding under the laws of the country in which it was made, and is either certified as such or states so within the judgment itself; and
5. That the order is not contrary to a judgment or order of a UAE court and not contrary to the morals and public order of the UAE.

Article 88 of the Resolution confirms that it is without prejudice to the provisions of any other treaties or agreements between the UAE and other states. As such the New York Convention will continue to apply to the enforcement of arbitral awards.

Appeal process

The order of an Enforcement Judge can be appealed to the Court of Appeal and the Court of Cassation, which means that the expedition of the initial order could be rendered nugatory if a defendant was to challenge the order through the available appeal processes.

Practical experience

I have been working with Dubai solicitors for more than two years, seeking to enforce a judgment obtained in the UK against a fraudster (and in respect of which there was no scope to refer the matter to the Courts of the DIFC). As such the efforts have straddled the two regimes. The first effect of the Resolution was that two months after it came into effect, the court which had previously been dealing with enforcement (and which had been seized of the enforcement action for the previous 12 months) refused to continue dealing and instead insisted that the matter be passed to the Enforcement Judge.

There was no order issued within the requisite three days by the Enforcement Judge. Instead, the Enforcement Judge tried to pass the file back to the Court which had initially been dealing with the case. This has been followed by around 10 weeks without a decision, and then by a rejection of the application, without any reasons or judgment given. Whilst the solicitors I am working with in Dubai have lodged an appeal, and made a complaint to the Court about how the case has been dealt with, my client is still, over 24 months later, without an order for enforcement in Dubai.

Conclusion

We are hopeful that the Dubai Court of Appeal will have a better understanding of the new Resolution and the intention that it should streamline and modernise the enforcement process. Nonetheless, at present the interpretation of the Resolution in terms of enforcement of foreign judgments does not appear to be assisting a great deal in terms of certainty, time or costs.

It is, of course, possible that once the Courts become more familiar with the Resolution they will embrace the changes it includes, leading to the modernised, streamlined approach to litigation and, in this particular instance, enforcement of foreign judgments it was intended to provide, but that remains to be seen.

BAHAMAS ASSET RECOVERY – PRIVY COUNCIL DETERMINES EXTRATERRITORIAL REACH OF CLAWBACK CLAIMS

Sophia Rolle-Kapousouzoglou
Lennox Paton

The Privy Council has recently ruled in the case of ***AWH Fund Ltd. (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) Ltd. [2019] UKPC 36*** that an application seeking a declaration to set aside a fraudulent preference claim served on a third party agent may be served outside of the jurisdiction even in the absence of express statutory procedure governing the extraterritorial jurisdiction to do so.

> **"THE RESPONDENT, A BAHAMIAN MUTUAL FUND ("AWH FUND") HAD BEEN PLACED INTO VOLUNTARY LIQUIDATION IN 2002."**

The Respondent, a Bahamian Mutual Fund ("**AWH Fund**") had been placed into voluntary liquidation in 2002. The fraudulent preference as it is termed under Bahamian law[13] was alleged by the Liquidator to have been made to ZCM (Asset Holding Company Bermuda) Ltd. ('**ZCM**'), within three months preceding the liquidation of AWH Fund. ZCM held the shares in AWH Fund on behalf of American Express Alternative Offshore Ltd. ('AMEX') as its agent. The Liquidator filed an application by way of Summons seeking a declaration that the payment made to ZCM in the sum of approximately $13 million was wrongful by reason that it constituted an undue and/or fraudulent preference of ZCM and is invalid accordingly.

The main issue considered by the Board on the appeal was whether the Supreme Court of The Bahamas had jurisdiction to serve an interlocutory Summons outside of the jurisdiction in winding up proceedings seeking a declaration to set aside a fraudulent preference claim. ZCM, is a company with its registered office in Bermuda. The Liquidator therefore applied pursuant to ***Order 11 Rule 8(4)*** of the ***Rules of the Supreme Court 1978 ('RSC')***[14] by way of an interlocutory Summons in the winding up proceedings to serve ZCM outside of the jurisdiction.

Under Bahamian law the legal test for the avoidance of fraudulent preferences is that the payment must be paid within the requisite statutory time (ie. within 3 months prior to the commencement of the liquidation), and there must be a dominant motive or intent to prefer a particular creditor over others.

The Privy Council in its ruling determined that although there were no Rules that governed the winding up of an ***International Business Company ('IBC')***, the jurisdiction could be vested in a Liquidator by way of the provisions governing service out of the jurisdiction as contained in the Rules of the Supreme Court and there was no need to have a substantive claim within ***Order 11 Rule 1(1)*** of the RSC in order to do so.

The Board determined in the judgment delivered by Lady Arden at paragraph [39] that, *"Times have moved on since the nineteenth century when the relevant provision in bankruptcy were enacted, and it would not be surprising to find provision now being made for service out"* and further at [40] *"it is now settled law that insolvency provisions can have extraterritorial effect"*. The Board in its ruling cited Sir Donald Nicholls VC In ***Re Paramount Airways [1993] Ch 223*** which was considered and, noted that, *"Trade takes place increasingly on an international basis. So does fraud."*

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13 *Section 160 of the International Business Companies Act ('IBC Act') 2000 provides: 160. (1) "Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such traders, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and is invalid accordingly. (2) For the purposes of this section — (a) the presentation of a petition for winding up a company in the case of a company being wound up by the court or subject to the supervision of the court; and (b) a resolution for winding up the company, in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual trader, and any conveyance or assignment made by any company formed under this Act of all or any part of its estate and effects to trustees for the benefit of all or any part of its creditors is void."*

The Board in coming to its conclusion as to the extraterritorial reach of clawback claims held at [40] that, *"in a winding up, a liquidator may serve notices on creditors and contributories outside the jurisdiction under the powers given by the Companies Acts and without express mention. Such powers are consistent with the fact that winding legislation (at least) has extraterritorial effect. The service of [a notice placing a foreign shareholder on the list of contributories] is no infringement of the jurisdiction of the Courts of a foreign country. If notices of this kind could not be served abroad, it might in many cases be impossible to wind up a company at all" as noted in the case of* ***In re Nathan Newman & Co. (1887) 35 Ch D 1***, a decision which distinguishes in re Anglo-African Steamship Co.

The Board however, accepted that there needs to be some connection between the jurisdiction of the court giving leave for service out and the respondent on whom service is ordered. The fact that the redemptions were in relation to shares in a Bahamian Company which took place outside of the jurisdiction was deemed in this case to be a sufficient connection. The natural place for the winding up proceedings was The Bahamas and the Liquidator was capable of serving the interlocutory summons issued in the winding up proceedings outside of the jurisdiction, on ZCM which redeemed the shares as agent for AMEX.

The Board went onto determine at [42] that, in circumstances such as these, the absence of a power in custom-made rules applying to the winding up of an IBC, it cannot be taken as an indication that the courts could not find an appropriate power elsewhere. On the contrary, where an IBC is in liquidation in The Bahamas, it is proper for its courts to rely on other sources of jurisdiction to entertain in appropriate cases proceedings to enforce a claim vested in the liquidator under section 160 to have a transaction declared void. It is desirable that such claims should be heard by them in the interests of ensuring that the purposes of the winding up are fully achieved. The decision therefore affirms that insolvency proceedings are of universal reach with the ultimate goal to recover the assets of the company in liquidation wherever situate.

It is of note that in England this issue was expressly resolved by statute as it relates to service out of fraudulent preference claims in insolvency proceedings by virtue of ***Rule 12.12 of the Insolvency Rules 1986***[16].

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14 *Order 11 Rule 8(4) provides: "Subject to Order 66, rule 4, service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court."*

15 *The test is governed by Section 72 of the Bankruptcy Act 1870 which provides." Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall if the person making, taking, paying or suffering the same becomes bankrupt, within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration."*

16 *12.12 0 (1) Order 11 of the Rules of the Supreme Court, and the corresponding County Court Rules, do not apply in insolvency proceedings.*
(2) A bankruptcy petition may, with the leave of the court, be served outside England and Wales in such manner as the court may direct.
(3) Where for the purposes of insolvency proceedings any process or order of the court, or other document, is required to be served on a person who is not in England and Wales, the court may order service to be effected within such time, on such person, at such place and in such manner as it thinks fit, and may also require such proof of service as it thinks fit.
(4) An application under this Rule shall be supported by an affidavit stating –
(a) the grounds on which the application is made, and
(b) in what place of country the person to be served is, or probably may be found

TAKING A LEAF OUT OF THE US BOOK ON CORPORATE CRIME:

THE UK'S PLAN TO FIGHT ECONOMIC CRIME MUST FOCUS MORE ON CIVIL ASSET RECOVERY TOOLS

Amy Harvey
Peters & Peters

Amalia Neenan
Peters & Peters

THE REPORT CUTTINGLY STATES THAT THE UK IS 'FAILING TO EFFECTIVELY POLICE THE INTEGRITY OF ITS OWN MARKETS.'

Everything is "bigger and better" in the US. The cars, the houses and, according to a 5 March 2019 report published by Corruption Watch UK, their approach to corporate criminal liability. The report details how in the 10 years since the financial crash, the UK, in comparison to its American counterparts has imposed 10 times fewer penalties on London and New York based banks in cases of financial misconduct and money laundering – a mere £10 billion compared to the US's £22 billion. The report cuttingly states that the UK is *'failing to effectively police the integrity of its own markets.'*

Three is a magic number

But what gives the US the edge in this arena? For starters, it has a broader and more encompassing concept of corporate criminal liability, in that a company can be held vicariously liable for the acts of *any* employee, committed during the course of their employment and for the benefit of the company. The UK on the other hand, limits liability to actors identified as the *'directing mind and will'* of the company, which taken on face value, means that only those in the upper rungs of the corporate structure can be caught by this provision.

Secondly, the US has for many years deployed a three-pronged attack to combat corporate crime, as endorsed by the 2012 *Memorandum to the U.S. Attorneys' Manual* and whereby the US Department of Justice and the US Attorney's Office are told that department policy is that *"criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law"* and that they *"'should have policies and procedures for early and appropriate coordination of the government's criminal, civil, regulatory and administrative remedies.'* To that end, the DOJ and the SEC (who undertake civil enforcement and may avail themselves of civil discovery tools) work closely together, often running parallel proceedings.

In an effort to overhaul the current framework and beef up its position on policing corporate criminality, the UK Government launched its *Economic Crime Plan for 2019 - 2022* in July of this year however, elements of the Plan, such as only allotting £48 million to tackle a whole host of offences including money laundering and terrorist financing, have garnered substantial criticism. This seems like a meagre offering, when the Director-General of the NCA, Lynne Owens, has said that it will take at least £2.7 billion over the next three years to make a meaningful contribution to combating this type of crime. Not only this, but the Plan in its current form has not attempted any type of revamp to the rules regarding corporate criminal liability. Susan Hawley, Policy Director at Corruption Watch UK has therefore warned that *'big businesses and banks are effectively above the law when it comes to fraud and money laundering in the UK. Until the government implements corporate liability reform, the UK's prosecutors will remain toothless in the face of major corporate financial crime.'*

"WHILST WHOLESCALE REFORM OF THE RULES REGARDING CORPORATE CRIMINAL LIABILITY DOES NOT APPEAR TO BE ON THE AGENDA, WHERE CAN THE UK TURN TO IN THE MEANTIME IN ORDER TO GIVE THE FIGHT AGAINST CORPORATE WRONGDOING SOME TEETH?"

Keeping it Civil?

Whilst wholescale reform of the rules regarding corporate criminal liability does not appear to be on the agenda, where can the UK turn to in the meantime in order to give the fight against corporate wrongdoing some teeth?

Whilst the UK has not historically adopted the same streamlined approach as the US, in late 2018, the NECC, hosted in the NCA, was established to co-ordinate and improve the response to serious and organised economic crime with its priority objective being to drive up asset recovery performance, in particular the use of proactive asset denial tools provided by the civil recovery regime and the Criminal Finances Act. This was an apparent step towards a US multi-pronged approach but has it achieved anything?

"BECAUSE OF THE MEDIA BACKLASH SURROUNDING THE GOVERNMENT'S ECONOMIC CRIME PLAN, LITTLE ATTENTION HAS BEEN GIVEN TO THE ASSET RECOVERY PLAN THAT WAS LAUNCHED ONLY A FEW DAYS LATER."

Because of the media backlash surrounding the Government's *Economic Crime Plan*, little attention has been given to the *Asset Recovery Plan* that was launched only a few days later. The Plan details how:

- over the past eight years, £1.6 billion has been recovered under the Proceeds of Crime Act 2002 (POCA), which is the highest recovery figure to date;
- Unexplained Wealth Orders (UWOs) are now an established civil recovery tool; and
- Account Freezing Orders (AFOs) have also been used more than 650 times in 2018/19 to quarantine over £110m of suspected illicit funds.

And yet the Asset Recovery Plan acknowledges that more needs to be done - *'But we can do better'*, extols the Ministerial Forward. In particular, it admits that *"civil recovery powers have not yet been used to their full potential"*. So, having seemingly accepted the need to work more towards a US-style multi-pronged approach, what next?

The answer is unclear. Little detail is given in the Asset Recovery Plan as to how further use of civil recovery powers will be embedded in practice. General plans are proposed to (1) update and reissue statutory guidance on the use of civil recovery powers in order to put the consideration of civil recovery powers on an equal footing with criminal routes where appropriate and (2) to develop training within mainstream policing. However, there is no consideration of how current powers can be used more effectively (for example, despite receiving considerable publicity UWOs have been used sparsely to date) or whether further weapons will be introduced to the asset recovery armoury despite the Asset Recovery Plan acknowledging that it lags behind the civil regime for example where *"an adverse judgement in a county court impacts upon a person's credit rating, but an unenforced confiscation order issued by the high court does not"*.

Therefore, whilst the UK seems to have accepted as a matter of principle that civil asset recovery is integral to the UK's attack on corporate financial crime, there is a way to go until this is borne out in practice and much more to be done.

THE HAGUE JUDGMENTS CONVENTION: EASIER ENFORCEMENT OF FOREIGN JUDGMENTS IN ENGLAND?

Harriet Campbell
Stephenson Harwood

ON 2 JULY 2019, THE 83 MEMBER STATES OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW ADOPTED THE HAGUE JUDGMENTS CONVENTION (THE "2019 CONVENTION").

On 2 July 2019, the 83 member states of the Hague Conference on Private International Law adopted the Hague Judgments Convention (the "**2019 Convention**"). The press release described the 2019 Convention as a *"gamechanger"* in international dispute resolution. Its intention is to create a global framework for the enforcement of civil or commercial judgments between its members (which include, amongst others, the EU, the US, China, Russia and much of Latin America).

"THIS IS CLEARLY A WELCOME DEVELOPMENT (PARTICULARLY GIVEN THE UK'S POTENTIAL WITHDRAWAL FROM THE BRUSSELS RECAST REGULATION)."

This is clearly a welcome development (particularly given the UK's potential withdrawal from the Brussels Recast Regulation). However, in the short term, it is unlikely to have a material impact. The 2019 Convention will only apply between countries that ratify it and will not come into force until at least a year after ratification. Currently, there are no definite timescales for any country to even begin that process. By comparison, the Hague Choice of Court Convention (a similar treaty relating to choice of law) was adopted in 2005 but currently (14 years later) is only in effect between the EU, Mexico, Montenegro and Singapore.

There is likely to be a significant delay before the new 2019 Convention has any real impact: quite possibly a delay of decades. Therefore, it is worth revisiting how foreign judgments from countries without reciprocal enforcement treaties can be enforced in England.

Legal Process

Where no treaty applies, a claimant must bring a new claim in England for a debt, using the unsatisfied judgment as the cause of action.

The judgment must satisfy the following criteria:

- The judgment must be final, binding and conclusive. If a judgment is subject to appeal, the English courts are likely to stay enforcement proceedings in England until the foreign appeal proceedings conclude and the judgment is final;
- The judgment must be for a definite sum of money that is not made up of, nor related to, taxes, fines or penalties; and
- The judgment must have been given by a court that had jurisdiction to determine the dispute according to the rules of private international law.

A judgment will not be recognised by the English courts if:

- It was obtained by fraud;
- Its recognition would be contrary to public policy (for example, the recognition would be irreconcilable with another decision in the English courts between the same parties) or would breach the Human Rights Act 1998; or
- The judgment was obtained in proceedings which were contrary to natural justice (for example, where evidence was wrongly excluded in a way which would not be permissible in the English courts).

This type of enforcement claim can usually be dealt with on a summary basis. If defences to enforcement are raised which have a real prospect of success, there may need to be a longer process and a full hearing (effectively, a trial of the issues).

In general, the English courts will enforce judgments which comply with the requirements set out above. There is a high hurdle to pass before enforcement can be successfully resisted. However, as often happens, allegations of fraud can make matters more complex and result in more heavily litigated enforcement cases than, for example, straightforward contract claims.

Recent Cases

In *Sinocore v RBRG (UK) Ltd [2018]*, the Court of Appeal allowed enforcement of a Chinese arbitral award, even where there was evidence of an attempt at fraud in the underlying arbitration. Although this judgment related to enforcement of an arbitral award (rather than the common law process outlined above), the court robustly dismissed the attempt to resist enforcement on public policy grounds. It stated that even if the public policy defence were engaged, it would have been *"clearly outweighed by the interests of finality"*.

In Maximov v Open Joint Stock Company & Ors [2017], the English courts were asked to enforce a Russian arbitral award. The award had already been set aside by the Moscow Courts and all routes of appeal exhausted. The claimant argued that upholding the court's decision would be contrary to natural justice due to bias on the part of the judges. The English court disagreed. It criticised the Russian judgments but stated they were not so extreme or perverse as to evidence bias.

In *Ningbo Jiangdong Jiemao and Export Company Ltd v Universal Garments International Limited [2017]*, the defendant resisted enforcement of a Chinese judgment on the grounds that: 1) the Chinese court did not have jurisdiction over the underlying dispute; and 2) the judgment was obtained in breach of natural justice. There had been a dispute about whether the defendant English company had voluntarily submitted to the jurisdiction of the Chinese court and the Chinese hearing proceeded in the defendant's absence. In addition, the defendant's travel had apparently been restricted by Chinese exit controls.

"THE 2019 CONVENTION MAY MAKE ENFORCEMENT OF FOREIGN JUDGMENTS EASIER AND FASTER. HOWEVER, IT IS UNLIKELY TO HAVE ANY MATERIAL IMPACT FOR A NUMBER OF YEARS."

Here, the court concluded that it did not have sufficient evidence about the Chinese procedural background to reject enforcement of the judgment. However, it had sufficient concerns about the potential breach of natural justice that it ordered Ningbo to pay £100,000 into court as security for costs if it wished to continue with the claim.

Practical Points

The 2019 Convention may make enforcement of foreign judgments easier and faster. However, it is unlikely to have any material impact for a number of years.

Under the current law, the English courts are most likely to refuse enforcement if a defendant can show that they (a) did not have proper notice of the hearing against them, or (b) they were prevented from participating in that hearing.

The key point for claimants is to ensure that underlying proceedings are fair: it is no good taking short cuts in obtaining a judgment, if any procedural irregularities will make enforcement impossible. Defendants, on the other hand, should engage early with lawyers in jurisdictions where they may want to resist enforcement. It is important that those lawyers have time to prepare evidence, for example expert evidence on the fairness of the underlying proceedings or human rights' abuses.

THE ASTANA INTERNATIONAL FINANCE CENTRE COURT – AN INTRODUCTION TO THE COURT AND ENFORCEMENT OF ITS JUDGMENTS IN KAZAKHSTAN

Sahana Jayakumar
Five Paper

1 JANUARY 2018 SAW THE LAUNCH OF THE ASTANA INTERNATIONAL FINANCE CENTRE (AIFC) IN NUR-SULTAN, KAZAKHSTAN, AS WELL AS THE ESTABLISHMENT OF THE AIFC COURT (“COURT”) AND THE ASTANA INTERNATIONAL ARBITRATION CENTRE (AIAC).

1 January 2018 saw the launch of the Astana International Finance Centre (AIFC) in Nur-Sultan, Kazakhstan, as well as the establishment of the AIFC Court (“Court”) and the Astana International Arbitration Centre (AIAC). While a key role for the Court will be to enforce the AIFC’s laws and support parties working in the AIFC, the Court is being promoted more generally as an international dispute resolution forum, with companies in the region being encouraged to include an AIFC jurisdiction clause in their contracts. The success of the Court will depend on a number of factors, foremost amongst them being the enforceability of the Court’s judgments.

“THIS ARTICLE WILL PROVIDE A BRIEF PROFILE OF THE COURT AND ALSO DISCUSS HOW ITS JUDGMENTS ARE ENFORCED WITHIN KAZAKHSTAN.”

This article will provide a brief profile of the Court and also discuss how its judgments are enforced within Kazakhstan.

The Legal Framework of the AIFC

The AIFC operates as an English-language, common law jurisdiction within Kazakhstan. The applicable law of the AIFC, known as the Acting Law, is comprised of a Constitutional Statute of 7 December 2017 (“the Constitutional Statute”), AIFC Acts (which are adopted by the various AIFC Bodies)[17] and, where matters are not covered by either of these, the law of the Republic of Kazakhstan. AIFC Acts are distinct from Kazakh legislation and it is permissible for the AIFC Acts to draw inspiration from the law of England and Wales and other global financial centres, as long as they remain consistent with the Constitutional Statute and the Constitution of the Republic of Kazakhstan. A number of AIFC Acts have already been enacted covering civil and commercial matters such as contract law, insolvency procedures, employment and company law.

The Court and its Jurisdiction

The independence and impartiality of the Court is enshrined in the AIFC Court Regulations 2017, which state that neither the Government of the Republic of Kazakhstan, the AIFC Authority, or any other person or entity shall interfere with the Court’s activities.

The Court is comprised of a Court of First Instance and a Court of Appeal and is presided over by the Chief Justice, currently Lord Woolf, and eight other justices with common law judicial experience. The decisions of the Court of Appeal are final and are not subject to any further review or appeal thereafter.

The Constitutional Statute provides that the Court has exclusive jurisdiction over the following:

- Disputes arising between AIFC Participants[18] , AIFC Bodies and/or their foreign employees,
- Any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC
- Any disputes transferred to the Court by agreement of the parties

- The interpretation of AIFC Acts.

The remedies which the Court can grant include a variety of interim and final remedies, such as injunctions and orders for specific performance.

[17] *The AIFC Bodies comprise the various administrative, regulatory and judicial institutions within the AIFC.*

[18] *AIFC Participants are legal entities registered under the Acting Law of the AIFC and recognised by the AIFC.*

Enforcement of Court judgments

In order to avoid parties needing to enter into separate enforcement proceedings outside the AIFC, it is provided in the Constitutional Statute that orders and judgments of the Court are directly enforceable throughout Kazakhstan (save that they will need to be translated into Kazakh or Russian). The Court's judgments are also enforceable pursuant to any treaties to which the Republic of Kazakhstan is a signatory, meaning that the judgments can be enforced in states such as Russia, Ukraine and Uzbekistan.

The readiness to recognise the Court's judgments and the desire that they should be easily enforced throughout Kazakhstan is a sign that the Kazakh government want the Court and jurisdiction to do well. However, it will be very interesting to see how receptive the Kazakh courts are in reality, particularly where the Court orders an injunction or other common-law remedy that may be granted rarely or not at all in wider Kazakhstan.

"THE COURT'S JUDGMENTS ARE ALSO ENFORCEABLE PURSUANT TO ANY TREATIES TO WHICH THE REPUBLIC OF KAZAKHSTAN IS A SIGNATORY, MEANING THAT THE JUDGMENTS CAN BE ENFORCED IN STATES SUCH AS RUSSIA, UKRAINE AND UZBEKISTAN."

With the Court only in its second year of operation, we are yet to see whether the AIFC will promote itself as a "conduit jurisdiction" as is currently the case with the DIFC. The principle of the DIFC Courts' conduit jurisdiction was established in relation to arbitration awards in the case of *Meydan Group LLC v Banyan Tree Corporate Pte* and in relation to foreign judgments in *DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings*. In summary, the DIFC Courts found that DIFC legislation granted them jurisdiction to recognise and enforce foreign arbitration awards and court judgments which then became reciprocally enforceable in the Dubai courts. The Government of Dubai's response to the DIFC Courts' approach was to establish a joint tribunal ("JT"), comprised of judges from the DIFC Courts and Dubai courts, to consider conflicts of jurisdiction between the two court systems. For many, the operation of the JT created an opportunity for parties to torpedo litigation by starting concurrent proceedings and raising a jurisdictional challenge which has stifled the DIFC Courts' "conduit jurisdiction" and made it less attractive as a result. The Registrar of the AIFC Court, Mr. Christopher Campbell-Holt, recently stated during the English Law Summit in Nur-Sultan in April 2019 that the AIFC Court was not looking to establish itself as a conduit jurisdiction yet but was focused on developing its body of case law.

It will be of great interest to see how the AIFC Court develops its jurisprudence in relation to the limits of its own jurisdiction, and to see how it operates in conjunction with Kazakh law and the Kazakh legal system. As can be seen from the DIFC Courts, the practicalities of how the Court and Kazakh courts work together will be crucial in determining how attractive it is as a jurisdiction.

TOOLS FOR CROSS-BORDER ENFORCEMENT OF JUDGMENTS

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OBTAINING A JUDGMENT IN A CASE IS OFTEN THE EASY PART. MANY PARTIES ARE THEN FACED WITH RECALCITRANT JUDGMENT DEBTORS AND THE RESULTING NEED TO CHASE ASSETS AROUND THE GLOBE.

Obtaining a judgment in a case is often the easy part. Many parties are then faced with recalcitrant judgment debtors and the resulting need to chase assets around the globe. Thankfully, there is an increasing array of tools designed to assist the enforcement of judgments effectively and efficiently across jurisdictions.

This article provides a whistle-stop tour through a couple of these, namely recent developments in (i) worldwide conventions on judgment recognition and enforcement; and (ii) cross-border insolvency.

The Hague Conventions

Almost sixty years to the day from the entry into force of the New York Convention governing the recognition and enforcement of arbitration awards, the summer of 2019 has seen a potentially significant parallel development in relation to the recognition and enforcement of judgments, namely the conclusion of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "2019 Convention")[19]. This follows on from the 2005 Hague Convention on Choice of Court Agreements (the "2005 Convention"), which became effective in 2015.

Whilst the 2005 Convention was designed to create a worldwide framework of rules relating to exclusive jurisdiction agreements in civil and commercial matters, as well as the subsequent recognition and enforcement of judgments obtained pursuant to those jurisdiction agreements, the scope of the 2019 Convention is of a far wider scope. It does not only apply to judgments deriving from jurisdiction agreements but other jurisdictional bases as well.

"URUGUAY HAS ALREADY SIGNED THE 2019 CONVENTION AND IT REMAINS TO BE SEEN WHETHER IT WILL BE AS ENTHUSIASTICALLY EMBRACED BY OTHER STATES AS THE NEW YORK CONVENTION."

Uruguay has already signed the 2019 Convention and it remains to be seen whether it will be as enthusiastically embraced by other states as the New York Convention. So far, parties to the 2005 Convention include the EU (plus Denmark), Mexico, and Singapore (with others such as the US and China having signed but not ratified it). Meanwhile, there are around 160 parties to the New York Convention.

Amongst the key features of the 2019 Convention is that a judgment from the state of origin should in principle be recognised and enforced in another contracting state without the need for there to be a review of the merits. This may simplify cross-border enforcement of judgments immeasurably in the same way as the New York Convention seeks to achieve for arbitration awards. As the Hague Conference announcement recorded, it may *"shorten timeframes for the recognition and enforcement of a judgement in other jurisdictions, providing better, more effective, and cheaper justice for individuals and businesses alike."*[20]

[19] *It has not yet entered into force.*

[20] https://www.hcch.net/en/news-archive/details/?varevent=687

Cross-border insolvency

Sometimes, a creditor will decide that the best way to pursue recovery is through the insolvency process. Here too is a body of tools enabling insolvency practitioners to take their appointments worldwide.

Of particular interest is the growing utilisation of the UNCITRAL Model Law on Cross-Border Insolvency (the "Insolvency Model Law"), which was issued in 1997 with the purpose of providing effective mechanisms for dealing with cross-border insolvency cases. Amongst those approximate 50 countries that have implemented the Insolvency Model Law into their domestic legislation are the UK, the USA, Japan, Mexico, South Korea, Philippines, Colombia and more recently Chile (in 2013) and Singapore (in 2017), as well as a host of European and African nations. Indeed, half of the countries in question have taken that step in the last six years.

The Insolvency Model Law aims to identify the principle jurisdiction in relation to a cross-border insolvency (the so-called foreign main proceeding), ensure the recognition of insolvency practitioners from that jurisdiction in other states and that the requisite co-operation is provided by those other states to assist the foreign main proceeding.

> **"IT IS APPARENT THAT, IN ENGLAND AND WALES AT LEAST, THERE ARE A GROWING NUMBER OF REPORTED CASES INVOLVING THE USE OF THE INSOLVENCY MODEL LAW IN THE PURSUIT OF ASSETS."**

This can therefore be an extremely effective tool in the hunt for international assets. It is apparent that, in England and Wales at least, there are a growing number of reported cases involving the use of the Insolvency Model Law in the pursuit of assets. Indeed, in what is believed to be the first recognition of a Chilean trustee in bankruptcy in England and Wales, we obtained using the Insolvency Model Law the recognition in England and Wales of the Chilean trustee in bankruptcy of the so-called Chilean Madoff in a cross-border insolvency that spanned multiple jurisdictions.

Conclusion

With the vast world at their disposal, judgment debtors intent on avoiding payment can seek to conceal their assets in a myriad of places internationally. As such, whilst domestic tools for enforcement can be extremely effective, it is reassuring to see that global tools continue to develop and become more prominent.

A SECOND WIND FOR THE FRENCH BLOCKING STATUTE

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BY ITS TERMS, THE BLOCKING STATUTE RESTRAINS THE COMMUNICATION OF INFORMATION OR DOCUMENTS IN THE FRAMEWORK OF FOREIGN JUDICIAL PROCEEDINGS.

Modified on July 16, 1980. It relates to the communication of economic, commercial, industrial, financial or technical documents and information to foreign individuals or legal entities.

By its terms, the Blocking Statute restrains the communication of information or documents in the framework of foreign judicial proceedings. Thus, it prohibits the collection and production of any materials in France for use outside of France in civil discovery, except in compliance with French law or an international convention.

Initially enacted by the French government to provide French companies with a valid legal excuse to resist abuses of pre-trial discovery requests from foreign jurisdictions, especially from the U.S. government conducting antitrust investigations and enforcement actions against international shipping cartels, the Blocking Statute had never been applied in practice.

However, the situation seems to be changing.

The French Blocking Statute as Defence against Foreign Discovery

The initial text of the Blocking Statute was modified in 1980 to expand the scope of its application. Article 1 bis of the Blocking Statute as applicable to date provides:

"Without prejudice to international treaties or agreements and laws and regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative procedures or in the context of such procedures."

In addition, Article 2 requires that persons subject to the Blocking Statute "promptly inform the competent Minister, upon the receipt of any request concerning such communications."

Finally, the Blocking Statute's third and final article, Article 3, makes its violation a criminal offence:

"Without prejudice to harsher penalties provided for by law, any breach of the provisions of Articles 1 and 1bis of the present law shall be punished by a six-month imprisonment and a fine of 18,000 euros or either one of these penalties only."

"AS A RESULT, THE BLOCKING STATUTE REQUIRES THAT EVIDENCE MUST BE OBTAINED BY WAY OF JUDICIAL COOPERATION..."

As a result, the Blocking Statute requires that evidence must be obtained by way of judicial cooperation, such as provided by the 1970 Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters or by seeking authorization in compliance with French law.

It should be noted that the scope of Article 1 bis is interpreted very broadly. First, the information or documents do not need to involve the sovereignty, security or essential economic interests of France to be covered by the Statute.

Secondly, the prohibition provided by Article 1 bis applies to any person, natural or legal, irrespective of whether such person is involved in the foreign proceedings.

The Blocking Statute does not make any distinction based on the nationality or domicile of the individual or entity searching for or disclosing the information or documents. In addition, Article 1 bis does not make any distinction as to whether disclosed information or documents are held in or outside France.

Considering the above, French companies involved in the proceedings abroad face a dilemma: Comply with the foreign discovery process and expose themselves to possible criminal conviction in France or comply with the Blocking Statute and violate discovery subpoenas abroad.

Single Conviction in 50 Years of Application

Until recently, the defence of French companies, which tried before foreign jurisdictions – namely the U.S. and the U.K. – to oppose the Blocking Statute against discovery, had been systematically rejected, as determined by landmark decisions in the Rogers case (357 U.S. 197 (1958), the *Aérospatiale* case (482 U.S. 522 (1987) or the *Vivendi* case (S.D.N.Y. Nov. 16, 2006). Not surprising, since only one violation of the Blocking Statute has been punished in 50 years of its application. Thus, on December 12, 2007 the French Supreme Court upheld the criminal conviction of a French lawyer to pay a fine of 10,000 euros for an infringement of the Blocking Statute.

> **"THE BLOCKING STATUTE DOES NOT MAKE ANY DISTINCTION BASED ON THE NATIONALITY OR DOMICILE OF THE INDIVIDUAL OR ENTITY SEARCHING FOR OR DISCLOSING THE INFORMATION OR DOCUMENTS."**

In the civil case Court of Appeal of Nancy, June 4, 2014, the French Courts expressly confirmed that the Blocking Statute also applies where the communication is voluntarily made by a party to defend its own interests in the course of U.S. proceedings.

A February 21, 2014 Delaware court decision in the *Blizzard* case considered the 2007 French decision and partially adopted the arguments based on application of the Blocking Statute.

New Life of the French Blocking Statute

Today, the application of the Blocking Statute seems to be changing.

Indeed, the Blocking Statute is expressly referred to in *Loi Sapin 2*, the 2016 French law on transparency, anti-corruption and modernisation of the economy, and falls under the scope of jurisdiction of the newly created French Anti-Corruption National Agency. The Agency's mission includes ensuring compliance with the Blocking Statute.

In addition, the June 26, 2019 report made by French Parliament member Raphaël Gauvin to the French Prime Minister on the protection of French companies against foreign extraterritorial measures emphasizes the modernisation of the Blocking Statute with increased penalties and on its strict enforcement.

So far, there has not been any new case law on the application of the Blocking Statute. Nevertheless, the trend is clear and companies and litigators facing the collection of evidence in France, or from French citizens and companies, need to be aware of the possible risks with regard to the Blocking Statute and of how to comply with it.

FRENCH SAFEGUARD PROCEEDING-A NEW « RALLYE » FOR CREDITORS?

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IN 1998 RALLYE TOOK CONTROL OVER THE CASINO GROUP IN THE CONTEXT OF A TAKEOVER BID.

In 1998 Rallye took control over the Casino group in the context of a takeover bid. The Casino group represents today a turnover of 37 billion euros and a gross operating surplus of 1.9 billion euros with 200.000 employees, including 75.000 in France. It operates, in France, nearly 9.000 stores under the GEANT, CAISNO, MONOPRIX, FRANPRIX and LEADER PRICE brands, as well as CDISCOUNT e-commerce business[21].

On May 23rd, 2019, Rallye has sought the benefit of a safeguard proceeding under French law.

French Commercial code[22] states a safeguard procedure may be opened at the request of a debtor who, without being in a state of insolvency, proves that he is unable to overcome difficulties.

In the opening judgment, Rallye has documented its balance sheet demonstrating 92.246.000 euros of available assets with no current liabilities for an outstanding debt relying on 1.9 billion euros of credits and 1.2 billion of bounds[23].

The safeguard proceeding is meant to enable the renegotiation of bank financing contracts in order to relieve Rallye from speculative financial pressure by decorrelating financing from stock prices. The procedure aims at maintaining the integrity of the group and therefore its control, in the interests of its employees and shareholders and also its creditors.

“THE SAFEGUARD PROCEEDING IS MEANT TO ENABLE THE RENEGOTIATION OF BANK FINANCING CONTRACTS IN ORDER TO RELIEVE RALLYE FROM SPECULATIVE FINANCIAL PRESSURE BY DECORRELATING FINANCING FROM STOCK PRICES.”

The safeguard proceeding originally last for 6 months, it can be extended by a 6 months period if the safeguard plan is voted down by a committee and can be exceptionally extended by another 6 months period[24]. Within this period, the debtor and judicial administrators establish a safeguard plan rescheduling the repayment of the various debts and enabling the company to overcome its momentary crisis. Besides, the safeguard proceeding allows for the rolling over of debts for up to 10 years or haircuts, in consideration for debt-for-equity swaps, increase in capital reserves, to the benefit of the leading financial institutions, involving the partial sale of assets.

As first concerned by this specific procedure, an overview of creditors’ rights is important.

Creditor’s, Bondholders & Auditors

After the two months period (that ended on July 23rd) during which creditors and bondholders have declared their receivables to the judicial administrator, creditors are gathered into two committees: one for credit institutions and another for the main suppliers of goods and services, bondholders are gathered into a unique assembly[25].

Any creditor member of a committee may submit an alternative safeguard plan to the one submitted by the debtor. The safeguard plan must be voted by a 2/3 majority before being proposed to the bondholder’s assembly[26]. All the creditors and bondholders that have voted against the plan shall comply with it if it is adopted. Moreover, within the elaboration of a safeguard plan, creditors can seek the removal of executives and negotiate the appointment of a new management.

If the bondholder's assembly votes in favour of the safeguard plan by a 2/3 majority then the Tribunal can adopt the plan. If the assembly doesn't vote within the 6 months from the opening of the safeguard proceeding or votes against the plan, then the current "committee safeguard proceeding" switchover to the "regular safeguard proceeding" in which all creditors will be individually consulted.

Regarding creditors holding less than 3% of the total debt and secured creditors by trust, they are individually consulted and therefore not concerned by the terms of the plan adopted by the creditors' committee.

[21] *Annual results - https://www.groupe-casino.fr/wp-content/uploads/2019/05/RA-Casino-2018.pdf*

[22] *Article L620-1 of the French Commercial Code.*

[23] *Opening judgment rendered by the Paris Commercial Court on March 23, 2019.*

[24] *Article L621-3 of the French Commercial Code.*

[25] *Article L626-30 & L626-32 of the French Commercial Code.*

[26] *Article L626-30-2 of the French Commercial Code.*

Among the creditor's rights, the emphasis should be put on the auditor status. Up to 5 controllers can be appointed by the bankruptcy judge[27] with at least one representing the creditors holding securities and one representing unsecured creditors. Controllers may examine the documents sent to the judicial administrator, may be present at the verification of debts and all the important steps of the safeguard proceeding. They have a key role because they can compensate the judicial administrator inefficiency in protection of creditors rights.

"THE SCENARIO WHERE DEBT RESTRUCTURING ALLOWS THE BOARD OF DIRECTORS TO RETAIN CONTROL OF THE CASINO GROUP IS THE MOST UNLIKELY CONSIDERING THAT ANY DEBT RESTRUCTURING WOULD UNDERMINE CURRENT CREDIT LINES."

Potential Scenarios

The scenario where debt restructuring allows the board of directors to retain control of the Casino Group is the most unlikely considering that any debt restructuring would undermine current credit lines. Indeed, it seems that Rallye is under great financial strain to finance its holdings (Fonciere Euris, Finatis & Euris), requiring about 350 million euros a year when receiving 177 million euros dividends from Casino Group[28].

We may also consider that the sale of Casino's strategic assets would prove insufficiency because reducing only part of the debt without addressing the indebtedness of the Group as a whole. Moreover, any reckless asset sale could signal the dismantling of the business, therefore damaging the repayment capacity of the outstanding debt. Furthermore, the satisfactory valuation of the assets in a context of divestment will undoubtedly prove arduous.

In the scenario where creditors fail to adopt a safeguard plan, the Rallye's administrators would be responsible for winding up the assets of the Group, sell off stocks, pay off creditors and distribute any remaining assets to shareholders. This hypothesis is possible in a context of CASINO's anticipation of changes in the business model of supermarkets (stagnant growth, zero inflation, reduced supplier credit, loss of appeal of the hypermarket format compared to proximity, acceleration of the omnichannel and digital strategy).

But for now, we are waiting for the next audience which will take place before November 23rd to know the outcome of the safeguard proceedings.

[27] *Article L620-1 of the French Commercial Code.*

[28] *Rallye Registration document 2018.*

CIVIL RECOVERY ORDERS: A CRUCIAL WEAPON IN THE FIGHT AGAINST ECONOMIC CRIME AND CORRUPTION

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In 2018, the UK became the first country in the world to introduce legal principles governing the award of compensation to victims of economic crime overseas. One method for compensating foreign victims of economic crime is using Civil Recovery Orders (CROs).

CROs allow enforcement authorities to right the wrongs of suspected economic offenders by compensating their victims. They are awarded if, on the balance of probabilities, it is likely that the property has been obtained through unlawful conduct. The grant of a CRO does not establish the guilt or innocence of the respondent and the respondent does not need to be the person who committed the unlawful conduct that gave rise to the original recoverable property. In some cases, civil recovery can be preferable to criminal proceedings because the enforcement authority must show that the property represents the proceeds of crime, but they do not have to prove who committed the crime.

CROs can be an effective way of taking urgent action to stop offending which is causing immediate harm to the public interest, companies or individuals. At first blush, it is easy to argue that civil orders are not a strong enough deterrent against economic offending and that criminal prosecution should be preferred. However, it is not practical to prosecute every single peripheral individual involved in a complex economic crime. Instead, a strategic approach must be taken to achieve a manageable and successful prosecution. Civil recovery symbolises an efficient use of resources to prevent economic crime and compensate victims. Using civil recovery tools, where appropriate, also allows more resources to be used to investigate and prosecute economic offenders who are likely to be convicted.

The Compensation Principles Agreement between the CPS, the NCA and the SFO establishes a mutual framework whereby foreign victims of economic crime can receive compensation quickly. CROs can be one way to achieve this and can be a particularly useful tool in the armoury against economic crime in cases where it is not likely that a conviction will be secured. They are also useful in cases where:

- the only known crimes took place overseas, in areas where the courts of England and Wales have no extra-territorial jurisdiction; or
- proceeds of crime can be identified but cannot be linked to any individual suspect or offence; or
- crypto assets form all or part of the recoverable property in the case.

For example, in March 2018, the SFO obtained a CRO to the value of £4.4m against Griffiths Energy International (GEI). GEI were involved in numerous corrupt dealings in Chad relating to contracts for the development of oil blocks. In 2013, GEI self-reported giving bribes to Chadian diplomats in Canada and the US and were fined by the Canadian courts. By applying for a CRO in this case, the SFO secured £4.4m for the companies and individuals in Chad who had been impacted by GEI's corrupt dealings. This outcome was achieved using the civil recovery procedures in the English and Welsh courts, despite the fact that everyone effected by the case was outside of the jurisdiction of the English and Welsh courts, the oil block contract that the bribes related to was signed in Chad and GEI is a Canadian company.

Cases where the proceeds of crime can be identified but cannot be linked to any individual suspect or offence are likely to become more common as the use of cryptocurrencies increases. Cryptocurrencies provide a fast and confidential way for economic offenders to launder money, pay bribes and demand ransoms. The use of private keys and encrypted blockchain technology means that the owners of cryptocurrency are incredibly hard to trace. In these cases, a CRO could be used to recover the crypto assets that represent the value of the proceeds of a crime. Unlike in criminal prosecutions, the enforcement authority would not need to identify the owner of the crypto asset, they would merely need evidence to suggest that the transfer of cryptocurrency related to an economic crime or that the crypto assets themselves represent the proceeds of such economic offending.

Overall, CROs are an efficient and effective way of compensating the victims of economic crime, wherever they may be. They will also be crucial in the UK Government's fight against economic crime and help achieve the government's aims as set out in the UK Anti-Corruption Strategy 2017.

ENFORCEMENT OF FOREIGN JUDGMENTS IN JERSEY

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FOREIGN JUDGMENTS (INCLUDING ENGLISH AND OTHER UK JUDGMENTS) DO NOT HAVE DIRECT EFFECT IN JERSEY.

1. Introduction

1.1 Foreign judgments (including English and other UK judgments) do not have direct effect in Jersey. They may, however, be enforced using one of two mutually exclusive routes: (1) enforcement of certain English/Welsh, Scottish, Northern Ireland, Isle of Man and Guernsey judgments on the basis of registration of the judgment in Jersey under a statutory procedure for the reciprocal enforcement of judgments and (2) enforcement at common law.

2. Enforcement through registration of the foreign judgment

2.1 The first route is to use the registration procedure under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (**the 1960 Law**).

2.2 Enforcement under the 1960 Law is usually straightforward and inexpensive.

2.3 The 1960 Law is available for the enforcement of judgments for a sum of money (typically debt) and in *rem* judgments (though that is much rarer). It does not deal with the recognition or enforcement of non-money judgments in *personam*.

2.4 The judgment must have been given by one the specified "superior" courts of the following jurisdictions:

(a) ***England and Wales:*** High Court and above (including County Court judgments transferred to the High Court for the purposes of enforcement);

(b) **Scotland:** Sherriff Court and above;

(c) **Northern Ireland:** Court of Judicature of Northern Ireland and above;

(d) **Guernsey:** Royal Court and above;

(e) **Isle of Man:** High Court of Justice and above.

2.5 There are a number of further conditions. The judgment must:

(a) be final and conclusive;

(b) not be in respect of tax or a fine or other penalty;

(c) not more than 6 years old (or, if appealed, the finalisation of the appeal cannot be more than 6 years old);

(d) be capable of enforcement by execution in the original country;

(e) not be for "multiple damages", i.e. damages arrived at by multiplying a sum assessed as compensation (Protection of Trading Interests Act 1980 as extended to Jersey);

(f) not be unenforceable in Jersey as a result of Article 9 of the Trusts (Jersey) Law 1984;

(g) not be against a judgment debtor which is immune from either jurisdiction or execution in Jersey as a result of sovereign immunity (State Immunity Act 1978, as extended to Jersey).

2.6 The foreign judgment is first registered by the clerk of the Courts, the Judicial Greffier, on the application of the judgment creditor. Once registered, notice is then given to the judgment debtor, who has a period of time (specified in the order of registration, and usually between 7 and 30 days depending on the location of the debtor) to apply to the Court by summons to have the registration set aside, on various limited statutory grounds.

2.7 The judgment creditor does not need leave to serve the notice of registration out of the jurisdiction to a non-resident judgment debtor.

2.8 A duly registered judgment which is not set aside within the time allowed (and an extension of time) can then be enforced in Jersey as if it were a judgment of the Royal Court.

3. Enforcement at common law

3.1 The second route is through enforcement at common law.

3.2 Provided that the judgment does not fall within the judgments which can be registered and enforced under the 1960 Law, it may be enforced (subject to various conditions) at common law.

3.3 Enforcement at common law requires the judgement creditor to obtain a fresh judgment in Jersey on the basis of the foreign judgment, which is regarded as conclusive on the merits and subject to only a limited number of possible defences. Strictly, therefore, to talk of enforcement of the foreign judgment is a misnomer; it is a fresh Jersey judgment which is enforced, and not the foreign judgment itself.

3.4 The proceedings are usually begun by Order of Justice (akin to an English form Particulars of Claim) and are necessarily *inter partes*. Leave to serve process out of the jurisdiction to a non-resident judgment debtor is required.

3.5 The statutory rules under the 1960 Law regarding the foreign court's jurisdiction, and the categories of non-enforceable judgments, in most respects reflect the common law position as well. Thus a foreign judgment will not be enforceable at common law if that would amount, directly or indirectly, to the enforcement of a foreign tax law and the foreign judgment will also not be enforceable if the foreign court is considered by the Jersey court to have lacked jurisdiction according to the principles set out in more detail below.

"PROVIDED THAT THE JUDGMENT DOES NOT FALL WITHIN THE JUDGMENTS WHICH CAN BE REGISTERED AND ENFORCED UNDER THE 1960 LAW, IT MAY BE ENFORCED (SUBJECT TO VARIOUS CONDITIONS) AT COMMON LAW."

3.6 The common law principles are adopted from English conflicts of law rules (but with some differences) and accordingly English case law and the authority of Dicey is also relevant and highly persuasive. One difference, established by the case of *Brunei Investment Agency v Fidelis Nominees Limited 2008 JLR 337*, is that the Royal Court has, unlike English courts, a discretion at common law (but not under the 1960 Law) to enforce a foreign judgment in personam which is not for a sum of money. Whether this development is correct or necessary may be doubted.

3.7 Sometimes what is called for in Jersey is only recognition of a judgment so that it can be relied upon in proceedings in Jersey, for example as res *judicata* as a cause of action estoppel or issue estoppel, rather than enforcement. Recognition is not dealt with by the 1960 Law and is entirely a matter of common law (save to the extent that some other enactment prevents recognition). This Guide does not deal with recognition, save to note that the circumstances in which a foreign judgment may be recognised and relied upon in Jersey at common law are, in general terms, similar to those in which a foreign judgment may be enforced at common law (i.e. may be regarded as conclusive on the merits and therefore form the basis of a fresh judgment in Jersey).

FULL AND FRANK DISCLOSURE: TOO HEAVY A BURDEN?

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RECENTLY, A NUMBER OF HIGH-PROFILE WORLD-WIDE FREEZING ORDERS (WFOS) HAVE BEEN SET ASIDE BECAUSE OF THE CLAIMANTS' FAILURE TO DISCHARGE THEIR DUTY OF FULL AND FRANK DISCLOSURE.

Recently, a number of high-profile world-wide freezing orders (**WFOs**) have been set aside because of the claimants' failure to discharge their duty of full and frank disclosure. WFOs are almost always obtained "ex parte" (i.e. in secret, without informing the opponent). In these circumstances, the claimant always has a duty of full and frank disclosure. This means that the claimant must fully and accurately disclose all material facts and present them to the Judge in a fair manner.

The duty is well established and wide, yet claimants continue to fall foul of the rules. In the recent cases of *Rogachev v Goryianov* and ***Tugushev v Orlov*** the breaches that led to the court setting aside the WFOs included the claimant's failure to make reasonable enquiries about the underlying facts of the case.

In *Rogachev v Goryianov*, the court accepted there was no evidence to suggest the Claimant was aware of a particular issue (an advert placed on a Russian property website). However because this fact would have been discoverable by more careful inquiry, the court found he was in breach of the duty. This was of particular concern to the court because had the document been discovered (and disclosed), the Claimant would not have been able to assert that the Defendant was acting *"clandestinely"* (under English law, secrecy is a key indicator of fraud and therefore important in supporting an application for a WFO).

"IN ROGACHEV V GORYIANOV, THE COURT ACCEPTED THERE WAS NO EVIDENCE TO SUGGEST THE CLAIMANT WAS AWARE OF A PARTICULAR ISSUE (AN ADVERT PLACED ON A RUSSIAN PROPERTY WEBSITE)."

In *Tugushev v Orlov* the fatal instance of non-disclosure was the claimant's failure to disclose documents signed by the claimant in 2003 showing that he had disposed of shares upon taking up a position in the Russian government. These documents were subsequently located by the defendant's advisers and shown to the court at his application to set aside the WFO. The claimant said that he had no recollection of signing the documents, and that he did not have copies of them. His legal team argued that his duty to make reasonable enquiries should not extend to events that happened over 15 years ago and which he could not recall. The Court disagreed, stating that the documents were highly relevant to the case and that the claimant should have made full enquiries of the relevant authorities before presenting his case to the Court on a without notice hearing.

Practical considerations

There is a lot of interest in the effect of English WFOs and how to obtain them. Far less is said about the duty of full and frank disclosure, and the risks of obtaining a WFO if it is later discharged. Any litigant considering applying for a WFO in England should ensure they understand fully what the requirements are and whether they can meet them. Parties outside England should consider very carefully at the outset whether they are willing and able to comply with the duty of full and frank disclosure. This includes considering:

- Are they willing to tell the Court the full truth about the dispute, and importantly any related matters? In particular, are they willing to instruct their lawyers to tell the Court, in detail, about any weaknesses in their case?
- Are they willing to make all enquiries that their lawyers ask them to make? Whilst some enquiries can usually be made by the claimant's lawyers, some may have to be made by the claimant themselves. This can be time consuming as they may have to search old records or get in touch with third parties.
- Are they willing to admit things they may see as personal failings? If a claimant cannot recall the facts of a historical event or whether a document ever existed, it is better to admit that uncertainty than stay silent or deny outright. Similarly, a claimant may have to admit that they were naïve in being misled or that their anti-fraud systems were not as good as they should have been.
- Are they willing to give a fair view of their case to the Court? Victims of fraud often rightly feel very aggrieved and understandably want their lawyers to focus on the strength of their case. However, if seeking a WFO it is essential not to over-state a case.

Winning the battle but losing the war

If the court considers that there has been deliberate and material non-disclosure on a without notice hearing, it will generally set aside a WFO. This is true even if, had the disclosure been made, it would have granted the WFO in any event. This approach is designed to encourage compliance with the rule of full and frank disclosure.

Having a WFO set aside is almost always worse than not obtaining a WFO in the first place. Claimants risk being ordered to pay significant legal costs and damages for any harm caused to the defendant.

> **"IF THE COURT CONSIDERS THAT THERE HAS BEEN DELIBERATE AND MATERIAL NON-DISCLOSURE ON A WITHOUT NOTICE HEARING, IT WILL GENERALLY SET ASIDE A WFO."**

Leaving that aside, the Court will regard any claimant who has wrongfully obtained a WFO with a significant degree of caution for the rest of the proceedings. Tactically, this is a terrible outcome for the claimant: the defendant will remind the Court of the defendant's failings on every occasion.

Whilst these cases should cause all claimants to exercise great caution in seeking WFOs, the message is not a negative one. WFOs are some of the most effective weapons in the English Court's arsenal. They can be determinative of a case, and can make the difference between an effective, enforceable judgment, and a pyrrhic victory. The lesson to be learned from these cases is not that claimants should avoid these orders; it is simply that claimants should expect to spend material time and resources in complying with the duty that comes with an ex parte application.

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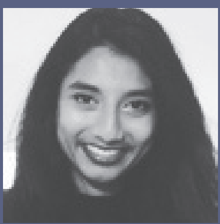

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