



INSOL
INTERNATIONAL

GLOBAL INSOLVENCY
PRACTICE COURSE

INSOL Global Insolvency Practice Course: Cross-Border Litigation Issues

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AGENDA

1. Framework for Addressing Global Fraud
2. Clawback/Avoidance Claims
3. Discovery Tools, Asset Freezes & Injunctions
4. Asset Recovery Tools & Digital Assets
5. Government Enforcement Issues
6. Simulation

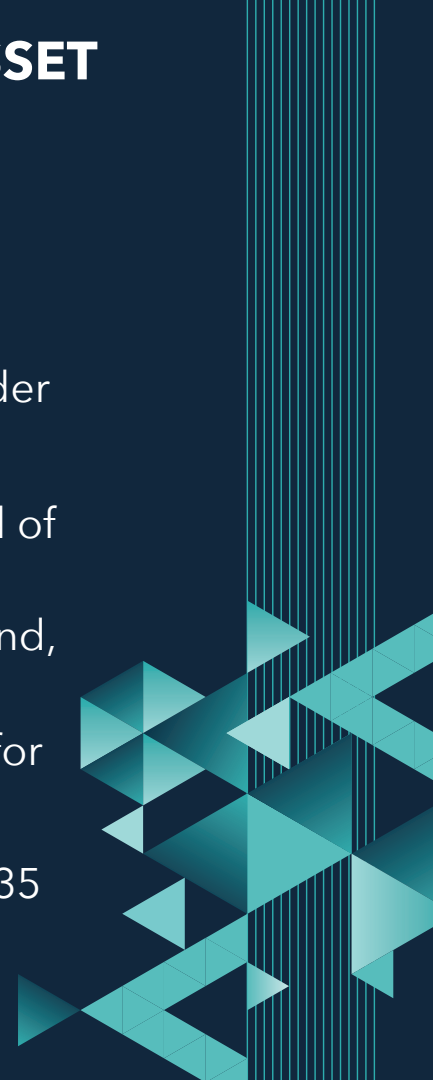
FRAMEWORK FOR ADDRESSING GLOBAL FRAUD & ASSET RECOVERY

- Private (civil) remedies: Pros and Cons
- Government (criminal) remedies: Pros and Cons
- Cross-border insolvency law: broader and more effective framework?



FRAMEWORK FOR ADDRESSING GLOBAL FRAUD & ASSET RECOVERY

- **Historical origins: Statute of Elizabeth (England) & fraudulent conveyance provisions for common law jurisdictions outside of insolvency regimes**
 - In 1542, the English Parliament enacted the world's first cross-border insolvency statute.
 - Any debtor who “withdr[ew] . . . into any foreign realm” in “defraud of his creditors” would be outlawed and his English property forfeited. Those who “willingly help[ed]” such debtors leave England, or who “convey[ed] their . . . goods” from English soil, would be imprisoned or fined as Parliament deemed “meet and convenient for their said offense or offenses.”
 - An Act Against Such Persons as Do Make Bankrupt 1542, 34 & 35 Hen. 8 c. 4, § 1 (Eng.)



FRAMEWORK FOR ADDRESSING GLOBAL FRAUD & ASSET RECOVERY

- **Principles of modern cross-border insolvency law supporting global asset recovery:**
 - One “main” proceeding
 - A “collective” proceeding addressing the claims of all creditors worldwide
 - One insolvency representative charged with realizing assets across jurisdictions
 - Cooperation from courts in other jurisdictions
 - Tools in arsenal for investigations and recovery actions



CLAWBACK/AVOIDANCE CLAIMS

- **Historical Origin:** Retrospective avoidance of otherwise valid transactions, to adjust rights as between debtor and creditors, and as between creditors.
- **Differing avoidance regimes across the globe:**
 - Common law: Undervalue transaction / fraudulent conveyance, and unfair preference, typically subject to time limits.
 - Civil law countries: Consolidated avoidance action focused on detrimental transactions to creditors, typically subject to time limits.



CLAWBACK/AVOIDANCE CLAIMS

- C.f. Setting aside fraudulent transactions (aka Actio Pauliana) in and outside insolvency regimes.
- Different approaches under Model Law: US (under Chapter 15, cannot bring US avoidance actions) vs. UK (under CBIR, can bring UK avoidance actions)
- Extraterritorial Reach of Avoidance Claims?



GENERAL DISCOVERY TOOLS, ASSET FREEZES / INJUNCTIONS

- **Investigative / Discovery Tools**

- Rule 2004 and Section 1782 discovery in the US
- Norwich Pharmacal orders in common law jurisdictions
- Data subject access requests
- Digital Assets: Blockchain Analysis



GENERAL DISCOVERY TOOLS, ASSET FREEZES / INJUNCTIONS

- **Asset Freezes / Injunction**

- Freezing, disclosure, and receivership orders.
- Challenges with cross-border recognition / enforcement of freezing and ancillary orders, even as between common law jurisdictions.
- Limitations in civil law jurisdictions and public policy challenges. E.g. concept of in personam freezing order may not exist, only in rem freezing order specific to assets; concept of disclosure of assets in aid of freezing order may also not exist.



INVESTIGATIVE AND ASSET RECOVERY TOOLS- MODEL LAW

- Discovery Powers (Art. 21(1)(d)): Examination of witnesses, taking of evidence, delivery of information.
- Entrustment Relief (Art. 21(1)(e)): Entrusting administration / realization of debtor's assets to foreign representative.
- "Appropriate Relief" (Art. 21(1)): Grant of additional relief that may be typically available to a local insolvency office holder.
- "Additional Assistance" (Art. 7): Additional assistance to a foreign representative under other local laws outside of insolvency regime.



GOVERNMENT ENFORCEMENT ISSUES

- Government Forfeiture Remedies
- Potential Clash Between Insolvency Representative and Government Prosecutors
- Victim Compensation Programs vs. Insolvency Distributions
- Using sovereign enforcement as an “ally” for asset recovery campaigns



SIMULATION CASE STUDY

- US debtor company in Chapter 11 with subsidiaries and operations across the globe, including intermediate companies in BVI, Singapore, Brazil.
- BVI: Suspicious transfers of hundreds of millions over the last decade to a BVI affiliate, which were invested into a Cayman Islands precious metal fund. US Co has minority shareholding interest and controlled by NZ resident director.
- New Zealand: Suspicious transfer of substantial monies authorised by NZ director of US Company, to an Irish headquartered crypto exchange for the purchase of 1000 Bitcoin credited to a private wallet.

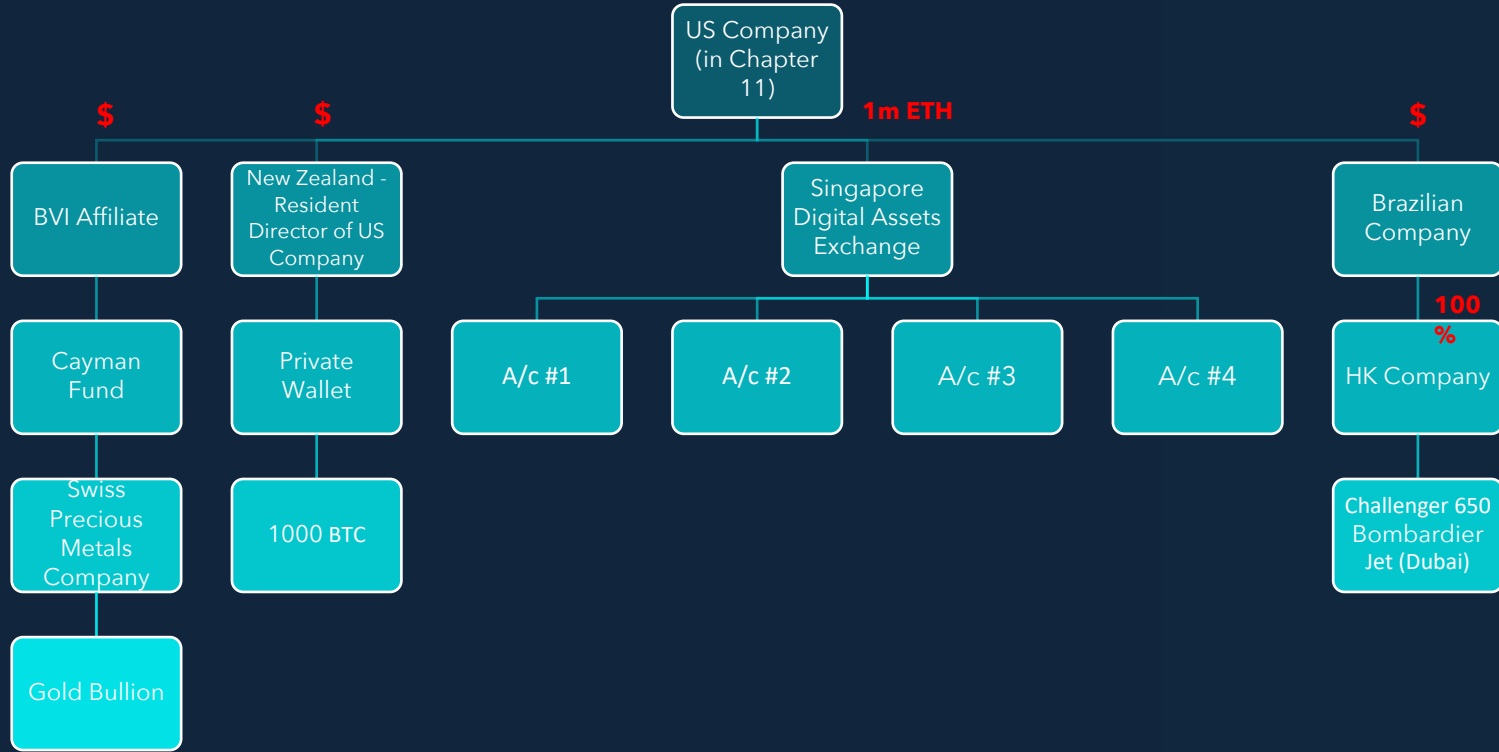


SIMULATION CASE STUDY

- Singapore: Suspicious transfer of 1 million of Ethereum to a Singapore-headquartered exchange from US Co's digital wallet, to the credit of 4 unknown accounts.
- Brazil: Suspicious transfer of tens of million to a Brazilian majority owned subsidiary, which in turn wholly owned a Hong Kong company.
- Teamwork: Consider possible effective means by which to unravel these suspicious transfers and facilitate recovery of US Co's assets.



SIMULATION CASE STUDY



PRESENTATIONS & DEBRIEF DISCUSSION

