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A PRACTICAL GUIDE TO RECOVERING ASSETS

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MINI-ROUNDTABLE

A PRACTICAL GUIDE TO RECOVERING ASSETS



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David Bennett leads Grant Thornton’s restructuring practice in Hong Kong and China. He has over 20 years’ experience advising parties in various sectors on insolvency and restructuring matters. He has been appointed on numerous matters in Hong Kong, the UK, the Cayman Islands and the British Virgin Islands, including complex cross-border appointments and has conducted investigative reviews throughout Asia on behalf of global financiers.

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Michael Leeds has over 11 years’ experience in insolvency and asset tracing and has been ranked as a leading expert in this field in *Who’s Who Legal’s* 2018 awards. He has particular experience of working with the global Grant Thornton network on asset recovery and has vast experience of handling high-profile and complex matters, including Russian and CIS cases. He has experience of dealing with assets and structures located across multiple jurisdictions, including Cyprus, Gibraltar, France, the British Virgin Islands, the Cayman Islands, Germany, Spain, India, New Zealand, Italy, Dubai, Switzerland, Liechtenstein, the US and the UK.

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Margot MacInnis is co-head of the Grant Thornton Specialist Services practice in Grand Cayman, and leader of insolvency and corporate recovery assignments in the Cayman Islands and Offshore. She is responsible for practice development and leading the Grant Thornton team across global engagements. She has over 20 years’ of experience as a forensic accountant, is a certified fraud examiner and anti-money laundering specialist.

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Mark McDonald leads Grant Thornton’s office in the British Virgin Islands. He has over 15 years’ experience of insolvency, specialising in contentious cross-border insolvency often involving fraud investigation, asset tracing and litigation across a number of jurisdictions. He is frequently appointed by the courts in the BVI and the wider Eastern Caribbean to act as liquidator or receiver of companies with assets and other interests in Russia, the CIS, Africa, Asia, Latin America and Europe.

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Stephen Michaelides qualified with Arthur Andersen & Co in London in 1990 and worked for over 15 years in the UK, UAE, Greece and the Netherlands in various financial, operational and managerial roles before joining Grant Thornton in 2008. He initially led the outsourcing department before moving to the restructuring and insolvency department and is now responsible for the joint venture formed with Grant Thornton UK to develop the recovery and reorganisation business in Cyprus.

CD: Reflecting on the past 12-18 months, what do you consider to be the most significant trends and developments shaping asset recovery processes?

Leeds: We have noticed that an increase in early enforcement has become a key focus for creditors. We have seen creditors take a far more proactive approach to the recovery of assets, particularly where litigation funders are involved. Litigation funders often look for clarity on the recoveries at the end of the proceedings. Because of this, creditors have become more acutely aware of the asset recovery process and recoverability on a claim. Although litigation funding has been prevalent for many years, it is providing better access and tools for insolvency practitioners (IPs).

McDonald: There is an increasing trend toward the use of ‘restructuring light’ or ‘soft wind-downs’ solutions. Stakeholders are seeking solutions that maximise value in tandem with a reduction in administrative costs, particularly as the liquidation process has the stigma of being a time consuming and costly process. This has resulted in a preference to appoint interim receivers to preserve value, whether through a debenture or other agreement or by way of application to the court. Where there is a large corporate structure, with subsidiaries in multiple jurisdictions, solutions often involve

a change of control through the appointment of replacement directors to secure the underlying assets, whether through debentures or through the court. Courts in the Caribbean region are certainly showing themselves to be creditor friendly, with an openness to consider alternate enforcement or protection remedies.

Bennett: In recent years, the Peoples’ Republic of China (PRC) has increased restrictions on private investigators, which has closed off some of the ‘non-official’ routes of obtaining information that were historically deployed by many. When conducting asset searches within the PRC it is important to collaborate with reputable companies to ensure compliance with the many local laws and regulations.

Michaelides: Following a long period of growth, in both property prices and lending, Cyprus went through a severe banking crisis in 2013, resulting in the bail-in and the subsequent measures imposed by lenders. This led to increased regulation and a substantial increase in insolvency appointments, in particular receiverships, which provide banks with a mechanism to deal with their non-performing loans. However, we have also seen an increase in liquidations and court appointed receiverships, which involve multijurisdictional matters. We expect to see a further increase in these types of insolvency appointments over the foreseeable future.

Furthermore, the law surrounding the foreclosure process was recently modernised and now provides a legal framework for auctions without the involvement of a government agency. The current legislation, which is still an alternative option to a creditor, additionally provides for auction through the Land Registry process.

CD: What do you consider to be the main challenges facing those tasked with tracing and recovering assets? In what ways might these challenges be amplified in cross-border recovery scenarios?

Bennett: In cases where limited data is available about the parties that have committed the fraud, it can be difficult to get that initial lead as to the location of potential assets. Often, the discovery of a minor piece of information, such as a prior directorship of a company or ownership of a particular asset, can have a domino effect in leading the investigation toward more leads and the tracing of assets. In a cross-border scenario, particularly when dealing with some of the more secretive offshore jurisdictions, obtaining that initial lead can be harder and it requires detailed knowledge of the many potential sources of information, as well as a certain doggedness to continue with the task.

Leeds: When working on cross-border engagements, there can be many cultural and legal challenges. These issues are often amplified when there is a need to pay an overseas lawyer in jurisdictions where there is no concept of working

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on a conditional fee arrangement (CFA), or when litigation funding is not common practice. To minimise these challenges, it is imperative to ensure there is some kind of financing in place.

Michaelides: One of the main challenges in Cyprus that we must consider in tracing and recovering assets is the availability of public record information, as it is not as readily available compared to other jurisdictions. This can prove difficult and only becomes obtainable once you can prove you are entitled to the information and, in this case, it would be via a form of insolvency process

or court appointment. In addition, we must take into account the legal system in Cyprus, what we are trying to achieve, how best to achieve it, the type of application required and the timing and costs involved in such applications. Cyprus does not have a dedicated insolvency court, as some other jurisdictions do, and this can make the process lengthy and costly.

MacInnis: Complex structures, nominee holdings and layers of corporate vehicles across multiple jurisdictions are contributing to increasingly complex solutions for cross-border restructuring and insolvency matters. Any strategy for asset recovery must take into account different legal regimes and access to the courts, and the ability to obtain the necessary powers to control and pursue the assets. The legal structure and character of the interest in the assets, such as an investment in a private equity fund versus a loan secured against assets, will impact the strategy for recovery and the ability to access books and records, as well as the ability to secure control of the asset.

CD: Once asset ownership has been determined, what practical strategies may be deployed to achieve a successful recovery?

Michaelides: A judgment could be obtained through the courts, an arbitration award or a mediation agreement. An effective enforcement strategy should be put in place before judgment is obtained to maximise the likelihood of success and

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recovery. Once a judgment is obtained, a memo could be placed at land registry over property, which would mean that the owner would not be able to sell these assets or place a mortgage on the property without first dealing with the memo that has been registered. If there is concern about dissipation, a freezing order could also be obtained over the assets, which can be worldwide. This allows preservation of assets to satisfy a judgment if one is obtained. A freezing order can also state that assets cannot be removed from the jurisdiction, assets

should be repatriated or require the provision of information of assets.

McDonald: For offshore companies, where the books and records are very seldom in the jurisdiction of incorporation, gaining access to those books and records is critical. The appointment of a liquidator brings with it the power to take control of the books and records of the company, which are generally held with the registered office, directors, administrators, managers and other service providers. As a first point of reference, the liquidation itself provides a powerful tool for obtaining the books and records of a company and the powers of examination. In large, high-profile matters it is important to have the capabilities for handling significant press interest, and the scrutiny of regulators and central banks across a number of jurisdictions.

Leeds: In order to take control of assets, external legal advisers utilise their powers as IPs. These powers may arise automatically, due to the ownership position of the asset, or as a result of the advisers taking an appointment as a director within a corporate structure. The strategy deployed depends on the nature and type of the asset involved. For example, the firm will take different steps to achieve recovery when it is dealing with a property located in Mayfair,

in comparison to those it would implement to recover a yacht located in the Mediterranean. The chosen strategy needs to be flexible and appropriate to the jurisdiction that the asset is located.

Bennett: Once ownership has been established, one of the risks faced is that the perpetrator of the fraud or wrongdoing may seek to move the assets, such as transferring shares to a different entity, to further frustrate the enforcement process. Therefore, the element of surprise can be important and finding

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a way to ‘secure’ the asset pending the outcome of the litigation is a worthwhile exercise.

CD: How might recovery strategies change or be influenced by the jurisdiction in which an asset is located?

Leeds: There are always many cultural sensitivities and nuances to consider, including language and legal barriers, which must be addressed by encouraging close collaboration with local offices. Recovery strategies are often more seamless and successful when working with a joined-up approach across jurisdictions. Establishing joint ventures allows firms to engage trusted partners and local experts, as well as the ability to deliver on the ground training to provide high-level solutions at short notice.

Michaelides: Strategy in Cyprus may be different to those of other jurisdictions because of the difficulty of obtaining information and the time-consuming process of the court system. An amendment to existing legislation seems to be vital to fill-in all the gaps faced in the legislation for the recovery of properties.

MacInnis: Careful planning and thought at the outset of an appointment and the early involvement of an IP to assist with the strategy, and ensure powers obtained, are relevant to the circumstances. This can save significant time and costs in the future. For example, in Switzerland, recognition is not impossible for being appointed receiver of shares or liquidator of a company, but it is time consuming, extremely costly and not guaranteed to be successful. By way of example, where you have a liquidator or receiver of a Cayman or BVI company





with assets in Switzerland, the liquidator should consider appointing directors with the power and authority to deal with the assets in Switzerland from the outset. Swiss financial institutions will typically recognise the authority of the board of directors of a company, therefore if a liquidator or receiver has the simple power to change the board, the board can then interact with the Swiss banks and obtain bank statements or account balances with relative ease, as opposed to commencing uncertain Swiss recognition proceedings.

Bennett: It is important to be familiar with the local legal environment before commencing any recovery strategy. A lack of planning can lead to increased costs and a failure to recover assets. For those jurisdictions with less transparent legal systems, local political connections can be enough to shield parties from enforcement attempts. As such, it is important to research the counterparty and understand its standing and local influence. Liaising with local practitioners familiar with the court system is important. In circumstances where you are unlikely to be able to obtain a judgment from a local court, it can be best to avoid incurring any costs and instead refocus attempts at recoveries in other jurisdictions.

CD: **What are some of the differences that might arise between the expectation of how a recovery process should unfold, and practical realities on the ground?**

McDonald: In circumstances where there are assets held by a BVI or Cayman company, the initial practical challenge is how to get control of the entity. Once you gain control of the entity, a thorough investigation of its affairs must be undertaken, to enable you to identify potential assets and confirm title to the same. More often than not, those holding this information, directors, lawyers and other advisers, are not located in the BVI or Cayman Islands and will not cooperate willingly, therefore additional actions, including discovery orders, may be required in various jurisdictions to obtain the necessary information. We often find the underlying assets have been transferred to another company, usually outside of the BVI or Cayman. This will require additional investigations and potentially legal actions to recover these assets, all of which will increase the cost and timescale.

Bennett: Costs are an important factor and in larger, more fluid investigations costs and recoveries can increase beyond initial expectations. In circumstances where the client is someone who has potentially already lost a significant sum of money from a fraud, they can be reluctant to expend further amounts. Consideration of litigation funding can be an alternative route to give the client comfort on the overall exposure. In jurisdictions such as the PRC,

taking control of companies and assets is a more time-consuming and costly process than in many of the common law jurisdictions and these issues need

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(Cyprus) Ltd*

to be clearly explained upfront. The asset tracing and recovery process can also be fluid and there may be a need to change strategy due to information uncovered as you proceed.

Michaelides: In an ideal world, an IP and advisers would be engaged at a very early stage, to consider the various options available and agree a detailed strategy, including advice from other member firms across the globe. The judgment or appointment will be made and the case will progress as planned. However, this is not always the case. In Cyprus, the involvement of the IP is likely to be at a much later stage and it is also possible that

a challenge to the judgment or appointment may occur, which will frustrate and delay any strategy. It could also be a tactic to provide time for assets to be misappropriated while the challenge is dealt with. Regarding the foreclosure procedure, the debtor can challenge and set aside the IA Notice for specific reasons prescribed in the law. If one of the reasons is met, then the IA Notice is set aside and foreclosure procedure cannot continue.

Leeds: We always tend to expect the unexpected, but that is what makes it exciting.

CD: To what extent is technology playing a greater role in the asset tracing and recovery process?

Leeds: The technological landscape is rapidly evolving for both sides of the dispute. A dedicated corporate intelligence offering, as well as strong digital forensics and cyber security expertise, can allow for an immediate response to requests from creditors and parties to assist.

MacInnis: Advancements in technology mean that access to digital forensics is crucial, as the challenges of successful asset tracing will often require the collection and review of significant amounts of data, which needs to be preserved

in a forensically sound manner and input into user-friendly platforms to allow the application of data analytics. The complexity of the structures mean there is often ever more data to review and understand. There is a notable increase in the number of sources of data and a requirement for advanced tools to map and track the structure, relationships and assets. With the hype of blockchain and crypto currencies, and the explosion in the number of ICOs being launched, the importance of investment in technology by IPs and their firms to assist in asset tracing and recovery is paramount,

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especially as we move into an era where the asset being traced is likely to be digitalised, as opposed to traditional bricks and mortar.

Bennett: Technology is of great assistance in asset tracing, particularly on global matters. More and more jurisdictions are digitalising records and databases, which makes record searching easier and cheaper to complete. In cases where significant amounts of data are recovered, either through a disclosure process in litigation or through an IP taking control of a company's records, the use of e-discovery platforms provides a useful and efficient way to interrogate electronic records.

Michaelides: Digital forensics are evolving and more tools are becoming available and it is crucial that an IP firm specialising in investigations and asset recovery should have access to a dedicated team of professionals with expertise in this area.

CD: Given the shifting economic, legal and geopolitical environment, what are your predictions for asset recovery practices in the years ahead? What issues are likely to dominate this space?

Bennett: Changes in legislation in Asia in recent years have opened up new routes to enforcement. India's implementation of the Insolvency and Bankruptcy Code, 2016, has made enforcement against companies there a more realistic option, while Singapore has shown itself to be keen to be at the forefront of restructuring in Asia with its legislative changes. In the quest to encourage

further foreign direct investment (FDI), a number of jurisdictions are realising that a working insolvency system is important to foreign investors so that they have some comfort that they may be able to recover some of their investment during disputes or the insolvency of a company. For example, Myanmar has been working with the Asian Development Bank to create and implement a new insolvency law. Vietnam has also introduced amendments to its bankruptcy code and new procedures to make the enforcement of contracts easier and to allow the wider use of arbitration. We anticipate further reforms of the insolvency legislation in South East Asia in the years ahead as countries compete for FDI.

Michaelides: In Cyprus, we expect to see an increase in insolvency appointments over the next few years. Receiverships, liquidations, asset tracing and investigations are likely to dominate this space. The new amendment to the Mortgaging Law has made it more difficult for the borrower to challenge the process, which we believe will increase the number of properties sold through auctions.

Leeds: There is a perception of uncertainty and risk in the market, arising out of shifts in the landscape through Brexit, for example. With risk comes change, which will likely lead to greater instances of fraud, the need for more litigation, as well as asset tracing and recovery services. The legal market is constantly evolving, with regular changes

in case law. Asset recovery experts need to be alive to these changes and how they can be implemented.

McDonald: The call for transparency across jurisdictions may be creating a 'catch 22' scenario. It may push those looking to hide assets beyond the reach of their rightful owners to create even more increasingly complex structures spanning numerous jurisdictions, some of which may not be so creditor friendly. Global reach, with highly skilled professionals who have done this work before, is

a key to success. Early identification of the critical issues and an ability to see them clearly, identifying the best approach in the circumstances is key. It is predicted that the movement to more light-touch restructuring will continue, and that there will also be a continuation in interim receiver appointments, in response to investor and creditor demand for more flexible, nimble and cost-effective solutions. It is going to be even more important to have a network that can cover off the international breadth of assets and relationships. 