INSOL INTERNATIONAL

ASSET TRACING AND RECOVERY HANDBOOK:
JURISDICTIONAL PERSPECTIVES

SPECIAL PROJECT

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ASSET TRACING AND RECOVERY HANDBOOK: JURISDICTIONAL PERSPECTIVES

INSOL INTERNATIONAL

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ACKNOWLEDGEMENT

INSOL International is pleased to present this new publication, “Asset Tracing and Recovery Handbook: Jurisdictional Perspectives”.

This handbook sets out the range of options available to an insolvency practitioner in seeking to identify, value, trace and recover a company’s assets. These issues are increasingly important, with asset structures growing in sophistication - including the rise of crypto and other digital assets.

These issues are explored in 5 jurisdictions: the Cayman Islands, Singapore, the Netherlands, the United Kingdom and the United States.

It is intended that further jurisdictions will be added to the handbook over time.

The country chapters were written by the committee members of the Asset Tracing and Recovery Committee and the overall project was managed by the two co- chairs Mr Ashok Kumar of Bird & Bird ATMD and Ann Gittleman of Kroll USA.

INSOL thanks the project leaders, and the contributors for each jurisdiction, for their time and expertise in bringing this project to fruition.

INSOL International

September 2025

FOREWORD

This Asset Tracing and Recovery Handbook provides a cross-jurisdictional guide of the range of options available to an insolvency practitioner in seeking to identify, collect, value, trace and recover a company's assets in certain countries.

The first publication provides for our members a guide in 5 jurisdictions: the Cayman Islands, Singapore, the Netherlands, the United Kingdom and the United States. The list of countries to be included in the guide will be expanded.

Some of the key "tools" available to an insolvency practitioner in seeking to trace and recover a company's assets include examination powers, freezing and seizure orders, and legislative provisions enabling the recovery of antecedent transactions (such as fraudulent conveyances, transactions that are not considered commercial and unfair preferences). These options are important in achieving one of the core goals of an insolvency administration: to maximise the pool of assets available for distribution to creditors.

In a cross-border context, the jurisdictional guides identify the means for asset tracing and recovery available including the Model Law framework, and court-to-court cooperation protocols, for example the Judicial Insolvency Network (JIN) Guidelines.

The reports also consider the complexities of privacy laws and regulations which an insolvency practitioner must consider in the asset tracing and recovery process, and the interplay with criminal law in the investigation of fraudulent and illicit transactions.

Significantly, the guide provides an overview of the distinct issues that arise in the context of digital and crypto assets – which continue to evolve in a technological age, and can give rise to several, and potentially conflicting laws involving creditors and commingled assets in multiple jurisdictions.

Asset tracing and recovery is currently one of the key priorities of UNCITRAL's Working Group V, which is continuing its work on a draft toolkit that sets out steps that could expedite civil asset tracing and recovery in insolvency proceedings, both domestically and across borders.

This INSOL publication provides an important addition to the discourse on asset tracing and recovery in an insolvency scenario. It serves as a useful compilation and "ready reckoner" for practitioners in seeking to understand the mechanisms that may be available to them in discharging their duties, and maximising returns for creditors, in the course of an appointment.

The publication also highlights key "gaps" that may be areas for law reform and greater consistency in cross-border asset tracing and recovery processes in future.

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CAYMAN ISLANDS

1. Before commencement of insolvency and restructuring proceedings (pre-order for insolvency and restructuring proceedings)

1.1 What are the relevant laws or rules and relevant provisional measures available in your jurisdiction in connection with the identification, tracing, recovery and preservation of assets before an application for an insolvency or restructuring proceeding is made?

The various provisional measures which are available in the Cayman Islands before the commencement of insolvency and restructuring proceedings are largely governed by legal precedents. An example of a provisional measure used to identify and trace assets is a Norwich Pharmacal order. Examples of provisional measures which may assist in preserving assets are freezing injunctions (formerly known as Mareva injunctions) and Chabra injunctions. Each of these measures has its own particularities and limitations, which will be further addressed below in section 2.5.

In particular circumstances, assets may also be protected through the appointment of provisional liquidators or receivers. The procedure and criteria for securing the appointment of provisional liquidators are set out in the Cayman Islands Companies Act (as amended) (Companies Act). Receivers may be appointed by secured creditors, in order to realise the secured assets and secure repayment of the outstanding debt. Receivers are generally appointed on the basis of the terms of a security document, which document also governs the powers of the receiver (who are generally enabled to do all things necessary to realise the secured property for the benefit of the security holder).

Schemes of arrangement can be pursued outside of a liquidation or the restructuring officer regime. Schemes of arrangement are essentially a compromise or arrangement between a company and its creditors or members (or any class of them). Where a scheme of arrangement is pursued outside of liquidation or restructuring proceedings, no moratorium exists, for which reason there is no protection from creditor action.

Outside of a liquidation or restructuring regimes, schemes of arrangement are initiated by the company (acting through its directors, creditor or member) by application to the court. The company will have to present a detailed scheme proposal. If the scheme of arrangement is with creditors of the company, the scheme will be approved if a majority (over 50%) in number, representing 75% in value of each class of creditors (present and attending) vote in favour of the scheme. If the scheme of arrangement is with members of the company, the scheme will be approved if 75% in value of each class of member (present and attending) vote in favour of the scheme.

After the scheme of arrangement has been approved by the creditors / members of the company, the scheme will also require sanction of the court. The court will generally sanction a scheme of arrangement which is compliant with legislation and represents an arrangement that an intelligent and honest man might reasonably approve.

Procedural rules in relation to these measures are governed by the Grand Court Rules (as amended) (GCR) and the Grand Court Financial Services Division User Guide (as amended) (FSD User Guide).

2. Summary of corporate insolvency and restructuring proceedings

2.1 Formal insolvency legislation for corporations

2.1.1 Does your jurisdiction have formal insolvency and restructuring legislation(s) or framework for corporations? What laws or rules govern the insolvency and restructuring of corporations in your jurisdiction? Does specific legislation, laws or rules exist in your jurisdiction for the identification, tracing, recovery and preservation of assets?

The Cayman Islands laws governing company insolvency and restructuring are to be found in Part V of the Companies Act, as well as in the Companies Winding Up Rules (as amended) (CWR). In respect of exempted limited partnership, provisions relevant to insolvency are also found in the Exempted Limited Partnership Act (as amended) (ELP Act). In addition, the Insolvency Practitioners' Regulation (as amended) (IPR) governs the appointment of liquidators and their remuneration.

In addition, as the Cayman Islands is a common law jurisdiction, judicial precedent is applied and is a significant source of law alongside the statutes mentioned above. While decisions from the courts of other Commonwealth countries are not strictly binding, they are considered highly persuasive, particularly the decisions of the English courts, and especially when there are no specific Cayman Islands precedents on a particular point of law.

2.2 Appointment of insolvency representative, provisional insolvency representative or authorised person

2.2.1 Upon the application of the insolvency or restructuring proceedings, does your jurisdiction have a legislative framework for the appointment of an authorised person or provisional insolvency representative who is entrusted with the administration or supervision of the debtor company's business or assets, or the realisation of all or part of the debtor company's assets?

These issues are addressed in the section below.

2.2.2 Where an application for an insolvency or restructuring proceeding is not made, is there a similar legislative framework for the appointment of such an authorised person for the identification, tracing, recovery and preservation of the company's assets?

Section 90 of the Companies Act provides that a company may be wound up in three ways, namely:

(1) compulsorily by order of the court;

(2) voluntarily:

   a. by virtue of a special resolution;

   b. because the period fixed for the duration of the company by its articles of association has expired; or

   c. because the event has occurred on the occurrence of which its articles of association provide that the company shall be wound up; or

(3) under the supervision of the court.

The situations in which a company may be compulsorily wound up are set out in section 92 of the Companies Act, and include (by way of example) a company's inability to pay its debts. Where a company is compulsorily wound-up, such winding up will invariably have occurred as a result of a winding-up petition filed by a creditor, contributory or director of a company, or a regulatory authority (section 94 of the Companies Act). Order 3, rule 2 of the CWR provides that a petition shall contain the name of a qualified insolvency practitioner (and any foreign practitioner) whom the petitioner nominates for appointment as official liquidator. Order 3, rule 4(1) of the CWR provides that every petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator stating, summarily, that they comply with the requirements as to professional qualification listed in the IPR, and confirming that they are willing to act as official liquidator if so appointed by the Grand Court.

In order to be able to be appointed as official liquidator, an insolvency practitioner must fulfil professional requirements (section 4 of the IPR), a residency requirement (section 5 of the IPR), an independence requirement (section 6 of the IPR), and an insurance requirement (section 7 of the IPR). If the intention is to appoint a foreign insolvency practitioner, he or she will equally have to swear an affidavit, which will have to include certain information prescribed by the CWR (Order 3, rule 4(2)).

Voluntary liquidations are governed by section 116 of the Companies Act. A company's resolution, resolving to enter into voluntary liquidation, will also include resolutions as to the appointment of a voluntary liquidator (section 119 of the Companies Act). Any person, including a director or officer of the company concerned, may be appointed as voluntary liquidator. No specific qualifications are required.

The director(s) of a company in voluntary liquidation are asked to sign a declaration of solvency within 28 days of the commencement of the voluntary liquidation. When signing a declaration of solvency, a director has to declare that he or she has made a full inquiry into the affairs of the company and that, having done so, he or she believes the company will be able to pay its debts in full, together with interest at the prescribed rate within a period of 12 months from the commencement of the winding up. A director who makes a declaration of solvency without having reasonable grounds for making that declaration, commits an offence and is liable on summary conviction to a fine of CI $10,000 and to imprisonment for 2 years.

If, where a company is being wound up voluntarily, the directors of the company do not sign a declaration of solvency within 28 days of the commencement of the liquidation, the voluntary liquidator has to apply to the Grand Court for an order that the liquidation be brought under the supervision of the court (commonly referred to as a supervision order) (section 124 of the Companies Act and CWR Order 15). When making a supervision order, the Court will appoint one or more qualified insolvency practitioners (and may, additionally, appoint a foreign practitioner) as official liquidator (section 132 of the Companies Act). Once a supervision order is made, the liquidation shall continue as if it had been commenced as a compulsory liquidation (section 133 of the Companies Act).

An additional power available to the court is that it may appoint a provisional liquidator at any time *after* the presentation of a winding up petition, but *before* the making of a winding up order. Only a creditor or contributory of a company[1] may make an application for the appointment of a provisional liquidator when one of the following grounds exist:

1 Under certain circumstances, the Cayman Islands Monetary Authority may also file an application for the appointment of a provisional liquidator (section 104(6) of the Companies Act).

(1) there is a *prima facie* case for making a winding up order; and

(2) the appointment of a provisional liquidator is necessary in order to –

(i) prevent the dissipation or misuse of the company's assets;

(ii) prevent the oppression of minority shareholders; or

(iii) prevent mismanagement or misconduct on the part of the company's directors (section 104 of the Companies Act).

The legal test for having provisional liquidators appointed is set out in detail in *Re Position Mobile Ltd SEZC* (Unreported, FSD 79 of 2022 (DDJ), 31 October 2023).[2]

Provided a winding up petition has been filed, and the applicant has standing to seek the appointment of a provisional liquidator, the court will consider the application in a two-stage process. First, the court will consider whether there is a *prima facie* case for a winding up order. Second, the court will consider whether the appointment of a provisional liquidator is necessary to achieve one or more of the purposes of section 104(2)(b) of the Companies Act.

At the first stage, the "applicant has to satisfy the court that the applicant is likely to obtain a winding up order on the hearing of the winding up petition" (Position Mobile, para 10). It is not necessary to demonstrate that the winding up order will be granted. This hurdle is likely to be crossed if the allegations in the petition are supported by evidence and have not been disproved.

At the second stage, the burden is on the applicant to prove that the appointment of a provisional liquidator is necessary in order to prevent one of the grounds set out in section 104 of the Companies Act from occurring. "The burden is not on the respondent to disprove the applicant's allegations on the necessity hurdle, but a respondent would normally be expected to provide detailed evidence in response rather than mere generalised denials" (Position Mobile, para 11). The court will consider all the evidence and will consider whether the risk which is sought to be prevented is sufficiently serious to justify the appointment of a provisional liquidator.

An application for the appointment of provisional liquidators will need to be supported by an affidavit. As the appointment of provisional liquidators is considered to be a "nuclear option", the applicant has a heavy evidentiary burden, and clear and strong evidence to support the application will be required. If the applicant can be protected with an alternative (lesser) remedy, a provisional liquidator is unlikely to be appointed.

The applicant must, furthermore, (usually) give an undertaking to the court to pay any damage suffered by the company by reason of the appointment of the provisional liquidator; as well as the remuneration and expenses of the provisional liquidator, in the event that the winding up petition is ultimately withdrawn or dismissed (CWR Order 4, rule 3).

Where an application for the appointment of a provisional liquidator is made by a creditor or contributory, the company is entitled to at least 4 clear days' notice of such an application, unless the court is satisfied that there are some exceptional circumstances which justifies the application being made *ex parte*.

A provisional liquidator can only carry out such functions as the court may confer on that person and a provisional liquidator's powers are limited by the order of the court appointing him / her.

In relation to company restructuring, a company can present a petition for the appointment of a restructuring officer where the company: (1) is or is likely to become unable to pay its debts; and (2) intends to present a compromise or arrangement to its creditors (or classes thereof) pursuant to the Companies Act, the law of a foreign country or by way of a consensual restructuring (section 91B of the Companies Act). The petition can be presented by a company director without a resolution of its members or an express power in its articles of association.

Similar to winding up petitions, a petition to restructure must include the name and address of the person or persons whom the petitioner nominates for appointment as restructuring officer (CWR Order 1A, rule 2(e)). A restructuring officer must be a qualified insolvency practitioner (section 91D of the Companies Act). The petition must also be supported by an affidavit sworn by the person or persons nominated for the appointment as restructuring officer, and CWR Order 3, rule 4 applies *mutatis mutandis*.

For success on the petition, the company must show credible evidence, to the satisfaction of the court, that:

(i) the statutory precondition of insolvency or likely insolvency is met;

(ii) there is an intention to present a restructuring proposal to the company's creditors (or a class thereof) with a reasonable prospect of success; and

(iii) the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to winding up the company.

2 For a discussion in relation to the court's statutory jurisdiction to appoint joint provisional liquidators and restructuring officers (and where that jurisdiction overlaps), which falls outside of the scope of this paper, please refer to *Re Oakwise Value Fund SPC* [2024] CI FSD 133, and *Re Kingkey Financial International (Holdings) Ltd* [2024] CI FSD 37.

However, it is to be remembered that the court's powers are broad and discretionary, and there is no fixed list of factors to be taken into consideration (*Re Oriente Group Ltd* (FSD 231 of 2022, unreported, 8 December 2022)).

The court has wide discretion in giving shape to restructuring proceedings, and the powers granted to a restructuring officer are not prescribed in the Companies Act. It is for the court, in its order, to determine what powers are granted to the restructuring officer, and whether it will allow the company's management to stay in place to continue managing the company's operations.

Where it is in the interest of the company to do so, a company may also make an *ex parte* application to the court for the appointment of a restructuring officer on an interim basis, pending the hearing of a petition (section 91C(1) of the Companies Act). An interim restructuring officer shall only have the power to carry out such functions as the court has expressly conferred in the order of appointment (section 91C(4) of the Companies Act).

2.3 Effects and duties imposed on the debtor company

2.3 1 What are the effect(s) and duties imposed on the debtor's company upon the application of insolvency or restructuring proceedings in relation to the identification, tracing, recovery and preservation of assets? Is there a similar duty imposed on any party or company where an application for an insolvency or restructuring proceeding is not made?

Prior to an (insolvent) liquidation and prior to a winding up petition having been filed, the directors of a company have to prioritise the interests of the main stakeholder.

Determining who the main stakeholder is, is approached on a sliding scale: as long as the company is financially stable, the shareholders will generally have the predominant economic interest in the manner in which a company's affairs are managed. However, when a company is in financial difficulties, the economic interest of its creditors become distinct from those of the shareholders, and are liable to become increasingly predominant as the company's situation deteriorates. In a situation where the company is bordering on insolvency, but is not faced with inevitable insolvent liquidation, both the interest of the shareholders and the creditors will have to be reflected in the company's actions. Where the shareholders' interests and creditors' interests conflict, a balancing exercise will need to take place. The more parlous the financial state of the company, the more the interests of creditors will predominate, and the greater the weight to be given to the creditors' interest. As soon as insolvent liquidation is inevitable, the shareholders cease to retain any valuable interest in the company. This follows from *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 (*Sequana*).

Following *Hunt v Singh* [2023] EWHC 1784 (Ch), it appears that directors will need to have had some form of (actual or constructive) knowledge of the (impending) insolvency for the duty to creditors to arise. *Sequana*, a decision of the United Kingdom Supreme Court, is not binding in the Cayman Islands, but is highly persuasive authority in the Cayman courts. Consequently, a director of a debtor company will want to give due weight to the interest of the company's creditors immediately prior to the company's liquidation.

Where the court has made a winding up order or has appointed a provisional liquidator, the liquidator may require particular individuals to prepare and submit a "statement of affairs" of the company (section 101(1) of the Companies Act). Rules about the form of notice to the "deponent" (and the statement of affairs more generally) can be found in CWR Order 6. The relevant individuals who may be required to file a statement of affairs are:

(1) persons who are or have been directors or officers of the company;

(2) persons who are or have been professional service providers to the company; and

(3) persons who are or have been employees of the company, during the period of one year immediately preceding the commencement of the winding up or the appointment of the provisional liquidator, as the case may be (section 101(3) of the Companies Act).

The statement of affairs must include information in relation to the following:

(1) particulars of the company's assets and liabilities, including contingent and prospective liabilities;

(2) the names and addresses of any persons having possession of the company's assets;

(3) the assets of the company held by those persons;

(4) the names and addresses of the company's creditors;

(5) the securities held by those creditors;

(6) the dates when the securities were respectively given; and

(7) such further or other information that the liquidator may require.

The contents of the statement of affairs must be verified by an affidavit sworn by the person making it (section 101(2) of the Companies Act).

After the liquidator has given notice to an individual to provide a statement of affairs, that person will have 21 days to do so. However, that period may be extended by the liquidator (or, if the liquidator refuses, the court) (sections 101(4) and 101(5) of the Companies Act).

A person who, without reasonable excuse, fails to complete a statement of affairs commits an offence and is liable on conviction to a fine of ten thousand Cayman Islands dollars.

The duties under section 101 of the Companies Act only arise in a liquidation. In addition, any person (whether a resident in the Cayman Islands or not) who:

(1) has made or concurred with the statement of affairs;

(2) is or has been a director or officer of the company;

(3) is or was a professional service provider to the company;

(4) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property; or

(5) has been concerned or has taken part in the promotion, or management of the company (each referred to as a relevant person), has a duty to cooperate with the official liquidator (section 103(1) of the Companies Act).

While a company is being wound up, the liquidator may at any time before the dissolution of the company apply to the court for an order for the examination of a relevant person; or for an order that a relevant person deliver up to the liquidator any property or documents belonging to the company. A relevant person may also be required to swear an affidavit answering written interrogatories, attend for oral examination, or both. Rules about the form of the application are contained in CWR Order 7, rule 1, which provides that an application shall be made on an *ex parte* basis, supported by an affidavit sworn by the official liquidator.

The Grand Court has jurisdiction to make an order under section 103 of the Companies Act against any relevant person who is not a resident in the Cayman Islands and may issue a letter of request for the purpose of seeking the assistance of a foreign court (section 103(7) of the Companies Act).

The examination takes place in private at a place and time to be agreed between the examinee and the liquidator. An examination can be conducted by video conference if the examinee is out of the jurisdiction. In any event, an official transcript of the examination shall be prepared by a court reporter (CWR Order 7, rule 3). The court may also order that a creditor or contributory be permitted to participate in an oral examination (sections 103(3)-103(6) of the Companies Act).

2.4 Stay of execution of assets

2.4.1 Upon the application of the insolvency or restructuring proceeding, is an automatic stay imposed on any existing, or the commencement of any new legal proceedings, or the realisation of assets (moveable and immoveable property) of the debtor company?

The presentation of a winding up petition does not, in the Cayman Islands, result in an automatic stay being imposed. An automatic stay (better known as a moratorium) only comes into place when a winding up order is made or provisional liquidators are appointed (section 97(1) of the Companies Act). From the time that a winding up order is made, no suit, action or other proceedings (other than criminal proceedings) may be continued or commenced against the company, except with the leave of the court. The latter means that a party wishing to commence proceedings may apply to the Grand Court to seek permission to commence or continue proceedings pursuant to section 97(1) of the Companies Act. If the court does grant permission, it can make this subject to terms.

Nevertheless, a company, creditor or contributory may, after the presentation of a winding up petition but before the winding up order is made, apply to the Grand Court for a stay of any action or proceedings that are pending against the company (section 96 of the Companies Act). Such an application would not be approached as a "usual" anti-suit application. Instead, the Cayman Islands Courts follow the Privy Council's judgment in *Stichting Shell* [2014] UKPC 41, where it was said that the court will grant a stay "where the ends of justice require" (at para 17).

The judgment went on to state that "the ends of justice is a deliberately imprecise expression. It encompasses a number of distinct legal policies whose application will vary with the subject matter and the circumstances", but it was said that there is a "public interest in the ability of a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction" (para 24).

Stichting Shell was followed by Chief Justice Smellie (as he then was) in *Ardent* (unreported, 13 May 2016, FSD 54 of 2016), who said that the power would be exercised to avoid a "free for all" race to grab a company's assets.

Finally, after a winding up order has been made, any attachment, distress or execution put in force against the estate or effects of the company, *after* the commencement of the winding up, is void (section 97(2) of the Companies Act). Similarly, when a winding up order has been made, any disposition of the company's property, and any transfer of shares or alterations in the status of the company's members made after the commencement of the winding up is void, unless the court otherwise orders (section 99 of the Companies Act).

In this context, section 100 of the Companies Act is important as it stipulates when a liquidation commences.

The winding up of the company is deemed to have commenced on the date that:

(1) a resolution has been passed by the company for voluntary winding up;

(2) the period fixed for the duration of the company by the articles of association has expired;

(3) the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred; or

(4) the date of the presentation of the petition to appoint a restructuring officer pursuant to section 91B of the Companies Act (section 100 of the Companies Act).

In any other circumstance, the winding up of a company by the court is deemed to commence at the time of the presentation of the petition for winding up.

In relation to restructurings, section 91G of the Companies Act provides that no suit, action or other proceedings (other than criminal proceedings) shall be continued or commenced against a company at any time after the presentation of a petition for the appointment of a restructuring officer under section 91B of the Companies Act, and when an order for the appointment of a restructuring officer is made (and has not been discharged). This moratorium also covers winding up resolutions and petitions, which therefore cannot be passed or filed other than with the leave of the court. There are, in addition, provisions which allow for an application to be made to stay criminal proceedings (section 91G(2) of the Companies Act). The moratorium covers both local and foreign suits, actions and proceedings (section 91G(3) of the Companies Act).

The above provisions in relation to a stay are not applicable to secured creditors in either restructuring or (provisional) liquidation proceedings. Secured creditors may enforce their security without leave of the court, even where a moratorium is otherwise in place.

To the extent that a party wishes to assert a debt or claim (sounding only in damages) to any of the company's assets, such a party will have to file a proof of debt in the company's liquidation (section 139 of the Companies Act). If a party asserts a claim that is proprietary in nature, such claim should be commenced only after leave is obtained from the court to pursue such a claim (pursuant to section 97 of the Companies Act). However, a creditor who has security over the whole or part of the assets of a company is entitled to enforce its security without the leave of the Court (and without reference to the liquidator) (section 142 of the Companies Act).

2.5 Power to restrain or order the transfer of assets

2.5.1 Does the insolvency representative, provisional insolvency representative or authorised person have the authority to limit the powers of the debtor company in respect of the transfer of its assets, or to issue a restraining order or injunction to any third party for the preservation or protection of assets of the debtor company?

Insofar as the assets of a company are in the hands of third parties, who either do not want to identify the asset(s) or hand them over, various tools are available to the liquidators.

Injunctive relief can be obtained and sought by application to the court, pursuant to GCR Order 29, part I. This part of the GCR allows for the detention, custody or preservation of property, but also has provisions dealing with the taking of samples and sale of perishable goods. Nevertheless, much of the guidance in relation to protective injunctions is still to be found in common law authorities. Injunctive relief to consider would be freezing injunctions (including Worldwide Freezing Orders (WFO)) and Chabra injunctions. Taking each in turn:

A freezing (Mareva) injunction freezes assets in the defendant's possession. The freezing nature allows the applicant to secure and protect the assets pending the outcome of further proceedings. In order to secure a freezing injunction, the applicant must show:

(1) that it has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money;

(2) the respondent(s) has assets within the jurisdiction of the court against which a judgment could be enforced;

(3) there is a real risk of dissipation of assets;

(4) there has been no delay in applying for the injunction; and

(5) it is just and convenient in all circumstances to grant the injunction.

The criteria are subject to development through case law.[3] In this respect, it is particularly noteworthy that, in relation to the first criterion mentioned, above, the Privy Council found, in relation to an appeal from the British Virgin Islands, that there was no reason in principle to link the grant of a freezing order to the existence of a cause

3 The test for granting a freezing injunction was helpfully summarised by *Lord Leggatt in Convoy Collateral v Broad Idea International ltd* [2021] UKPC 24, at [101].

of action, and that it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (*Convoy Collateral v Broad Idea International ltd* [2021] UKPC 24, at [90-92] and [102]) (*Broad Idea*).

Broad Idea was cited with approval in the Grand Court, listing the first requirement of the relief as "a good arguable case … that will be enforceable through the process of the court" (see *Ovaskainen v Ovaskainen*, FSD 183/2023 (MRHCJ), unreported, 21 June 2023).

It has, in addition, been confirmed by the English Court of Appeal in *Dos Santos v Unitel* [2024] EWCA Civ 1109 (*Dos Santos*) that the requirement for a "good arguable case" on the merits is that of a "serious issues to be tried", or a case which is more than barely capable of serious argument, but not necessarily one which has a 50% chance of success. *Dos Santos* has since been followed in the Caymans Islands in *Productivity Media Inc. v Santor & Others*, FSD 360/2024 (NSJ), unreported, 18 December 2024, at [28]-[31].

Finally, a successful applicant will, upon the granting of the freezing order, generally have to give a cross-undertaking in damages, meaning that the applicant must undertake to the court to pay any damages that the respondent (or any other party notified of the order) sustains by reason of the freezing order, if it subsequently transpires that the order ought not to have been granted.

An applicant may seek an order that the respondent's asset be frozen wherever located; a WFO. A WFO is generally sought where the respondent is unlikely to have sufficient assets within the jurisdiction to cover the applicant's claim. However, because there is a greater risk of oppression, a WFO is generally only made on an undertaking from the applicant that it shall not take any steps to enforce the WFO in a foreign jurisdiction without first obtaining the permission of the court.

A Chabra injunction is also a freezing injunction. However, it allows freezing orders against third parties (the non-cause of action defendant or NCAD) to whom the plaintiff asserts no cause of action, provided that the injunction is ancillary and incidental to a claim concerning a defendant against whom the plaintiff does assert a cause of action. The relief stems from the case *TSB Private Bank International v Chabra* [1992] 1 WLR 231. The Chabra jurisdiction was specifically recognised and applied in the Cayman Islands in *Walker International Holdings Ltd v Olearius Ltd* [2003] CILR 457. The requirements for granting a Chabra injunction were considered before the Grand Court, and subsequently the Cayman Islands Court of Appeal (CICA) in *Ahmad Hamad Algosaibi Brothers Company v Saad Investments Company Ltd and Forty Two Others* [2011 (1) CILR 178].

The court must be satisfied of the following matters before granting a Chabra freezing order:

(i) there is a "good reason to suppose" against the NCAD that the assets of or held by the non-party would be susceptible to a procedure which would lead to compulsory satisfaction of the claim or a judgment; and

(ii) there is a real risk of dissipation of assets and that the judgment will remain unsatisfied if an injunction is not granted; and

(iii) it is just and convenient to exercise the jurisdiction.

In addition, insofar as a liquidator is not entirely sure where the company's assets are located, but he or she has reasons to believe that a third party has information in relation to the company's assets, he or she can seek a Norwich Pharmacal order.

A Norwich Pharmacal order is most commonly pursued pre-action to obtain disclosure of documents or information held by a third party for use in subsequent proceedings. In order to succeed on an application for Norwich Pharmacal relief, the applicant has to show that:

(1) there is a good arguable case that a wrong has been carried out;

(2) the order is necessary to enable action to be brought against the wrongdoer;

(3) the respondent to the application must:

    (a) be mixed up in the wrongdoing; and

    (b) able (or likely to be able) to provide the information needed to enable the ultimate wrongdoer to be sued; and

(4) the applicant is able to give a cross-undertaking in damages.

Applications for relief of this nature are often made on an *ex parte* basis, so as not to put the respondent on notice of the relief sought. The rationale for *ex parte* applications is to avoid notifying the respondent, as the assumption is that the respondent would destroy or remove the documents, information and / or assets if they were made aware.

On *ex parte* applications, the applicant has a duty of full and frank disclosure, meaning that the applicant must disclose all matters that are material to the court in deciding whether to grant the order. This duty encompasses both matters of fact and law, and includes matters that are adverse to the applicant and / or favourable to the respondent. A careful note of the hearing must be taken, which will have to be provided to the respondent, together with the order granted by the court (if any). At an *ex parte* hearing, a "return date" will invariably be set; the listing of an *inter partes* hearing (usually after only a couple of weeks) on which occasion the respondent can challenge the order granted, and the court may set aside the order or extend it (on the same or varied terms).

The various tools set out above are available in litigation generally, and are not particular to insolvency and / or restructuring proceedings.

2.6 Safeguards, checks and balances

2.6.1 Does the insolvency representative, provisional insolvency representative or authorised person have to satisfy any test or legal threshold in order to obtain any reliefs in relation to the assets of the debtor company?

These issues are addressed in the response below.

2.6.2 Is there a notice requirement by the provisional insolvency representative or authorised person to publicise any application for any provisional measures to be imposed against the debtor company, its creditors or any other third party? Is there an avenue for the debtor company, its officers, or any other third party to terminate or challenge the application for or imposition of any provisional measures? Is there a duration for which the provisional measures would be imposed?

In relation to obtaining the relief set out in section 2.5 above, such as a Norwich Pharmacal order, freezing injunction or Chabra injunction, the criteria for obtaining such relief are generally strict. As a result, liquidators (who are officers of the court) will not pursue such relief lightly, and will generally only do so on the basis of favourable legal advice.

In addition, liquidators in the Cayman Islands, are accountable to the court and to the creditors or contributories of the company in liquidation.

Most importantly, official liquidations occur under the supervision of the Grand Court, and each liquidation proceeding is supervised by a single Judge allocated to the matter. Liquidators are held to a high standard of conduct and are officers of the Court (CWR Order 18, rule 1).

The function and powers of liquidators are set out in sections 102 and 110, and Schedule 3, of the Companies Act. The exercise of all the liquidators' powers is subject to the control of the court (section 110(3) of the Companies Act). However, and in particular, the liquidator cannot exercise the powers listed in Part I of Schedule 3 without first obtaining sanction to do so from the court.

The powers in Part I of Schedule 3 include (but are not limited to) the power:

(1) to bring or defend any action or other legal proceeding in the name and on behalf of the company;

(2) to carry on the business of the company so far as may be necessary for its beneficial winding up;

(3) to dispose of any property of the company to a person who is or was related to the company;

(4) to pay any class of creditors in full;

(5) to make any compromise or arrangement (e.g. reach a settlement) with creditors or persons claiming to be creditors or in respect of debts or liabilities capable of resulting in a debt;

(6) to raise or borrow money and grant securities therefor over the property of the company; and

(7) to engage attorneys and other professionally qualified persons to assist the liquidator.

Additional safeguards are built in through the liquidators' obligation to establish a liquidation committee.

The constitution of the liquidation committee will depend on the liquidator's determination of solvency:

(1) where a liquidator determines that the company is insolvent, the liquidation committee will comprise of creditors;

(2) where the liquidator determines that the company is solvent, the liquidation committee will comprise of contributories; and

(3) where the liquidator determines that the company is of doubtful solvency, the liquidation committee shall comprise of creditors (in majority) and (at least one) contributory (CWR Order 9, rule 1).

A liquidation committee must have at least three and no more than five creditors or contributories on it. If the minimum numbers cannot be achieved, a liquidation committee may be dispensed with on application to the Grand Court.

It is the duty of an official liquidator to report to the members of the liquidation committee on all such matters as appear to the official liquidator as being of concern to the committee in respect of the winding up (CWR Order 9, rule 4). The official liquidator must also convene a meeting with the liquidation committee at such intervals as requested by the liquidation committee or in any event every 6 months. At a liquidation committee meeting, resolutions may be passed in relation to actions / steps to be taken by the liquidator, the liquidators' fees, and any other matters in relation to which the liquidator wishes to formalise the liquidation committee's support.

Creditors, contributories and the liquidation committee are, furthermore, empowered by CWR Order 11 to make sanction applications to the Grand Court for an order directing an official liquidator to exercise or refrain from exercising any of his powers in a particular way. Where a creditor, contributory or the liquidation committee makes a sanction application, the official liquidator is obliged to attend the hearing and be prepared to assist the court.

Reports and accounts in respect of the conduct of the liquidation must be prepared (at a minimum) annually, in accordance with CWR Order 8, rule 2. The official liquidator is furthermore under a duty to report to the liquidation committee and the court (CWR Order 10, rule 1). The liquidator's reports must include information in relation to:

(1) the steps taken in the liquidation since the date of the winding up order or the date of the official liquidator's previous report;

(2) the matters which are relevant to any resolutions intended to be put to the next meeting of contributories or creditors;

(3) any matters upon which the official liquidator is asked to report by the liquidation committee;

(4) any matters upon which the official liquidator is directed to report by the court;

(5) any matters upon which the official liquidator seeks a direction of the court; and

(6) any other matters which, in the opinion of the official liquidator, are or ought to be of concern to the contributories or creditors of the company (CWR Order 10, rule 2).

Pursuant to section 114 of the Companies Act, creditors and contributories are, furthermore, empowered to apply for an order of the Grand Court for the inspection (by them) of the company's documents.

Similarly, in a voluntarily liquidation which continues for more than one year, the voluntary liquidator must summon a general meeting of the company at the end of the first year of the voluntary winding up, and at the end of each succeeding year thereafter (section 126 of the Companies Act / CWR Order 13, rules 7 and 11). At each such meeting, the voluntary liquidator must lay before the meeting a report and account of his acts, dealings, and the conduct of the winding up. It is an offence for a voluntary liquidator not to comply with this obligation.

The report of a voluntary liquidator must include a narrative description and analysis of the steps taken in the liquidation, and all the information necessary to enable the members of the company to make an informed decision about the company's financial condition (CWR Order 13, rule 8).

Creditors whose debt has not been paid in full may request a copy of any report or account, which the voluntary liquidator must then provide (CWR Order 13, rule 7(4)).

Prior to a company's dissolution, a voluntary liquidator must call a final meeting of its members (section 127 of the Companies Act).

Both in respect of voluntary and official liquidations, the liquidator has a duty to create and maintain a complete record of all the work done and steps taken in connection with the liquidation (liquidation file). The liquidation file must include, by way of example:

(1) a duplicate of the court file;

(2) the minutes of meetings with creditor, contributories and / or the liquidation committee (if any);

(3) the liquidator's reports and accounts;

(4) any proof of debt filed and records of their adjudication;

(5) the liquidator's correspondence; and

(6) copies of notices and publications (CWR Order 16, rule 2).

The liquidation file must be retained for at least 3 years following the dissolution of the company.

In respect of company restructuring, an order appointing a restructuring officer must set out the functions and powers of the restructuring officer, which may include orders and directions in respect of a restructuring officer's obligation to prepare a report about the financial condition of the company (and such other subject as the court thinks fit) (CWR Order 1A, rule 6).

A restructuring officer has, in any event, an obligation to send a report to every creditor and contributory of the company (of whose address the restructuring officer is aware) within 28 days of his appointment (CWR Order 1A, rule 8). The report must include information in relation to:

(1) the steps taken in the restructuring and the further steps intended to be taken in the restructuring generally;

(2) the financial position of the company;

(3) the work done by or on behalf of the restructuring officer and the amount of remuneration claimed by that restructuring officer;

(4) such other information which is required in order to provide the contributories and creditors with a proper understanding of the company's affairs, financial position and proposed restructuring; and

(5) such other matters as the court may direct.

The court may also direct that certain information in the report be excluded for reasons of confidentiality where disclosure of such information could be damaging to the company.

The various reporting obligations are a(nother) way of ensuring accountability.

3. Identification of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

3.1 Notice of insolvency proceedings

3.1.1 What effect(s) and duties imposed on the debtor's company upon the commencement of insolvency or restructuring proceedings in relation to the identification of assets?

In the Cayman Islands, winding up petitions filed by a creditor or the company itself are to be advertised pursuant to CWR Order 3, rules 6 and 18 respectively. The CWR contain a prescribed form for doing so, and the rules provide that the advertisement shall appear "in a newspaper having a circulation in the Islands". As a matter of practice, petitions are generally both advertised in the local newspaper and in the Cayman Islands Gazette.

If a company carries on business outside of the Cayman Islands, the petition shall also be advertised "in a newspaper having a circulation in the county or countries in which it is most likely to come to the attention of the company's creditors". In the event, the advertisement must be in the official language of the relevant country.

The purpose of the rules is to bring the winding up petition to the attention of anyone who may have an interest in the company and / or liquidation.

The timeline for advertising is extremely important if the hearing of the petition is to be effective, as the advertisement must appear not less than 7 days after service of the petition upon the company (in the case of a creditors' petition), and not less than 7 business days before the hearing. The timeline allows for interested parties to give notice of an intention to appear on the hearing of the petition to the petitioner's attorneys at least 3 days prior to the hearing (CWR Order 3, rules 8 and 20).

Winding up petitions filed by a contributory or regulatory authority need only be advertised upon direction by the court (CWR Order 3, rules 12(1)(d) and 15(3), respectively).

In the case of a voluntary winding up, the liquidator, or in the absence of any liquidator, a director of the company must, within 28 days of the commencement of a voluntary winding up:

(1) file a notice of the winding up with the Registrar of Companies (Registrar);

(2) file the liquidator's consent to act with the Registrar;

(3) file the director's declaration of solvency with the Registrar;

(4) (if the company is regulated) serve notice of the winding up upon the Cayman Islands Monetary Authority (CIMA); and

(5) publish notice of the winding up in the Cayman Islands Gazette (section 123 of the Companies Act).

A director or liquidator who fails to comply with this section commits an offence.

If a petition is subsequently filed to bring the voluntary liquidation under the court's supervision (per sections 124 or 131 of the Companies Act), notice of such a petition must be given to the company's creditors and (if, in the view of the voluntary liquidator, the company is solvent) shareholders. The petition must also be advertised in a newspaper in the Cayman Islands and, if a company carries on business outside of the Cayman Islands, in a newspaper having a circulation in the county or countries in which it is most likely to come to the attention of the company's creditors (CWR Order 15, rule 5).

Subsequently, when a winding up order has been made, the liquidator must file a copy of the winding up order with the Registrar, and must publish a notice of the winding up in the Cayman Islands Gazette as well as in any newspaper in which the winding up petition was advertised (section 98 of the Companies Act). An official liquidator shall, in addition, give notice of his or her appointment to all creditors and contributories of the company of whom he or she is aware, within 28 days of the appointment (CWR Order 5, rule 3).

Where a company which is carrying on a regulated business presents a petition for the appointment of a restructuring officer, the directors of the company must service notice of the petition on the regulator immediately after the presentation of the petition (section 91B(6) of the Companies Act). A failure to do so constitutes an offence. The petition must, in addition be advertised in a newspaper with circulation in the Cayman Islands. If the company is carrying on business outside of the Cayman Islands, every petition for the appointment of a restructuring officer shall also be advertised in a newspaper having circulation in the countries in which it is most likely to come to the attention of the company's creditors and shareholders, and shall be published in the official language of that country (CWR Order 1A, rule 1).

The advertisement in relation to a petition for the appointment of a restructuring officer must appear not more than 7 business days after the presentation of the petition and not less than 7 business days before the hearing date. The timeline needs to be kept in mind in circumstances where the rules provide that (unless otherwise directed by the court), petitions for the appointment of a restructuring officer will be heard within 21 days from being filed. As with winding up petitions, this timeline allows for interested parties to give notice of an intention to appear on the hearing of the petition at least 3 days prior to the hearing (CWR Order 1A, rule 3).

Subsequently, where the court makes an order appointing a restructuring officer, the order shall set out the manner and time within which the restructuring officer must give notice of his appointment to the company's creditors, contributories and any regulator (if a regulated business) (section 91B(3) of the Companies Act). Similar measures apply in relation to *ex parte* applications for the appointment of a restructuring officer on an interim basis (per section 91C of the Companies Act). In any event, CWR Order 1A, rule 7 provides that an appointed restructuring officer shall:

(1) register the order with the Registrar within 7 days of the order being made;

(2) arrange publication of the order in the Cayman Islands Gazette within 7 business days after the order is made; and

(3) give notice of the appointment to the company's creditors, contributories and the CIMA (if the company is regulated).

Where an order has been made for the appointment of a provisional liquidator, the appointee must:

(1) register the order with the Registrar within 7 business days after the order was made;

(2) arrange publication of the order in the Cayman Islands Gazette within 7 business days of the order being made;

(3) give notice of the appointment to the company's creditors and contributories as directed by the court or in whatever manner appears to him to be the most expedient; and

(4) where the company is a regulated business, the provisional liquidator shall give notice of the appointment to the CIMA (CWR Order 4, rule 8).

3.2 Identifying assets

3.2.1 How does your jurisdiction identify assets if the books and records are unreliable?

Subsequent to the making of a winding up order, the liquidator is empowered to investigate the affairs of the company and to identify the company's asset position. This may be done through taking possession of the books and records of the company. Indeed, taking possession of a company's books and records is one of the duties of an official liquidator (CWR Order 26, rule 3(1)). It is often the case that in official liquidation appointments, the company and its directors fail to provide full details of the company's asset position and it is therefore necessary for official liquidators to use their powers to obtain books and records.

All companies are required to have a registered office in the Cayman Islands, and the first step would usually include obtaining all of the records held by the registered office. This would include the register of directors, register of members and a register of mortgages and charges and may often include other records, such as audited financial statements and the company's minute book.

The next most obvious step for liquidators is to take control of a company's bank accounts and this may involve writing to all banks in the Cayman Islands to determine if any bank accounts are held.

Often, the assets of Cayman Islands registered companies are located in other jurisdictions and Cayman based liquidators are regularly required to undertake online research of publicly searchable registers to identify company assets.

Searches that can be undertaken in the Cayman Islands includes searching court records for legal actions and judgments and checking property or marine registers for known or suspected assets.

In addition, many of the duties which are imposed on (former) directors, professional service providers and / or employees of a company, following the commencement of liquidation proceedings, are (also) tools used to assist a liquidator in identifying the company's assets. For example:

(1) A statement of affairs is likely to give clarity about the asset and liability position of the company. A statement of affairs can be sought by the liquidator from particular individuals, pursuant to section 101 of the Companies Act.

(2) Insofar as a statement of affairs is not provided and / or a liquidator is in need of further information, a liquidator can seek a party's agreement to be interviewed. Where such agreement is not forthcoming, section 103 of the Companies Act may be used to compel the attendance of a relevant person at interview. Furthermore, as part of an examination order, the court may also require an individual to deliver up property or documents belonging to the company.

Both tools are addressed in detail above at section 2.3.

If a liquidator is aware or suspects that certain property must exist and / or belong to the company, but is unaware exactly of what has happened to it, the liquidator may be able to seek Norwich Pharmacal relief in order to obtain disclosure in relation to such property or affairs. It should be noted that Norwich Pharmacal relief can only be sought where there is suspected wrongdoing, and where the third party target of the application was somehow caught up in the alleged wrongdoing, even if innocently so. This and other relief is discussed in detail in section 2.5 above.

3.3 Asset location

3.3.1 What laws or rules govern the insolvency and restructuring of asset location in your jurisdiction?

A company's liquidation estate includes all assets of the company wherever located. The former does, of course, not mean that it will either be easy or certain that the official liquidator will be able to gather in all the assets. However, in principle the liquidator is entitled to pursue the company's assets (where necessary, with sanction from the court) wherever located.

Asset location may, however, be important insofar as a party is seeking to wind up a foreign company. In accordance with section 91 of the Companies Act, which lists the corporate bodies in relation to which the Grand Court has the jurisdiction to make a winding up order, a foreign company which has property located in the Cayman Islands may be wound up by the Grand Court.

3.4 Asset exclusions

3.4.1 What assets may be considered exempt property?

There are no particular assets, asset types or asset classes, which are considered to be exempt property under the laws of the Cayman Islands in relation to company liquidations.

3.5 Collecting Assets

3.5.1 Once assets included in the books and records or outside the books and records have been identified, what methodologies are in place to collect those assets? Does an insolvency representative need to have possession of the assets? Is the insolvency representative required to put a lien on the assets? How does the insolvency representative collect assets outside the jurisdiction?

In order to be able to make any payments to creditors and / or (depending on solvency status) distributions of surplus to the contributories of a company in liquidation, an official liquidator must have possession of the company's assets.

Section 110(1)(a) of the Companies Act dictates that it is the function of an official liquidator to collect (and realise and distribute) the assets of the company, and the official liquidator is empowered, as agent of the company, to collect, take possession, retain, manage and realise the company's property under CWR Order 18, rule 1. Paragraph 1, Part II of Schedule 3 of the Companies Act confirms that the power to take possession of, collect and get in the property of the company is a power exercisable by liquidators without the need for sanction from the Grand Court.

In order to get in assets which are not within a liquidator's possession, power or control, a liquidator may take all such proceedings as he or she considers necessary. By way of example, where any of the company's property or documents are in the possession of a third party, the Grand Court may require a person to pay, transfer or deliver such property or documents to the official liquidator (section 138 of the Companies Act).

It should be noted, however, that in order to bring (or defend) legal proceedings (which fall outside of the liquidation proceedings), the official liquidator requires sanction from the Court (paragraph 1, Part I of Schedule 3 to the Companies Act).

Where property is located abroad, a (worldwide) freezing injunction may be sought in order to avoid the property from being dissipated. However, ultimately (in order to retrieve the asset for the purpose of distribution) it may be necessary to seek recognition of the liquidation in the jurisdiction where the assets are located and / or institute (enforcement) proceedings.

3.6 Asset inventory and valuation

3.6.1 How does an insolvency representative ensure that the value of the assets on the books and records are accurate?

Following their appointment by the court in an official liquidation, the insolvency practitioner will issue notices requiring directors and officers to submit a statement of affairs which must be accompanied by a notarised affidavit. This document is filed with the court upon receipt. Further details about the statement of affairs are set out in section 2.3 above.

Upon receipt of a statement of affairs, the insolvency practitioner investigates each asset line item to determine and verify the existence, ownership and valuation of the asset.

As stated above in section 3.2, the insolvency practitioner has powers and the duty to collect in all books and records and initial steps following their appointment will include contacting all professional service providers, directors, officers and any other related parties to collect the company's records.

In all Cayman Islands restructuring and insolvency proceedings, the insolvency practitioner is required to issue a report to creditors and contributories including details of the nature and estimated value of the company's assets. This is provided with the overall aim of helping creditors and contributories gain an understanding of the company's financial position, so it is expected that the insolvency practitioner will have undertaken initial enquires to test the value of assets, collectability, and any security held against the assets, and have formed a view on liquidity and marketability.

An insolvency practitioner will take appropriate and proportionate actions to determine the valuation of each asset category. This may include appointing a professional valuation agent to determine the value of a property or undertaking desktop research into financial assets. The approach to valuation will be commensurate with the value of the underlying asset. The aim is usually to realise the assets in order to make distributions to creditors and/or contributories, and the realisable value is ultimately the amount it can be realised for in the open market or to a willing purchaser.

Insolvency practitioners use their professional judgment to determine the best approach to asset valuation and realisation. If there were any issues or disputes then the insolvency practitioner could report on actions taken or the proposed approach to the liquidation committee who act as a sounding board and represent the views of the creditors and / or contributories.

4. Recovery of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

4.1 Court-based remedies

4.1.1 What tools does your jurisdiction have to recover assets, e.g. freezing orders, seizure orders or orders for judicial sale?

In relation to voluntary liquidations, a voluntary liquidator may apply to the court to determine any question arising in the voluntary liquidation of a company, or to exercise all or any of the powers which the court might exercise if the company were being wound up under the supervision of the court (section 129 of the Companies Act).

In relation to voluntary liquidations, one must therefore also have regard to the court-based powers available in the event of an official liquidation.

Many of the court-based remedies used in official liquidations have already been mentioned, such as the official liquidator's ability to apply to the court for an order for the examination of a relevant person, and the court's ability to order that any relevant person transfers or delivers up to the liquidator any property or documents belonging to the company (section 103 of the Companies) (see also section 2.3 above).

Section 138 of the Companies Act empowers the court to require any person to pay, transfer or deliver any property or documents in his possession to the official liquidator insofar as it appears that the company is entitled to the property or documents in that person's possession.

The difference between the provisions is that section 103 of the Companies Act can only be used in respect of individuals who fall within the definition of "relevant person", whereas section 138 covers "any person".

Liquidators can also avail themselves of sections 145-147 of the Companies Act in relation to suspected preferential payments or transactions at an undervalue, or to seek payments from individuals who participated in fraudulent trading. These remedies are more fully addressed in the context of section 5.3 below.

Other court-based remedies, which are not particular to insolvency proceedings, are also available such a freezing injunctions, Chabra injunctions, and Norwich Pharmacal orders. These have been discussed in detail at section 2.5 above. Applications for relief of this nature are often sought on an *ex parte* basis.

4.1.2 Do all or only some insolvency representatives have powers to use these tools? Which ones?

Section 4.1.1, above, addresses court-based remedies in the context of provisional liquidations, voluntary liquidations and official liquidations.

In respect of company restructuring, the court plays a different, but important role in securing its success. In particular (and by way of example), following the appointment of a restructuring officer: (1) the restructuring officer relies on the court for an order summoning a meeting of (a class of) creditors for the purpose of proposing a compromise or arrangement; and (2) the court is relied on to sanction a compromise or arrangement (or order such other actions as appropriate) (sections 91I and 91L of the Companies Act).

4.1.3 Can a party approach the court on a confidential, ex parte basis? What notice is required to be given to the holder of the assets (or potential defendant)?

Yes, applications can be filed on an *ex parte* basis.

The rationale for filing an application on an *ex parte* basis is to avoid notifying the respondent of the relief sought. This is done on the assumption that the respondent would otherwise render the application nugatory by transferring assets sought or by destroying documents / information.

4.1.4 If applying on an ex parte basis, is there a duty to make full and frank disclosure?

An applicant who seeks relief on an *ex parte* basis has a duty of full and frank disclosure, and the must disclose all matters that are material to the court in deciding whether to grant the relief sought. The matters to be disclosed include both matters of fact and law, and may be adverse to the applicant (such as a defence to a claim). In relation to matters of fact, the duty applies to facts known to the applicant and facts that would have been known had proper enquiries been made from all relevant parties who may have information which could assist the court.

If an application which is heard on an *ex parte* basis is successful, a date will invariably be set for the relisting of the application at an *inter partes* hearing, to allow the respondent to challenge the relief granted.

4.1.5 What elements are required to be proven, and to what standard of proof, in order to succeed? Is this a more onerous standard than usual in your jurisdiction?

See sections 2.3, 2.5, 4.1.1 and 5.3 above.

4.1.6 Are there any other requirements in order to obtain the orders? For example, an undertaking to pay damages associated with the freezing of assets and, if required, security for such an undertaking.

See sections 2.3, 2.5, 4.1.1 and 5.3 above.

4.1.7 What safeguards can the court require to be in place?

See sections 2.3, 2.5, 4.1.1 and 5.3 above.

4.1.8 What mechanisms are available to expedite claims against non-responsive or other defendants? For example, summary judgments or judgment in default. Is a final judgment required to enforce against a defendant?

Due to the existence of a moratorium (as discussed at section 2.4.1, above), a liquidator will have to seek (and obtain) the sanction of the court prior to the commencement of legal proceedings. Once sanction is obtained, the normal offering of procedural tools is available to the liquidator, including in respect of summary judgment and default judgment.

The rules in relation to summary judgment are contained in GCR Order 14. In most actions begun by writ, a party may have the option to apply for summary judgment where a statement of claim has been served, on the ground that the defendant has no defence to the claim (or any part of it). Summary judgment may also be pursued in respect of a counterclaim, or by a defendant on the basis that a claim has no prospect of success (but only after a defence has been served).

The rules in relation to default judgment are contained in GCR Order 13 and Order 19. Pursuant to GCR Order 13, a default judgment may be applied for where a writ has been validly served, and either the time for the defendant to acknowledge service of the writ has expired, or the defendant has given notice that it does not intend to defend the action. Pursuant to GCR Order 19, default judgment may be applied for in a writ action in circumstances where: (i) a plaintiff fails to file a statement of claim within the prescribed timeframe; or (ii) a claim is pursued for liquidated damages, and the defendant fails to file a defence.

Where a claim is pursued in relation to which damages are unliquidated, an interlocutory judgment may be rendered, with damages to be assessed. Default judgment may also be available in respect of counterclaims. Finally, specific rules may apply depending on the asset being claimed by the proceedings.

4.1.9 What ancillary orders may be available?

Provided that sanction has been obtained from the Court for the commencement of proceedings, the usual rules of procedure apply to litigation commenced by a liquidator, and the usual array of ancillary relief is available to the appointee.

Insofar as any relief sought at court by an office holder or any reports or documents filed by him are sensitive or confidential, the CWR contains provision to ensure such reports / documents may be sealed.

CWR Order 10, rule 3(3) is specific to an official liquidator's reporting obligations, and provides that a court may direct that a report be kept confidential for a specific period of time or until the occurrence of a specified event.

CWR Order 24 applies more generally to application to the Grand Court under Part V of the Companies Act. Pursuant to Order 24, rule 6 the court may direct that the whole or any part of a report, order, affidavit or other document (except a petition, winding up order or supervision order) which has been filed at court (or is required to be filed) may be sealed and kept confidential for a specific period of time or until the occurrence of a specified event, but only on grounds that: (1) the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in court; and (2) the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company.

Provision has also been made in CWR Order 24, rule 6 for documents to be unsealed where the information contained in them:

(1) is no longer confidential;

(2) the reason for sealing the document no longer exists; or

(3) publication of the information is no longer harmful to the economic interest of creditors or contributories.

An application for a document to be unsealed may be made by a liquidator, creditor or contributory.

4.1.10 In your jurisdiction, who enforces against assets?

There are multiple ways of enforcing a judgment.

If a judgment is for the payment of a sum of money, and the judgment creditor is unfamiliar with the judgment debtor's assets, it may be best served by seeking an *ex parte* order for the oral examination of the judgment debtor, pursuant to GCR Order 48. Such an oral examination can be used to assess whether the judgment debtor has any assets, and what property may be available for satisfying the judgment or order.

Money judgment can be enforced in a number of ways, including:

1. *Writ of fieri facias*

   A sealed writ of *fieri facias* entitles a bailiff to seize and sell the debtor's assets in order to satisfy the judgment debt, the costs of the proceedings and the costs of enforcement.

2. *Charging Order*

   GCR Order 50 empowers the Grand Court to make a charging order in respect of a judgment debtor's beneficial interest in any property. A charging order makes the judgment creditor a secured creditor, who (if necessary) could obtain an order for the sale of the charged property.

3. *Garnishee Order*

   A judgment creditor can obtain a court order that a third party must pay money, owing to the judgment debtor, to the judgment creditor instead. Such an order is most commonly used in relation to banks (GCR Order 49).

4. *Attachment of earnings order*

   This is an order which compels the debtor's employer to make regular deductions from the debtor's earnings and to pay them into court. The procedure for obtaining an attachment of earnings order is set out in GCR Order 50A.

5. *Writ of sequestration*

Insofar as a judgment debtor was ordered to take certain steps within a specified period of time (e.g. make a payment or delivery up goods), but fails to do so (and is therefore in contempt of court), a writ of sequestration may, with leave, be issued against the debtor's property (GCR Order 46, rule 5).

6. *An order for committal*

A judgment debtor's defiance of a court order constitutes contempt, and may be punished by an order committing the offender to prison. An order for committal may be sought by a judgment creditor by application on notice, but the court may also make such an order of its own motion (GCR Order 52).

Finally, if a judgment debt remains unpaid, a judgment creditor may also seek to enforce it through the appointment of a receiver or the use of insolvency proceedings.

Not all enforcement methods are available in all situations. Legal advice should be sought as to which tools are available in particular circumstances.

4.1.11 Are there specific causes of action or remedies that are only available to insolvency representatives to recover assets and / or books and records of the company? Do all or only some insolvency representatives have these powers?

See sections 2.3 (above) and 5.2 (below), which deal with an insolvency representatives' powers to recover books and records of the company.

4.2 Out-of-court assistance

4.2.1 What mechanisms are available to the insolvency representative to identify and secure assets without court assistance?

4.2.2 What is required to utilise these mechanisms? Are there costs or time barriers involved?

A liquidator has the power to assist the Cayman Islands Police Service to investigate the conduct of a person (section 102(2)(a) of the Companies Act). In practice, this power is hardly ever used.

Further, insofar as a company is a regulated entity registered with the CIMA, CIMA has authority to examine the affairs of the company's business and identify assets for recovery. It should be noted that, pursuant to section 94(4) of the Companies Act, winding up petition may (under certain circumstances) be presented by the CIMA.

It is arguable that the (truly) out-of-court powers do not exist in relation to official liquidations where the entire liquidation occurs under the supervision of the court. Therefore, even actions of the liquidator which do not involve the filing of proceedings, or the need for sanction from the court, would still be subject to scrutiny by the court insofar as steps taken by the liquidator of any consequence would be included in the liquidator's report to the court (see section 2.6 above).

4.3 Powers to examine and investigate

4.3.1 What powers are available to investigate the affairs of the company to identify and recover assets? Do these extend to individuals involved in the company or recipients of funds? What tools are available for the liquidator to investigate the location and nature of assets to satisfy a judgment?

Where a winding up order is made by the court, the liquidator is empowered (pursuant to section 102(1) of the Companies Act) to investigate the promotion, business, dealings and affairs of the company, as well as (where applicable) the causes of failure of the business.

In the course of his investigation, a liquidator may require individuals who are or were directors, professional service providers or employees of the company to prepare and submit to him a "statement of affairs" of the company (section 101(1) of the Companies Act). A statement of affairs must include particulars of the company's assets and liabilities, the names and addresses of any persons having possession of the company's assets, and a description of the assets held by them. Further information in relation hereto is set out in section 2.3 above.

Insofar as the company's assets appear to be held by a third party, the court can require that person to pay, transfer or delivery such property (or documents) to the official liquidator (section 138 of the Companies Act).

A liquidator may, furthermore, apply to the court for an order for the examination of particular individuals, including: a (former) director of the company, a (former) professional service provider of the company, a former controller, advisor, liquidator, receiver or manager of the company, someone involved in the promotion or management of the company, or anyone who has made or concurred with a statement of affairs. Further information in relation hereto is set out in section 2.3 above.

In addition, a liquidator may resort to court-based tools of investigation such as an application for a Norwich Pharmacal Order or Chabra Order, as already discussed in detail in section 2.5 above. Where (in doing so) the liquidator seeks to institute (new) proceedings, he or she will require sanction from the court before doing so (section 110(2), Schedule 3, Part I, para. 1 of the Companies Act).

Finally, subject to the directions of the court, the liquidator may also institute a criminal prosecution of a person who is or was a director, professional service provider or employee of the company, or he or she may assist the Cayman Islands Police Service in an investigation (section 102(2) of the Companies Act).

4.3.2 *What criteria are required to be satisfied before activating any powers of investigation regarding assets?*

See sections 2.3 and 2.5, above.

5. Tracing of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

5.1 Verification of assets

5.1.1 *Has the Model Law been implemented or enacted as part of local legislation? What remedies can be obtained under the Model Law for the verification of assets?*

The Model Law has not been implemented in the Cayman Islands.

5.2 Completeness of books and records

5.2.1 *What criminal offences (if any) have been implemented for misrepresentation or incomplete information?*

Cayman Islands insolvency legislation contains various provisions which seek to ensure that a liquidator can confirm the completeness of a company's books and records.

As set out at section 2.3 above, a liquidator may require relevant persons (such as (former) directors, professional service providers or employees), to prepare a statement of affairs (verified by a sworn affidavit) in relation to a company's affairs (section 101 of the Companies act). A person who, without reasonable excuse, fails to prepare and submit a statement of affairs, commits and offence and is liable on conviction to a fine of ten thousand Cayman Islands dollars.

Section 137 of the Companies Act reinforces the importance of the completeness of any statements made in relation to the company's affairs. It provides that any person who is or was a director, officer, restructuring officer, controller or professional service provider of the company, and who is found to have made a material omission in any statement relating to the company's affairs with the intent to defraud the company's creditors or contributories, commits an offence and is liable on conviction to a fine of C $25,000 or to imprisonment for a term of 5 years, or to both.

Furthermore where a company is being wound up (whether voluntarily or by the court), a person who is or was a director, officer, restructuring officer, controller or professional service provider of the company, and who:

(1) does not to the best of that person's knowledge and belief fully and truly discover to the liquidator:

  (a) all the company's property;

  (b) the date on which and manner in which the company's property, or any part thereof, was disposed of (if it was disposed of); or

  (c) the persons to whom any property was transferred (if it was disposed of); or (iv) the consideration paid for any property which was disposed of;

(2) does not deliver up to the liquidator any of the company's property which is in that person's custody or control, and which that person is required by law to deliver up;

(3) does not deliver up to the liquidator or does not deliver up, in accordance with the directions of the liquidator, all documents in that person's custody or control which belong to the company and which that person is required by law to deliver up;

(4) knows or believes that a false debt has been proved by any person in the winding up and fails to inform the liquidator of such knowledge or belief as soon as practicable;

(5) prevents the production of any document affecting or relating to the company's property or affairs; or

(6) destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company, with intent to defraud the company's creditors or contributories; it is considered "misconduct in the course of winding up" (section 136 of the companies Act).

Any person who commits misconduct in the course of winding up, commits an offence and is liable on conviction to a fine of CI$25,000 or to imprisonment for a term of 5 years, or to both.

Having taken possession of the company's books and records, it is the official liquidator's duty to keep them in safe custody unless and until the liquidator is authorised or directed to destroy them in accordance with an order of the court (in a compulsory liquidation) or resolution of the company (in a voluntary liquidation) (CWR Order 26, rule 3(2)).

5.3 Avoidable transactions – fraudulent conveyances and preference actions

5.3.1 What are the rules governing transaction avoidance?

The court may require that any person in possession of any property or documents to which the company appears to be entitled, pay, transfer or deliver such property or documents to the official liquidator (section 138 of the Companies Act).

Insofar as the company's assets (or any of them) were transferred within the twelve months immediately preceding the commencing of the winding up, the office holder may wish to consider whether a fraud was committed in anticipation of the winding up. In particular, where a person who is or was a (shadow) director, officer, professional service provider, voluntary liquidator, restructuring officer or controller of the company has:

(1) concealed any part of the company's property to the value of ten thousand Cayman Islands dollars or more, or concealed any debt due to or from the company;

(2) removed any part of the company's property to the value of ten thousand Cayman Islands dollars or more;

(3) concealed, destroyed, mutilated or falsified any documents affecting or relating to the company's property or affairs;

(4) made any false entry in any documents affecting or relating to the company's property or affairs;

(5) parted with, altered or made any omission in any document affecting or relating to the company's property or affairs; or

(6) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for;

he or she has committed an offence insofar as such action was done with the intent to defraud the company's creditors or contributories. Such person is liable on conviction to a fine and to imprisonment for 5 years (section 134 of the Companies Act).

Similarly, insofar as such a person: (1) has made or caused to be made any gift or transfer of, or charge on the company's property; or (2) has concealed or removed any part of the company's property; with the intent to defraud the company's creditors or contributories, such a person will have committed an offence and will be liable, on conviction, to a fine and to imprisonment for 5 years (section 135 of the companies Act).

There are, in addition, two types of voidable transactions under Cayman Islands law:

1. voidable preferences; and
2. transactions at an undervalue.

Voidable preferences are transfers of property, charges on property, or payments made in favour of any creditor at a time when the company is unable to pay its debts, where such transfer, charge or payment was made with a view of giving that creditor a preference over other creditors. Insofar as such a transactions, charges or payments occurred within 6 months immediately preceding the commencement of the liquidation, such transaction, charge or payment is voidable upon the application of the company's liquidator (section 145 of the Companies Act).

There is, therefore, a subjective element to "voidable preferences" insofar as an intention to favour a particular creditor needs to be shown. However, where the transaction, charge or payment occurred in favour of a related party of the company, the transfer, charge or payment shall be deemed to have been made with a view to giving such creditor (i.e. the related party) a preference.

A creditor shall be treated as a "related party" if it has the ability to control the company or to exercise significant influence over the company in making financial and operating decisions.

Transactions at an undervalue are essentially dispositions of company property made at an undervalue with the intent to defraud creditors. Such transactions are voidable at the instance of the official liquidator (section 146 of the Companies Act).

This action, too, requires proof of a subjective element, namely: the intent to defraud creditors. In this context, "intent to defraud" means an intention to wilfully defeat an obligation owed to a creditor. The burden of proof of establishing an intention to defraud rests upon the official liquidator.

For the purpose of section 146 of the Companies Act, "undervalue" means a disposition of company property either for no consideration, or for consideration the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

Successful pursuit of a transaction at an undervalue results in the disposition being set aside.

In addition to these remedies, a liquidator may resort to section 147 of the Companies Act, which deals with fraudulent trading.

Fraudulent trading occurs where the liquidator finds that the business of the company has been carried on with intent to defraud creditors of the company, creditors of any other person, or for a fraudulent purpose. In such circumstances, the liquidator may apply to the court for a declaration that a person knowingly carried on the business of the company to defraud creditors of the company, creditors of any other person or for a fraudulent purpose. The court may also, on such an application, find the culpable party liable to make a contribution to the company's assets.

5.4 Time limits for commencement of avoidance actions

5.4.1 Is there a limitation period for the commencement of avoidance action? Are there different limitation periods for concealed transactions?

The limitation period for the commencement of proceedings for avoidance of a disposition is 6 years after the date of the relevant disposition.

6. Recognition of judgments in relation to asset tracing and recovery

6.1 UNCITRAL Model Law on Cross-Border Insolvency

6.1.1 Has the Model Law been implemented or enacted as part of its local legislation, and what remedies can be obtained under the Model Law for the identification, tracing, recovery and preservation of assets?

The UNCITRAL Model Law on Cross-Border Insolvency has not been implemented or enacted as part of Cayman Islands insolvency legislation.

6.2 Judicial Insolvency Network

6.2.1 Have the JIN Guidelines been adopted, and what tools are available under the JIN Guidelines to facilitate court to court communication in respect of any recognition application made to court or any court filings for the purpose of identifying, tracing, recovering and preserving assets?

In October 2016, the Judicial Insolvency Network (JIN) issued a set of guidelines titled "Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters" also known as the "JIN Guidelines".

The JIN Guidelines primarily focus on the principles and procedural rules that may be adopted and applied in cross-border insolvency matters, regulating (among other things):

(1) the manner of communication between courts;

(2) the acceptance of official documents and orders made in a foreign jurisdiction;

(3) joint hearings; and

(4) the appearance of counsel in the cooperating courts.

The JIN Guidelines can be applied either by incorporation in a protocol between officeholders in different jurisdictions and subsequently approved by the court, or by order of the court without a prior protocol.

The Cayman Islands adopted the JIN Guidelines with effect from 7 August 2018 via Practice Direction No. 1 of 2018 (Court-to-court Communications and cooperation in cross-border insolvency and restructuring cases) (PD 1/2018).

Official liquidators in the Cayman Islands are under a duty, pursuant to CWR Order 21, rule 2(1) to consider whether (or not) it is appropriate to enter into an international protocol with a foreign officeholder in circumstances where the company in liquidation is subject to concurrent liquidation proceedings under the laws of a foreign jurisdiction. This shall be addressed further in section 6.3 below. PD 1/2018 requires that the official liquidator give consideration to the incorporation of the JIN Guidelines in such an international protocol. Paragraph 7 of PD 1/2018 furthermore makes clear that any international protocol that is to be adopted can go beyond those matters expressly addressed in CWR Order 21, rule 3, and may also address (for example) court-to-court communication and cooperation.

Finally, paragraph 8 of PD 1/2018 makes clear that office holders other than official liquidators (such as e.g. restructuring officers) may also enter into international protocols, and provides that PD 1/2018 will equally apply. Insofar as the use of PD 1/2018 is unclear to other office holders, they are encouraged to apply to the Court at an early stage of the proceedings to seek directions.

Subsequent to the JIN Guidelines, the "Modalities of Court-to-Court Communication" (Modalities) were adopted by the JIN in July 2019.

The Modalities deal with the mechanics for initiating, receiving and engaging in court-to-court communication. They provide more practical guidance as to the matters to be addressed to facilitate communication; including (by way of example) the method and language of communication.

The Modalities were adopted in the Cayman Islands by Practice Direction 2 of 2019 (Adoption of Judicial Insolvency Network Modalities for Court-to-Court Communications) with effect from 1 August 2019 (PD 2/2019).

Paragraph 4 of PD 2/2019 confirms that Justice Kawaley was appointed as "facilitator" pursuant to the Modalities.[4] Per paragraph 5 of the Modalities, the primary role of the facilitator is to initiate and receive communications for the purpose of court-to-court communications.

Paragraph 5 of PD 2/2019 confirms English to be the language in which initial communications to the Facilitator may be made.

In addition to the JIN Guidelines, PD 1/2018 similarly adopted the "American Law Institute / International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases" (ALI / III Guidelines), also with effect from 7 august 2018. As with the JIN Guidelines, PD 1/2018 requires that the official liquidator give consideration to the incorporation of the ALI / III Guidelines in an international protocol with foreign officeholders.

Pursuant to CWR Order 21, r. 2(1), it is the duty of an official liquidator to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder, in circumstances when: (1) a company in liquidation is the subject of a concurrent bankruptcy proceeding under the law of a foreign country; or (2) the assets of a company in liquidation located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country.

CRW Order 21, rule 2(2) sets out that an international protocol should be adopted where this would promote the orderly administration of the estate of a company in liquidation and avoids duplication of work and conflicts between the official liquidator and the foreign officeholder. An international protocol is likely to address and / or allocate the responsibilities as between the official liquidator and the foreign officeholder. CWR Order 21, rule 3 addresses the scope of an international protocol, which may include (by way of example):

(1) the formulation and promotion of restructuring proposals, including a scheme of arrangement;

(2) the preservation of assets located outside the Cayman Islands;

(3) the realisation of assets located outside the Cayman Islands;

(4) procedures for the exchange of information between the official liquidator and foreign officeholder;

(5) procedures relating to the payment of claims; and

(6) procedures relating to the remission of funds between the official liquidator and foreign officeholder.

A protocol that has been agreed between the official liquidator and the foreign officeholders shall only take effect and become binding if and when approved both by the Grand Court and the foreign court or authority (CWR Order 21, rule 2(3)).

The Companies act also seeks to promote cooperation in relation to foreign insolvency proceedings in Part XVII of the Companies Act.

More particularly, section 241 provides that the Grand Court may, upon an application by a foreign representative (defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding), make orders ancillary to a foreign bankruptcy proceeding (defined as proceedings for the purpose of reorganising or rehabilitating an insolvent debtor) for the purpose of:

(1) recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor (defined as a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established);

4 We have been unable to ascertain who the new facilitator will be upon Justice Kawaley's retirement.

(2) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(3) staying the enforcement of any judgment against a debtor;

(4) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and / or

(5) ordering the turnover to a foreign representative of any property belonging to a debtor.

The rules in relation to an application pursuant to section 241 of the Companies Act are set out in the Foreign Bankruptcy Proceedings (International Co-Operation) Rules, 2018.

Section 242 of the Companies Act provides that the court shall, when considering to make an ancillary order pursuant to section 241 of the Companies Act, be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with:

(1) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(2) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(3) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(4) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by the Companies Act;

(5) the recognition and enforcement of security interests created by the debtor;

(6) the non-enforcement of foreign taxes, fines and penalties; and

(7) comity.

Further assistance may be given in relation to foreign proceedings pursuant to the Evidence (Proceedings in Other Jurisdiction) (Cayman Islands) Order 1978 (1978 Order). The 1978 Order provides that a party may apply for an order for evidence to be obtained in the Cayman Islands if the court is satisfied that:

(1) the application was made in pursuance of a request issued by or on behalf of a court exercising jurisdiction in a country or territory outside of the Cayman Islands; and

(2) the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or which proceedings are in contemplation.

Upon an application pursuant to paragraph 1 of the 1978 Order, the Grand Court has the power to make an order providing for the obtention of evidence in the Cayman Islands as may appear appropriate for the purpose of giving effect to the request in the application, including (but not limited to) the provision of evidence through:

(a) the examination of witnesses (orally or in writing);

(b) the production of documents; and

(c) the inspection, photocopying, preservation, custody, or detention of any property.

6.3 Other forms for recognition of judgments and reliefs granted under common law or any other legislations in your jurisdiction

6.3.1 How do foreign judgments become recognised? What relief may be granted upon recognition of the foreign judgments in relation to the identification, tracing, recovery and preservation of assets of the debtor company which the foreign judgment relates to?

Foreign judgments may be enforced under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (Foreign Judgments Act), which governs the recognition and enforcement of judgments in the Cayman Islands on the basis of reciprocity as between the superior courts of a foreign country and the Grand Court. Currently, only judgments of the Superior Courts of Australia (and its external territories) are recognised in the Cayman Islands under the Foreign Judgments Act.

Any party against whom a judgment has been registered pursuant to the Foreign Judgments Act may apply to have such registration set aside on limited grounds including (but not limited to):

(1) a lack of jurisdiction of the original (judgment) court;

(2) that the judgment debtor had no notice of the proceedings and did not appear in them;

(3) that the judgment was obtained by fraud; or

(4) that the enforcement of the judgment would be contrary to public policy.

Where the Foreign Judgments Act is inapplicable, (other) foreign judgments must be enforced under the common law. The Cayman Islands court may enforce an *in personam* foreign judgment where the foreign judgment

(i) was given by a court of competent jurisdiction in accordance with Cayman Islands conflicts of law rules;

(ii) is final and conclusive; and

(iii) has not been obtained by fraud, in opposition to natural justice or in contravention of the public policy of the Cayman Islands, and principles of comity and fairness require its enforcement (see: *Bandone Sdn. Bhd. v Sol Properties Inc*. [2008 CILR 301]).

The court does not have jurisdiction to enforce *in rem* foreign judgment in respect of Cayman property.

In order to achieve enforceability of a foreign judgment, a party must issue a writ of summons before the court, seeking an order in terms identical to the judgment granted by the foreign court.

7. Privacy related issues when investigating and tracing assets

7.1 Privacy law issues related to assets of the insolvent company

7.1.1 Which (privacy) laws and regulations govern the processing of personal data in asset tracing investigations?

The processing of all personal data is governed by the Cayman Islands Data Protection Act (as amended) and Data Protection Regulations.

The Cayman Islands Ombudsman is an independent office of the Cayman Islands Parliament that acts as the supervisory authority for data protection.

7.1.2 Who is considered the controller within the meaning of article 4 par. 7 of the General Data Protection Regulation (GDPR) (e.g. for keeping the books and administration or processing personal data) during insolvency proceedings?

See the response below.

7.1.3 If the GDPR is not applicable within your jurisdiction, who is considered the person (natural person or entity) responsible for compliance with privacy laws (e.g. for keeping the books and administration or processing personal data) during the insolvency proceedings?

The GDPR is no longer applicable to the Cayman Islands since the introduction of the Data Protection Act and Data Protection Regulations on 30 September 2019. The Cayman Islands Data Protection Act is largely similar to the GDPR.

The data controller is defined as the person who, alone or jointly with others determines the purpose, conditions and manner in which any personal data are, or are to be, processed and includes a local representative nominated that is established in the Cayman Islands who shall ensure the obligations under the Data Protection Act are met.

The appointed insolvency practitioner has the responsibility for managing and collecting in all of records under the CWR Order 26, rule 3, and would take steps to ensure the company complies with all its regulatory requirements. Insolvency practitioners may act as data controllers. However, this role may also be delegated through contractual arrangements and where such contractual obligations exist, the insolvency proceeding does not necessarily cause a change in the role of data controller.

7.1.4 Are there any legal requirements or obligations for obtaining and processing personal data, including sensitive data (e.g. criminal records), during the asset tracing process?

The Data Protection Regulations specifically covers obtaining and processing personal data, including sensitive data, in the Cayman Islands. In addition, eight 'data protection principles', listed in Schedule 1 to the Data Protection Act, guide the process of obtaining and processing personal data. These principles must be complied with when handling personal and in particular sensitive personal data.

7.1.5 *Are there any other relevant obligations in relation to the processing of personal data in the course of insolvency proceedings in your jurisdiction?*

In the Cayman Islands, there are no additional obligations in processing personal data in insolvency proceedings other than those applicable to all data processing.

7.1.6 *Are there restrictions on sharing personal data with third parties (e.g. law enforcement or creditors) involved in the insolvency proceedings?*

All information held in an insolvency practitioner's files is treated as confidential.

Certain parties are permitted to inspect the relevant court file for an insolvency proceeding overseen by the Grand Court under the CWR Order 26, rule 4. This includes the liquidator, former liquidator or controller, a director or professional service provider immediately before the commencement of the liquidation, CIMA in the case of an entity that carried on regulated business, and any creditor or contributory of the entity. In addition, any person may apply for special leave of the court to inspect the court file. The insolvency practitioner would be required to consider the rules on data protection before disclosing confidential information and should request that the court redact personal data.

7.1.7 *If the GDPR is not applicable, are there any restrictions for transfers of personal data to countries outside your jurisdiction?*

The Eighth Principle of data protection provides that personal data shall not be transferred to a country or territory unless that country or territory ensures an adequate level of protection for the rights and freedom of data subjects in relation to the processing of their personal data (Schedule 1, Data Protection Act). Exceptions to this principle are listed in Schedule 4 to the Data Protection Act and include the following:

(a) where the data subject has consented to the transfer;

(b) where the transfer is necessary for the conclusion or performance of certain contracts;

(c) where the transfer is necessary for reasons of substantial public interest;

(d) where the transfer is necessary in connection with legal proceedings, for the purpose of obtaining legal advice, or for the purpose of establishing, exercising or defending legal rights;

(e) where the transfer is necessary to protect the vital interests of the data subject;

(f) where the transfer has been approved and authorised by the Ombudsman; and

(g) where the transfer is necessary for the purposes of international cooperation between intelligence or regulatory agencies to combat organized crime, terrorism or drug trafficking or to carry out other cooperative functions, provided that such disclosure is permitted or required by Cayman Islands law or court order.

7.1.8 *Are there pending legislative proposals or amendments that may impact the processing of personal data during asset tracing in insolvency proceedings?*

There are currently no pending legislative proposals or amendments in the Cayman Islands that may impact the processing of personal data during asset tracing in insolvency proceedings.

7.2 Privacy law issues related to assets of directors or other parties

7.2.1 *What legal grounds or exemptions allow the processing of personal data of directors or other parties during asset tracing, particularly when the insolvency representative considers actions or has initiated actions against them?*

7.2.2 *Do these legal grounds or exemptions only apply to a (court appointed) insolvency representative, or also to other parties?*

There are no specific grounds or exemptions that allow the processing of personal data of directors or other parties during asset tracing (in insolvency proceedings).

8. Considerations when criminal law is involved

8.1 How should the insolvency representative or provisional insolvency representative or other authorised person deal with the authorities when criminal law is involved?

Subject to directions of the Grand Court, the section 102(2)(a) of the Companies Act gives the insolvency practitioner the power to assist CIMA and the Royal Cayman Islands Police Service to investigate the conduct of the company's:

a. directors or officers;

b. current or prior professional service providers; and

c. former employees in the year prior to the insolvency appointment.

8.2 Are there any relevant laws, authorities and considerations under criminal law which may be applicable in relation to an application made by the provisional insolvency representative or authorized person for any provisional measures?

Section 102(2)(b) of the Companies Act permits insolvency practitioners to institute and conduct a criminal prosecution of the entity's directors or officers, current or prior professional service providers, or former employees in the year prior to the insolvency appointment.

9. Digital assets and Crypto assets

9.1 Crypto as an asset and ownership issues

9.1.1 How is crypto currency classified?

In the Cayman Islands, the Grand Court has not yet been required to opine on how cryptocurrency is classified as an asset. However, it is expected that the court would follow the decision of the English High Court in *AA v. Unknown Persons* [2019] EWHC 3556 (Comm), and cryptocurrency would be classified as property (capable of being the subject of a proprietary injunction). Decisions of the English High Court are not binding on the Cayman Islands Grand Court, but do provide persuasive authority.

The Cayman Islands has enacted the Virtual Asset (Service Providers) Act (2022 Revision) (VASP Act), which contains (at section 2) a statutory definition of "virtual assets", namely:

"a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes but does not include a digital representation of fiat currencies."

9.1.2 What rights and interest do cryptocurrency exchanges or trading platforms have in the cryptocurrency held in accounts at the exchange or platforms?

There is no Cayman Islands jurisprudence in relation to the proprietary status of digital assets at present, but overseas case law may be highly persuasive.

It may be necessary to consider whether the holding is custodial or non-custodial. The distinction significantly affects rights and interests of the platform and clients and therefore would be important in determining whether assets are pooled or can be specifically identified for a particular creditor.

9.1.3 Is cryptocurrency capable of being subject to a trust, secured creditor interest or custody arrangement?

There is no Cayman Islands jurisprudence as to whether cryptocurrencies are capable of being the subject of a trust, secured creditor interest or custody arrangement. However, as previously stated, the decision of the English High Court in *AA v. Unknown Persons* [2019] EWHC 3556 (Comm) may be persuasive. In that case the claims pursued by the applicant, in respect of cryptocurrency, were based in constructive trust and restitution.

9.2 Core issues in insolvency

9.2.1 When a cryptocurrency exchange / platform is subject to insolvency proceedings, what are the applicable legal standards for determining whether the exchange / platform or the accountholder owns the cryptocurrency held at the exchange / platform?

No cryptocurrency exchanges / platforms have been the subject of insolvency proceedings in the Cayman Islands.

If the Grand Court were to follow common law and classify cryptocurrency as property, then it is capable of forming the subject of a trust.

It is likely that the Grand Court would follow the usual principles applied to other forms of property, and would consider the contractual position between the underlying beneficiaries and the cryptocurrency exchange / platform, and would (on that basis) determine whether the exchange / platform or the account holder owns the cryptocurrency.

9.2.2 Have there been any significant legal decisions in your jurisdiction regarding ownership of cryptocurrency in insolvency proceedings?

There have not been any significant legal decisions in the Cayman Islands in relation to the ownership of cryptocurrency in insolvency proceedings.

9.2.3 *How is cryptocurrency valued in insolvency proceedings?*

To the extent that the cryptocurrency forms part of an insolvent estate, it would be incumbent on the insolvency practitioner appointed to consider how to value and maximise realisations from the cryptocurrency for the benefit of creditors. There has not been any guidance issued by way of practice direction or otherwise on how and when the cryptocurrency should be realised, given issues of volatility and risk of dissipation. It is anticipated that each appointed insolvency practitioner would be required to consider the particulars of the cryptocurrency that falls part of an insolvent estate and take appropriate steps to safeguard the assets and maximise value, whether this be achieved by conversion to fiat currency or continuing to hold the asset. The ability to obtain sanction, or retrospective sanction for actions taken, is available to insolvency practitioners.

In relation to creditor claims that are denominated in crypto currency, an official liquidator must determine the currency of the liquidation (CWR Order 16, rule 3(3)), and all claims are converted to that currency on the date of the liquidation. To date, there have not been any known cases where a cryptocurrency was classified as the currency of the liquidation, however, in theory this is possible and therefore creditor claims could increase or decrease with the underlying cryptocurrency holding.

9.2.4 *When a cryptocurrency / platform goes into insolvency, do customers have any special priority or are they treated as general unsecured creditors?*

No cryptocurrency platforms have entered liquidation in the Cayman Islands. As a result, the answer to this question is yet unknown. However, should the circumstances be such that there is a custodial relationship and the cryptocurrency is appropriately segregated, then we consider it likely that the customer could have a specific proprietary claim to those assets which would rank before unsecured creditors.

9.2.5 *If the UNCITRAL Model Law on Cross-Border Insolvency has been enacted in your jurisdiction, how can that law be used to assist with the tracing and recovery of cryptocurrency assets? Are there other laws or rules dealing with cross-border insolvency that can be used to assist with the tracing and recovery of cryptocurrency assets?*

Whilst the UNCITRAL Model Law on Cross-Border Insolvency has not been enacted in the Cayman Islands, there is the ability for insolvency practitioners to obtain recognition in the Cayman Islands and the Grand Court is often willing to do so. The court will generally assist foreign representatives to obtain information.

9.3 Clawback / recovery of cryptocurrency assets

9.3.1 *What types of non-insolvency claims are available to recover stolen / misappropriated cryptocurrency?*

There may be various claims available such as breach of contract and claims for unlawful interference. The types of claims available will be dependent on the circumstances of each case.

9.3.2 *Are there any clawback or avoidance claims under insolvency law that can be brought to recover cryptocurrency transferred from the debtor prior to commencement of insolvency proceedings?*

The causes of action discussed in section 5.3 above, (including claims for voidable preferences and disposition at an undervalue), which are available pursuant to the Companies Act, are not available prior to the commencement of insolvency proceedings.

9.3.3 *Are there any special or unique issues in bringing a clawback / avoidance claim to recover cryptocurrency? Have there been any significant decisions in this area?*

In the Cayman Islands, there have not been any significant decisions in relation to clawback and / or avoidance claims to recover cryptocurrency.

9.3.4 *What remedies are available under both insolvency and non-insolvency law to freeze or compel the turnover of cryptocurrency assets? What are the legal standards / requirements for obtaining those remedies?*

In the Cayman Islands, the relief available under both insolvency and non-insolvency law to freeze or compel the turnover of cryptocurrency are the same as in relation to any other assets of a company. Information in relation to freezing injunctions is set out in detail at section 2.5 above.

9.4 Tracing of cryptocurrency

9.4.1 What discovery or information gathering tools are available, under insolvency and non-insolvency law, to obtain information on the location of cryptocurrency and the owner of that cryptocurrency?

In the Cayman Islands, the relief available under both insolvency and non-insolvency law to obtain information on the location of cryptocurrency are the same as in relation to any other assets of a company. Information in relation to Norwich Pharmacal relief is set out in detail at section 2.5 above. Freezing injunctions also commonly contain ancillary disclosure orders. It is worth noting that this relief can be obtained in support of foreign litigation.

9.4.2 What type of information are cryptocurrency exchanges / platforms required to collect from customers (including KYC information) when they open an account?

The VASP Act requires that all registered exchanges comply with the Anti-Money Laundering Regulations. This includes, but is not limited to, identifying a customer, identifying a beneficial owner, and conducting ongoing due diligence on a business relationship including ensuring that documents held for the purpose of due diligence are kept current.

9.4.3 Can the KYC information about accountholders collected by a cryptocurrency exchange / platform be obtained through a formal discovery process? Are there any special issues to navigate in your jurisdiction in order to obtain such information?

It may be possible to obtain KYC information about accountholders (collected by a cryptocurrency exchange or platform) through an application for a Norwich Pharmacal Order. This relief is addressed in detail in section 2.5 above.

When obtaining and transferring personal data (such as KYC information) it is important to consider the implications and requirements of the Data Protection Act and possible data protection legislation in other jurisdictions.

9.4.4 What type of forensic or tracing tools are available to assist with the tracing and recovery of cryptocurrency?

There are various forensic and tracing tools available to practitioners worldwide and many Cayman Islands practitioners have access to new and developing technologies. There are no restrictions on the use of such technologies at this time.

9.4.5 What type of expert evidence is necessary to establish the tracing of stolen or misappropriated cryptocurrency to a particular account / wallet?

Although no jurisprudence currently exist in the Cayman Islands to confirm when expert evidence may be required to establish the tracing of stolen or misappropriated cryptocurrency, it is likely that the using of specialist tracing technology may need to be explained to the court by an expert in order to explain the methods used to the court and satisfy the court of the accuracy of the exercise. It is more likely that expert evidence is required if the accuracy of the tracing exercise is challenged in contentious litigation.

9.5 Government / Regulatory Intervention

9.5.1 What governmental bodies or agencies have oversight over fraud or theft of cryptocurrency?

The CIMA has oversight over all virtual asset service providers who are licenced. CIMA has a process for reporting any complaints regarding matters supervised by CIMA.

The Royal Cayman Islands Police Service, and in particular the Cayman Islands Bureau of Financial Investigation, has oversight over investigations in relation to fraud and theft relating to financial assets and cooperates with overseas governmental bodies or agencies tasked with similar investigations.

9.5.2 Are there remedies available to law enforcement that could lead to the recovery or forfeiture of stolen / misappropriated cryptocurrency and the return of that cryptocurrency to the victims?

Where a virtual asset service provider is registered with the CIMA and fails to comply with any of the requirements under the VASP Act, section 25(2) of the VASP Act provides that CIMA may use specified enforcement powers (listed below). However, those powers are only available to the CIMA in certain circumstances , including (but not limited to) where the virtual asset service provider:

(i) is, or is likely to become, unable to meet its obligations as they fall due;

(ii) is carrying on business fraudulently or otherwise in a manner detrimental to the public interest, to the interest of its clients or to the interest of its creditors (among other circumstances);

(iii) has contravened any provisions of the VASP Act or the Anti-Money Laundering Regulations; or

(iv) has failed to comply with the conditions of its licence.

The enforcement powers are included at section 25(3) of the VASP Act and include the power to apply to the Grand Court for any order which is necessary to protect the interests of clients or creditors of the virtual asset service provider in question and to appoint a person to act as controller, to assume control of the entity's affairs. This will often lead to a subsequent application to the court for the entity's winding up and the appointment of the controller(s) as official liquidator(s). The official liquidators will be able to pursue the remedies discussed above to recover assets for creditors and / or contributories.

In addition, CIMA also has the ability to apply to the Grand Court to wind up and appoint an official liquidator over a current or former registered entity if it is in contravention of section 4(1) of the VASP Act, which states that a person shall not carry on, or purport to carry on, virtual asset service in or from the Cayman Islands unless it is appropriately registered under the VASP Act.

CIMA has not yet taken this action under the VASP Act but does use similar remedies in relation to other types of regulated entities.

The Cayman Islands Bureau of Financial Investigations also has powers to trace, freeze and recover the proceeds of crime.

SINGAPORE

1. Before commencement of insolvency and restructuring proceedings (pre-order for insolvency and restructuring proceedings)

1.1 What are the relevant laws or rules and relevant provisional measures available in connection with the identification, tracing, recovery and preservation of assets before an application for an insolvency or restructuring proceeding is made?

In Singapore, the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) and its subsidiary legislation provide the overarching framework for all insolvency and restructuring proceedings. Outside of the insolvency and restructuring regime, common law principles and the Rules of Court 2021 (ROC), which govern the various civil procedures, are also relevant. As such, while the IRDA governs the insolvency or restructuring process (such as the appointment and powers of liquidators or judicial managers), the ROC provides the procedures by which injunctions or orders may be sought for purposes of identifying, tracing, recovering and preserving assets.

Even before formal insolvency and restructuring proceedings are commenced, provisional liquidators and interim judicial managers (collectively, Pre-Commencement Insolvency Representatives) can take steps to identify and preserve a company's assets before it formally enters insolvency. However, due to the short-term and temporary nature of their appointment, the main role of these Pre-Commencement Insolvency Representatives is to preserve the assets of the company, and they generally do not concern themselves with the tracing and / or recovery of assets at this time.

That said, even without having commenced formal insolvency or restructuring proceedings, it remains open for a company to take action to trace and recover their assets without relying on the IRDA. For example, to recover its misappropriated assets, the company can commence a civil action for conversion, unjust enrichment, fraudulent misrepresentation, or knowing receipt following a breach of fiduciary duty. Where necessary, the company may also apply for pre-action discovery orders, freezing orders or search orders under the ROC: see section 2.6 below.

2. Summary of corporate insolvency and restructuring proceedings

2.1 Formal insolvency legislation for corporations

2.1.1 Does your jurisdiction have formal insolvency and restructuring legislation or a framework for corporations? What laws or rules govern the insolvency and restructuring of corporations? Does specific legislation, laws or rules exist for the identification, tracing, recovery and preservation of assets?

The IRDA sets out the overarching legislative framework for all insolvency, restructuring and bankruptcy proceedings. The IRDA operates together with Part 7 of the Companies Act 1967 (CA), which governs the processes under which a company, its creditors and / or its shareholders may enter into a compromise or arrangement for purposes of restructuring. Once insolvency proceedings formally commence, the insolvency representative (liquidator or judicial manager as the case may be) can rely on both the ROC and IRDA to identify, trace, recover and preserve assets.

Under the IRDA, assets that have been disposed via avoidable transactions may be clawed back: see section 5.3 below.

Under the ROC, a company may apply for freezing and / or search orders to identify and preserve the assets of a company: see section 2.6 below.

2.2 Appointment of insolvency representative, provisional insolvency representative or authorised person

2.2.1 Upon the application of the insolvency or restructuring proceedings, does your jurisdiction have a legislative framework for the appointment of an authorised person or provisional insolvency representative who is entrusted with the administration or supervision of the debtor company's business or assets, or the realisation of all or part of the debtor company's assets?

2.2.2 Where an application for an insolvency or restructuring proceeding is not made, is there a similar legislative framework for the appointment of such an authorised person for the identification, tracing, recovery and preservation of the company's assets?

Only licenced insolvency practitioners can act as Pre-Commencement Insolvency Representatives, liquidators or judicial managers. This licensing regime aims to ensure that the insolvency practitioner possesses "a significant repertoire of technical knowledge and skills, as well as a certain level of experience in, and familiarity with, the conduct of insolvency proceedings generally."[1]

1 Chapter 10, Para 1 of the Final Report of the Insolvency Law Review Committee (2013).

Upon the filing of a winding up or judicial management application, and prior to the making of any winding up or judicial management order, a Pre-Commencement Insolvency Representative may be appointed to ensure that the company's assets are preserved. To achieve this, Pre-Commencement Insolvency Representatives are generally vested with the same powers and subject to the same duties as liquidators and judicial managers to preserve the company's assets. For instance, in court-ordered winding up proceedings, section 138 of the IRDA provides that the provisional liquidator has and may exercise all the functions and powers of a liquidator (save as specifically limited or restricted in statute or by court order). The provisional liquidator is also under a duty to take into custody or place under his or her control all property and things in action to which the company is or appears to be entitled.[2]

A company can also be placed into winding up or judicial management voluntarily without the filing of a court application, and a provisional liquidator or interim judicial manager (i.e. a Pre-Commencement Insolvency Practitioner) can also be appointed and would generally be vested with the same powers and subject to the same duties as liquidators and judicial managers to preserve the company's assets in the meantime.

2.3 Effects and duties imposed on the debtor company

2.3.1 What are the effect(s) and duties imposed on the debtor's company upon the application of insolvency or restructuring proceedings in relation to the identification, tracing, recovery and preservation of assets? Is there a similar duty imposed on any party or company where an application for an insolvency or restructuring proceeding is not made?

Upon the application of insolvency or restructuring proceedings, but before any winding up or judicial management order is made, an interim judicial manager[3] or provisional liquidator[4] may be appointed, mainly with the view of preserving the assets of the company: see section 2.2 above.

While strictly not a consequence of the application itself, as a company nears insolvency, the company directors owe a duty to consider the creditors' best interests when making decisions. A breach of this duty could result in the directors being held liable for breach of fiduciary duty. This means that, in general, the directors should not direct the near-insolvent company to transfer or dissipate assets to the detriment of the general body of creditors. This duty arises even if no application is made to place the company in an insolvent or restructuring proceeding. Any recent prior transactions made at an undervalue or given as an unfair preference to a particular creditor can be reversed upon application to court[5]: see section 5.3 below.

2.4 Stay of execution of assets

2.4.1 Upon the application of the insolvency or restructuring proceeding, is an automatic stay imposed on any existing, or the commencement of any new legal proceedings, or the realisation of assets (moveable and immoveable property) of the debtor company?

Upon application of a winding up order or a judicial management order, an automatic moratorium is triggered.[6] The scopes of each moratorium differ, but generally the moratoriums would allow for ongoing proceedings to be stayed, and for further proceedings against the company to be restrained.

Notably, for a moratorium arising from a judicial management application, no step may be taken to enforce any security over any property of the company without permission from the court. This means that a receiver cannot be appointed to satisfy a charge held over the company's assets. However, this does not apply for a moratorium arising from a winding up application as the scope of the moratorium therein is comparatively narrower. This means that even after a winding up application is made, it is possible for a secured creditor to appoint a receiver to satisfy the secured debt.

For a non-insolvent restructuring such as a scheme of arrangement commenced under section 210 of the CA, there is no automatic moratorium. The company may apply for either a moratorium pursuant to section 64 of the IRDA, or a moratorium pursuant to section 210(10) of the CA, but not both. If the company chooses to not apply for a moratorium, a stay of execution of assets is unlikely.

2.5 Power to restrain or order the transfer of assets

2.5.1 Does the insolvency representative, provisional insolvency representative or authorised person have the authority to limit the powers of the debtor company in respect of the transfer of its assets, or to issue a restraining order or injunction to any third party for the preservation or protection of assets of the debtor company?

Upon the filing of a winding up application, any disposition of property by the company, share transfers and alterations in the status of the members of the company are considered void unless the court otherwise orders.

2 Section 140(1) of the IRDA.
3 Section 92 of the IRDA.
4 Section 138 of the IRDA.
5 For example, see Part 9, Division 3 of the IRDA.
6 For winding up: section 129 IRDA; for judicial management: section 95 of the IRDA.

This includes any attachment, sequestration, distress or execution put in force against the estate or effects of the company.[7]

Similarly, upon the filing of a judicial management application but prior to the hearing of the application, a creditor of the company may apply to the court for an order to restrain the company from disposing of property (other than in good faith and in the ordinary course of business), and / or an order restraining the company from transferring any share in, or altering the rights of any member of, the company.[8]

Pre-Commencement Insolvency Representatives are mainly concerned with the identification and preservation of assets. To this end, a Pre-Commencement Insolvency Representative may seek the necessary court orders and / or injunctions such as a freezing order or search order: see section 1 above.

2.6 Safeguards, checks and balances

2.6.1 Does the insolvency representative, provisional insolvency representative or authorised person have to satisfy any test or legal threshold in order to obtain any reliefs in relation to the assets of the debtor company?

These issues are addressed in the section below.

2.6.2 Is there a notice requirement by the provisional insolvency representative or authorised person to publicise any application for any provisional measures to be imposed against the debtor company, its creditors or any other third party? Is there an avenue for the debtor company, its officers, or any other third party to terminate or challenge the application for or imposition of any provisional measures? Is there a duration for which the provisional measures would be imposed?

The most common orders and injunctions sought in insolvency proceedings for the identification and preservation of assets are pre-action discovery orders, freezing orders and search orders. When such applications are made, the company will have to satisfy certain requirements depending on the type of order or relief sought. Generally, these requirements are intended to ensure that there is no abuse of the court's processes, and that such orders (which could be invasive and disruptive to a non-party) are not granted too readily.

For instance, Order 11 Rule 11 of the ROC allows the court to order the production of documents and information before the commencement of proceedings or against a non-party to enable a party to trace the party's property. To succeed in obtaining such an order, some of the key requirements the applying party must satisfy include showing that the person from whom discovery is sought must have been involved in the wrongdoing (even though such involvement may have been innocent), and that such disclosure is necessary to enable an action to be commenced, or at least that it is "just and convenient" in the interests of justice to make the order sought.[9] If there is an alternative and / or more appropriate method by which the information or documents sought may be obtained, the court will generally decline to grant such an order.

Where necessary, freezing orders and search orders may also be sought under Order 13 of the ROC. Specifically, Order 13 Rule 1(2) of the ROC provides that in an urgent case, a party may apply for a freezing order or search order before the commencement of proceedings. Such relief remains available to the company regardless of whether formal insolvency proceedings are commenced. To successfully obtain a freezing order, one of the key requirements is to show that there is a real risk that the assets of a company would be dissipated. In this regard, solid evidence must be provided to demonstrate the existence of such a risk.[10] Likewise, one of the key requirements to obtaining a search order is the need to show that there is a real possibility that the documents would be destroyed.[11]

3. Identification of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

3.1 Notice of insolvency proceedings

3.1.1 What effect(s) and duties imposed on the debtor's company upon the commencement of insolvency or restructuring proceedings in relation to the identification of assets?

Upon the commencement of insolvency proceedings, the company must comply with certain notice requirements, such as advertising in an English newspaper a copy of the winding up or judicial management application

7 Section 130 of the IRDA.

8 Section 93(b) of the IRDA.

9 *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 at [45]; *Goh Seng Heng v Liberty Sky Investments Ltd and another* [2017] 2 SLR 1113 at [32].

10 *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 at [36]- [37]; *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 490 at [40].

11 *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another and another appeal and another matter* [2020] 2 SLR 912 at [123].

order.[12] A company will also have to add the words "in liquidation", "in provisional liquidation" or "under judicial management" (as the case may be) after the name of the company.[13]

One of the first things that a liquidator and judicial manager must do upon being formally appointed is to identify the company's assets with the view of preserving the same. In this regard, upon a company entering judicial management or liquidation, it will be obliged to provide the judicial manager and liquidator respectively with a statement of the company's affairs up to the date the company entered judicial management[14] or liquidation[15] (as the case may be). The company's obligation to provide its statement of affairs works together with a liquidator and judicial manager's obligation to take into custody or place under his or her control all property and things in action to which the company is or appears to be entitled.[16] To ensure the accuracy of such information, the statement of affairs must be verified by an affidavit.

In the case of a court ordered winding up, failure to comply with this requirement could result in penalties, including a fine not exceeding $10,000 or to imprisonment for a term not exceeding 12 months or to both and also to a default penalty.[17]

The insolvency practitioner is also empowered to have any person surrender any books and records belonging to the company that they are in possession or control of,[18] and may even apply to the courts to have any relevant person provide further information on the company's prior dealings.[19]

Conversely, under section 243 of the IRDA, officers and employees of the company are under a duty to cooperate with judicial managers and liquidators by providing information concerning the company and its promotion, formation, business, dealings, affairs or property as the liquidator may reasonably require, and to also attend on the liquidator as may be reasonably required. Failure to comply with either is an offence punishable by a fine.

3.2 Identifying assets

3.2.1 How does your jurisdiction identify assets if the books and records are unreliable?

Generally, the insolvency representative can rely on third party sources to corroborate unreliable records, or to reveal more information on the company's assets, debts and liabilities.[20] The following non-exhaustive list includes possible avenues for insolvency representatives to obtain third-party records for assets commonly owned by companies.

Cash and brokerage accounts: The insolvency representatives may choose to reach out to the company's banks and request for the company's bank statements and / or the related transaction advices (e.g. MT103, cheque records, debit advice). This provides the insolvency representatives with specific details of the cash balance, as well as transactional level data if required to commence the identification and tracing process.

Property and real estate: For a fee, the insolvency practitioner may conduct title searches with the Singapore Land Authority to determine details of the property owned by the company, including but not limited to caveats filed on the property, title tenure and other property information. At present, the search can be done using the Singapore Land Authority's portal here: https://app.sla.gov.sg/inlis/#/home. Most records on private properties are available electronically. However, if the property records are not available online, a manual search can be done by contacting the customer service centre at 55 Newton Road #12-01 Revenue House Singapore 307987.

Motor vehicle: The insolvency representative may also conduct searches with the Land Transport Authority of Singapore (LTA) to determine the ownership of the vehicles registered to the company. This would require the insolvency representative to log into LTA's portal at https://onemotoring.lta.gov.sg/content/onemotoring/home.html.

Listed equities and instruments: To determine the publicly traded shares and financial instruments (e.g. bonds) owned by the company, the insolvency representative can log into the company's Central Depositary Pte Ltd account with the registered users' log in details and password if available.

Non-listed equities: A company search can be done using the Accounting and Corporate Regulatory Authority's Bizfile portal for a fee. Information that can be obtained include the company's details and history, the company's capital structure, any registered charges, and the particulars of the company's shareholders and directors.

Intellectual property: To determine the ownership of certain intellectual property recorded (e.g. patents, trademarks), a search can be done on the Intellectual Property Office of Singapore website. The preliminary information required to perform the search would include but is not limited to the patent / trademark application number, or title of invention.

12 See, for example, section 105(1) of the IRDA.
13 See, for example, sections 97(1), 194(1) of the IRDA.
14 Section 106 of the IRDA.
15 Section 141 of the IRDA.
16 Sections 99(1) and 140(1) of the IRDA.
17 Section 141(5) of the IRDA
18 Section 242 of the IRDA.
19 Section 244 of the IRDA.
20 While a liquidator is generally empowered to request for any books and records the company is entitled to (e.g. bank records), the liquidator may also rely on section 188(5) IRDA to compel the transfer of books and records from certain related parties.

Cryptocurrency and digital assets: The insolvency representative will first have to obtain information of the ownership and type of digital asset held from the relevant cryptocurrency and digital asset exchanges. The insolvency representative will require specialised forensic software to track the movement of digital assets across blockchain networks to identify the relevant exchange. This involves analysing transaction histories and wallet addresses to establish the flow of digital assets. At minimum, the wallet address or transaction hash (a unique identification number used to track cryptocurrency transactions on the blockchain) is needed. As these exchanges may not be regulated, they are not obliged to provide the insolvency representative with the requested information. In that case, the insolvency representative may apply to court to compel the disclosure of information, which can be instrumental in uncovering hidden or obfuscated assets.

3.3 Asset location

3.3.1 What laws or rules govern the insolvency and restructuring of asset location?

Under the IRDA, "property' is defined as including "money, goods, things in action, land and every description of property, wherever situated" and "obligations and every description of interest, whether present or future or vested or contingent, arising out of or incidental to property".[21]

Section 252 of the IRDA incorporates the UNCITRAL Model Law on Cross-Border Insolvency (save for certain modifications to adapt it for application in Singapore) (Model Law) into Singapore law. The incorporation of the Model Law facilitates the tracing and recovery of assets in support of insolvency proceedings, even across borders.

3.4 Asset exclusions

3.4.1 What assets may be considered exempt property?

Generally, there are no stipulations under Singapore's corporate insolvency and restructuring regime to exempt unencumbered assets from distribution.

3.5 Collecting assets

3.5.1 Once assets included in the books and records or outside the books and records have been identified, what methodologies are in place to collect those assets? Does an insolvency representative need to have possession of the assets? Is the insolvency representative required to put a lien on the assets? How does the insolvency representative collect assets outside the jurisdiction?

For assets in Singapore: There is generally no specific methodology as collection depends on the available documentary evidence to trace and identify ownership of the asset. If ownership of the assets is not contested, there is generally no further step needed, other than to take control and possession of said assets. If ownership of the assets is contested, then the dispute might be better resolved by initiating a claim with the Singapore courts.

This is instrumental because the insolvency representative must take control and possession of the estate to effectively carry out the insolvency process. This would also involve the insolvency representative's duty to account for, safeguard, and liquidate the assets in accordance with the law.

For assets outside of Singapore: There is also generally no specific methodology as it depends on the specific facts of each case and would depend on the jurisdiction where the asset is held. If ownership of the asset is uncontested, the insolvency representative should consider the practical implications of transferring the asset back to Singapore. If ownership of the asset is contested, it would then depend on the respective jurisdiction's laws. To this end, Singapore adoption of the Model Law is intended to facilitate the cross-border preservation and recovery of assets. For instance, under article 21 of the Model Law, upon the recognition of a foreign proceeding, where necessary to protect the property of the debtor or interests of the creditor, the Singapore court may stay execution against a debtor's property[22] or suspend the right to transfer of any property of the debtor.[23] Reciprocal legislation to the same effect can be expected when seeking recognition of a winding up order issued by the Singapore courts before the courts of Contracting States to the Model Law.

21 Section 2 of the IRDA.
22 Article 21(1)(b) of the Model Law.
23 Article 21(1)(c) of the Model Law.

3.6 Asset inventory and valuation

3.6.1 How does an insolvency representative ensure that the value of the assets on the books and records are accurate?

Upon formally entering an insolvency proceeding, the officers of the company must provide a statement of affairs, which must include information such as the particulars of the assets and liabilities of the company: see section 3.1 above.

It is also open to the insolvency representative to conduct an independent valuation of the company's assets. Briefly, there are several data points available to assist the insolvency representative in obtaining an indicative or estimated realisable value of an asset. The three common data points are as follows.

Book Value: This is the value of a company's assets as disclosed on its balance sheet based on the original cost of the asset less the accumulated depreciation applied over the useful life of that asset. This is also known as the "net book value" of an asset as defined by accounting policy. The net book value can be verified against the historical books and records of the company.

Market Value: This reflects the estimated amount for which an asset is valued and is generally based on a willing buyer and willing seller in an arms-length transaction. The valuation of specific types of assets may have specialised valuation methodologies applied by professional valuers. For example, valuation of assets such as property, motor vehicles, art and the enterprise value of equity interests held in private companies may be based on various methods. These may include the discounted cash flow basis, analysis of comparable transactions, and income approach. For certain types of assets, an insolvency representative may also obtain an indicative valuation by performing an expression of interest exercise, soliciting offers through public tender, or by conducting an auction.

Liquidation Value: This is the estimated recoverable value of the asset when it is sold in the event of an insolvency proceeding on an expedited basis, less costs of disposal. In determining this value, the insolvency representative must exercise professional judgment, and account for a signification discount applied to the net book value and / or market value.

4. Recovery of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

4.1 Court-based remedies

4.1.1 What tools are available to recover assets e.g. freezing orders, seizure orders or orders for judicial sale?

Common tools relied upon after the commencement of insolvency or restructuring proceedings for purposes of identifying and recovering assets include applying to the court for search orders and freezing orders. General interlocutory injunctions, in particular proprietary injunctions (where a party is prevented from dealing with an asset and its traceable proceeds pending resolution of a dispute) may also be sought against an offending party to preserve assets to facilitate recovery of the same: see section *4.1.5* below.

Furthermore, assets that have been transferred out of the company may be clawed back if they had been transferred pursuant to an avoidable transaction: see section 5.3 below.

4.1.2 Do all or only some insolvency representatives have powers to use these tools? Which ones?

All insolvency representatives are empowered to use these tools as they are not limited to companies in insolvent proceedings. Regarding avoidance transactions like unfair preference and undervalue transactions, these are available to both the liquidator and judicial manager.

4.1.3 Can a party approach the court on a confidential, ex parte basis? What notice is required to be given to the holder of the assets (or potential defendant)?

An application for an injunction or search order may be made "without notice". However, the applicant will have to explain to the court by way of an affidavit stating the urgency and explaining why the responding party should not be informed about the application and the merits of the application. Applications on a "without notice" basis are often made where the circumstances are such that the responding party would immediately take steps to dissipate the assets in question should he be informed or alerted to the possibilities of legal proceedings being made against him / her.[24]

4.1.4 If applying on an ex parte basis, is there a duty to make full and frank disclosure?

Yes. A party applying for an injunction or a search order has the duty to disclose to the court all material facts that the party knows or reasonably ought to know, including any matter that may affect the merits of the party's case adversely.[25]

24 Order 13 Rule 1(3) of the ROC 2021.

25 Order 13 Rule 1(5) of the ROC 2021.

4.1.5 *What elements are required to be proven, and to what standard of proof, in order to succeed? Is this a more onerous standard than usual?*

As injunctions and search orders are civil remedies, the standard of proof is on the balance of probabilities. The elements required to be proven depend on the nature of the injunction or order sought.

Prohibitory and proprietary injunctions are two commonly sought orders by parties seeking to preserve and prevent the dissipation of assets. While a prohibitory injunction restrains a party from doing something (such as the disposal of assets), the proprietary injunction fastens on the specific asset in which the plaintiff asserts a proprietary interest.[26]

In both cases, it must be shown that there is a "serious question to be tried". Once the court has determined that there exists a "serious question to be tried", it will apply the "balance of convenience test". This test comprises two stages. The court first considers If damages would be an adequate remedy, and the respondent is in a financial position to pay them. If so, an injunction should normally not be granted. On the other hand, if damages would not be an adequate remedy, the court should consider whether, if the injunction was granted, the respondent would be adequately compensated under the applicant's undertaking as to damages. If damages would not be an adequate remedy, or if the court is doubtful about the adequacy of damages, the court considers where the balance of convenience lies. The court will take whichever course appears to carry the lower risk of injustice if that course should ultimately turn out to have been the "wrong" course.[27]

4.1.6 *Are there any other requirements in order to obtain the orders? For example, an undertaking to pay damages associated with the freezing of assets and, if required, security for such an undertaking.*

To successfully obtain a freezing order, the applying party must show that there is a real risk that the assets in question would be dissipated. In this regard, solid evidence must be provided to demonstrate the existence of such a risk. Likewise, one of the key requirements to obtaining a search order is the need to show that there is a real possibility that the documents would be destroyed: see section 2.6 above.

4.1.7 *What safeguards can the court require to be in place?*

In Singapore, search orders and freezing orders are by default issued in a prescribed form which contains default terms meant to safeguard against the party subject to such orders from being unduly and / or irrevocably prejudiced. For instance, one of the undertakings to be given by the applying party seeking a freezing order is that the defendant would be compensated for any loss suffered by the defendant should the court later find that the granting of the freezing order had caused loss to the defendant.

Similarly, a party seeking a search order would be required to undertake that he would compensate the defendant for any loss suffered should the court later find that the granting of the search order had caused loss to the defendant. In addition, the court may order that a "supervising solicitor" be appointed to oversee the execution of the search order. The "supervising solicitor" is normally an independent third party unconnected with the dispute at hand whose main responsibility is to explain to the person served with the search order its meaning and effect, and to inform him of his right to seek legal advice and apply to vary or discharge the order if need be.

4.1.8 *What mechanisms are available to expedite claims against non-responsive or other defendants? Is a final judgment required to enforce against a defendant?*

In the event a defendant fails to respond to an originating claim and / or statement of claim that has been properly served, the claimant may proceed to enter judgment in default. If the defendant fails to set aside such default judgment, the claimant may proceed to enforce the judgment in the same manner as if the judgment had been granted after a trial.

4.1.9 *What ancillary orders may be available?*

Depending on the circumstances, ancillary orders may be sought. In insolvency and restructuring proceedings, it is uncommon for parties to seek ancillary orders such as a gagging order, which is intended to restrain a party from alerting potential wrongdoers of the possibility of legal action being taken against them, which may result in them taking immediate steps to dissipate the assets in question. Upon a company entering judicial management or liquidation, the company will be obliged to provide the judicial manager and liquidator respectively with a statement of the company's affairs up to the date the company entered judicial management[28] or liquidation[29] (as the case may be).

26 *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 at [144]; *Leong Quee Ching Karen v Lim Soon Huat and others* [2024] 4 SLR 862 at [27].

27 *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29 at [17(b)].

28 Section 106 of the IRDA.

29 Section 141 of the IRDA.

4.1.10 In your jurisdiction, who enforces against assets?

In Singapore, a party seeking to enforce a judgment may apply for an enforcement order for the seizure and sale of property and / or the delivery or possession of property. In both cases, the enforcement order would authorise a Sheriff to carry out such orders.[30]

Further or alternatively, another common method of enforcement is by seeking what was previously known as a garnishee order. Such an order is useful, especially when the judgment debtor's bank account details are known to the party seeking enforcement. A garnishee order would allow a judgment creditor to compel a third party, such as a bank, to pay any debt owed by the judgment debtor directly to the judgment creditor. Garnishee orders do not require a Sheriff for execution.

4.1.11 Are there specific causes of action or remedies that are only available to insolvency representatives to recover assets and / or books and records of the company? Do all or only some insolvency representatives have these powers?

Insolvency representatives are vested with the power to apply to avoid certain pre-insolvency transactions, such as an unfair distribution of assets to a creditor. These powers are available to liquidators and judicial managers but are not available to receivers or scheme managers.

4.2 Out-of-court assistance

4.2.1 What mechanisms are available to the insolvency representative to identify and secure assets without court assistance? What is required to utilise these mechanisms? Are there costs or time barriers involved?

Upon the commencement of insolvency proceedings, the insolvency representative takes all the company's property into their custody and control. This includes the company's books and records, which thus allows the judicial manager or liquidator (as the case may be) to review the information and investigate if necessary: see section 3.1 above.

Insolvency representatives are also empowered to engage professionals to identify and trace company assets that were dissipated, such as forensic experts.

The insolvency practitioner is further empowered to disclaim onerous property to preserve as much of the company's assets as possible.[31] Onerous property includes any unprofitable contract or property that is unsaleable or may give rise to a liability of the company to pay money or perform any onerous act.

4.3 Powers to examine and investigate

4.3.1 What powers are available to investigate the affairs of the company to identify and recover assets? Do these extend to individuals involved in the company or recipients of funds? What tools are available for the liquidator to investigate the location and nature of assets to satisfy a judgment?

4.3.2 What criteria are required to be satisfied before activating any powers of investigation regarding assets?

The insolvency practitioner steps into the shoes of the directors and is vested with powers to manage the affairs of the company. Liquidators are generally vested with powers intended to seize and take control of property belonging to insolvent companies. Section 188(5) of the IRDA gives the court the power to require any officer of the company to deliver, surrender or transfer to the liquidator any money, property, books and papers in their hands to which the company is prima facie entitled. In that regard, the insolvency practitioner is inherently empowered to investigate the affairs of the company to identify and recover assets.

The powers to investigate the affairs of the company to identify and recover assets depend on the insolvency proceedings invoked as each insolvency proceeding aims to achieve a different outcome.

A winding up aims to conclude the company's affairs and distribute the remaining assets to its creditors and shareholders. The liquidator's powers are categorised into: (1) powers they possess after authorisation by the court or the Committee of Inspection; and (2) powers which they can exercise without such authorisation. For the former, the liquidator may, among other things, bring or defend any action or other legal proceeding in the name and on behalf of the company, or appoint a solicitor to assist them in their duties.[32] This will allow the liquidator to commence an action to identify and recover dissipated assets. As regards to the latter, the liquidator may, among other things, sell the immovable and movable property and things in action of the company, and do all such other things as are necessary for winding up the affairs of the company and distributing its assets.[33]

30 Order 22 Rule 2 of the ROC 2021.
31 Section 230 of the IRDA.
32 Section 144(1) of the IRDA.
33 Section 144(2) of the IRDA.

A judicial management aims to ensure: (a) the survival of the company, or the whole or part of its undertaking, as a going concern; (b) the approval under section 210 of the CA or section 71 of a compromise or an arrangement; or (c) a more advantageous realisation of the company's assets or property than on a winding up.[34] For these reasons, the judicial manager is given the same powers and duties as a director of the company and must do such things as may be necessary for the management of the affairs, business and property of the company.[35] This means that the judicial manager is authorised to review the company's books and records to investigate the affairs of the company. In addition, the judicial manager's powers, as listed in the First Schedule of IRDA, includes the power to take possession of, collect and get in the property of the company and, for that purpose, to take such proceedings as may seem to the judicial manager expedient.

5. Tracing of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

5.1 Verification of assets

5.1.1 Has the Model Law been implemented or enacted as part of local legislation? What remedies can be obtained under the Model Law for the verification of assets?

Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency through section 252 of the IRDA with certain modifications to adapt it for application in Singapore, i.e. the Model Law. For instance, the Model Law includes the words "or adjustment of debt" to the definition of "foreign proceedings", which the Singapore courts have held to mean that proceedings in foreign jurisdictions that are akin to schemes of arrangement commenced under Singapore law and / or reorganisations commenced under Chapter 11 of the United States Bankruptcy Code and proceedings recognisable under Chapter 15 of the United States Bankruptcy Code (which sets out the United States' adaptation of the UNCITRAL Model Law) are recognised under the Model Law.[36] The Model Law can be found in the Third Schedule of the IRDA.

Under article 21 of the Model Law, where a "foreign proceeding" is recognised (whether it is a foreign main proceeding or a non-main proceeding), the court has discretion to grant various reliefs. The list of reliefs under article 21 is non-exhaustive in nature and the type of relief to be granted depends on the circumstances of each case.[37] However, this is subject to the requirement under article 22 of the Model Law – that the interests of the creditors and other interested persons, including if appropriate the debtor, are adequately protected.

To support the verification of a debtor's business and assets, the court may provide for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor and his business and assets under article 21(1)(d) of the Model Law. This is subject to two requirements: first, that the specific action is necessary to protect the interests of the debtor and its creditors; and second, that the specific action is not inconsistent with the determinations of the court of the foreign proceeding.[38]

After verification is complete, the court may also provide for the stay and / or suspension of the following upon recognition of a foreign proceeding: commencement or continuation of actions or proceedings concerning the debtor's property rights, obligations or liabilities; execution against the debtor's property; and / or the right to transfer, encumber or otherwise dispose of any property of the debtor. A stay and suspension are automatically granted under article 20(1) of the Model Law upon recognition of a foreign main proceeding, and discretionarily granted under article 21(1) of the Model Law upon recognition of a foreign non-main proceeding.

5.2 Completeness of books and records

5.2.1 What criminal offences (if any) have been implemented for misrepresentation or incomplete information?

Section 234(1) of the IRDA sets out a list of offences that any officer of a company in judicial management or liquidation may be liable for. These offences involve the misrepresentation of or the deliberate provision of incomplete information, and includes the following:

- where an officer of the company does not to the best of his or her knowledge and belief fully and truly disclose to the judicial manager or liquidator all the property movable and immovable of the company, and how and to whom and for what consideration and when the company disposed of any part of such property, except such part as has been disposed of in the ordinary way of the business of the company;
- where within 12 months immediately before the commencement of the judicial management or winding up or at any time thereafter, an officer of the company has concealed, destroyed, mutilated or falsified, or has been privy to the concealment, destruction, mutilation or falsification of, any book or paper affecting or relating to the property or affairs of the company;
- where an officer of the company makes any material omission in any statement relating to the affairs of the company; and

34 Section 89 of the IRDA.

35 Section 99 of the IRDA.

36 *Ascentra Holdings, Inc (in official liquidation) and others v APGK Pte Ltd* [2023] SGCA 32 at [41].

37 *Re PT Garuda Indonesia (Persero) Tbk* [2024] 3 SLR 254 at [144].

38 *Ascentra Holdings, Inc (in official liquidation) v SPGK Pte Ltd* [2024] 1 SLR 130 at [26].

- where within 12 months immediately before the commencement of the judicial management or winding up or at any time thereafter, an officer of the company attempts to account for any part of the property of the company by fictitious losses or expenses

Any officer of the company who commits any of the aforementioned acts shall be guilty of an offence and liable on conviction to a fine not exceeding S $10,000 or to imprisonment for a term not exceeding 2 years.

5.3 Avoidable transactions – fraudulent conveyances and preference actions

5.3.1 What are the rules governing transaction avoidance?

The rules governing transaction avoidance can be found within Division 3 of Part 9 of the IRDA.

Under section 224 of the IRDA, where a company transacts with a person for no consideration or significantly lower consideration in money's worth (more commonly referred to as "undervalued transactions"), and the company enters judicial management or winding-up proceedings, the court may order the avoidance of the undervalued transaction. The touchstone is whether there was a bargain of such a magnitude that it cannot be explained by normal commercial practice. It is a defence that the company transacted in good faith and for the purpose of carrying on its business, or there were reasonable grounds for believing the transaction would benefit the company at the time of transaction.

Under section 225 of the IRDA, where a company does anything or suffers anything to be done which has the effect of giving a particular creditor, surety, or guarantor a better position in winding-up proceedings, and the company enters judicial management or winding-up proceedings, the court may order the avoidance of such transactions where an unfair preference has been given.

Under section 228 of the IRDA, where a company is or has been a party to an extortionate transaction for or involving the provision to the company of credit, and the company enters judicial management or winding-up proceedings, the court may order the avoidance of the extortionate transaction. The transaction is presumed extortionate if it required grossly exorbitant payments to be made for the provision of credit.

Under section 229 of the IRDA, where a company created a floating charge on its property in favour of a connected person to the company, or in favour of any other person but the company was or became unable to pay its debts as a result, the floating charge is generally invalid.

5.4 Time limits for commencement of avoidance actions

5.4.1 Is there a limitation period for the commencement of avoidance action? Are there different limitation periods for concealed transactions?

The relevant time limits concerning the commencement of avoidance actions are generally set out in Division 3 of Part 9 of the IRDA, and are summarised in the table below:

Type of Transaction	Time Limit Within Which Transaction Must Have Occurred[39]	Relevant Section of the IRDA
Undervalued transactions under section 224 of the IRDA	Within the period starting 3 years before the commencement of the judicial management or winding up (as the case may be)	Section 226(1)(a)
Unfair preference to a connected person under section 225 of the IRDA	Within the period starting 2 years before the commencement of the judicial management or winding up (as the case may be)	Section 226(1)(b)
Any other type of unfair preference under section 225 of the IRDA	Within the period starting one year before the commencement of the judicial management or winding up (as the case may be)	Section 226(1)(c)
Extortionate credit transactions under section 228 of the IRDA	Within 3 years before the commencement of the judicial management or winding up (as the case may be)	Section 228(2)
Impugned floating charges under section 229 of the IRDA	With 2 years from the date of commencement of winding-up proceedings or judicial management if made in favour of a connected person, and 1 year from the same in any other case.	Section 229(2)

The statutory regime under the IRDA does not provide for different limitation periods for concealed transactions.

39 These time limits apply only if the company is unable or becomes unable to pay its debts within the meaning of section 125(2) of the IRDA in consequence of the transaction or preference and/or an undervalued transaction is entered with a person connected with the company: sections 226(2) and 226(3) of the IRDA.

6. Recognition of judgments in relation to asset tracing and recovery

6.1 UNCITRAL Model Law on Cross-Border Insolvency

6.1.1 Has the Model Law been implemented or enacted as part of its local legislation, and what remedies can be obtained under the Model Law for the identification, tracing, recovery and preservation of assets?

Singapore has adopted the Model Law through section 252 of the IRDA: see section 5.1 above.

The available remedies that can be obtained are distinguished between a "foreign main proceeding", where the debtor's centre of main interests is in a state where there is a foreign proceeding taking place, and a "foreign non-main proceeding", where other than a "foreign main proceeding", there is a foreign proceeding taking place in a state where the debtor has an establishment.

Under article 20 of the Model Law, upon recognition of a "foreign main proceeding", there is an automatic stay and suspension of the following: commencement or continuation of actions or proceedings concerning the debtor's property rights, obligations or liabilities; execution against the debtor's property; and the right to transfer, encumber or otherwise dispose of any property of the debtor. The stay and suspension, however, do not affect any right to take any steps to enforce security over the debtor's property.[40]

Under article 21 of the Model Law, where a "foreign proceeding" is recognised (whether it is a foreign main proceeding or a non-main proceeding), the court has discretion to grant various reliefs that may be obtained for the identification, tracing, recovery and preservation of assets. For instance, articles 21(1)(a) and 21(1)(b) of the Model Law give the court the power to stay individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, or stay execution against the debtor's property. Such relief is intended to facilitate the preservation of the debtor's assets.

In addition, article 21(1)(d) of the Model Law allows the court to provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities which would facilitate the identification, tracing and recovery of a debtor's assets. Article 21(1)(e) of the Model also gives the court the power to entrust the administration or realisation of all or part of the debtor's property located in Singapore to the foreign representative, or another person designated by the court, to ensure that the debtor's assets are properly administered and liquidated.

Such relief may be granted subject to the requirement under article 22 of the Model Law, namely that the interests of the creditors and other interested persons, including if appropriate the debtor, are adequately protected.

6.2 Judicial insolvency network

6.2.1 Have the JIN Guidelines been adopted, and what tools are available under the JIN Guidelines to facilitate court to court communication in respect of any recognition application made to court or any court filings for the purpose of identifying, tracing, recovering and preserving assets?

The JIN held its inaugural conference in Singapore on 10 and 11 October 2016, which involved insolvency judges from 10 jurisdictions including Singapore. At the end of the conference, draft guidelines intended to facilitate cross-border communication and cooperation regarding insolvency matters were prepared. These draft guidelines were eventually formalised into the Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters (JIN Guidelines).

On 1 February 2017, the Supreme Court of the Republic of Singapore announced that the JIN Guidelines would be considered in any case involving cross-border proceedings relating to insolvency or adjustment of debt commenced in more than one jurisdiction (Parallel Proceedings): see Registrar's Circular No. 1 of 2017. Since then, the Supreme Court has also adopted the JIN's Modalities of Court-to-Court Communication (Modalities) to supplement the JIN Guidelines: see Registrar's Circular No. 7 of 2020.

Under the JIN Guidelines, the Singapore courts have the authority to communicate directly with a foreign court as well as receive information from them. The courts can communicate through any other method agreed by the two courts, or the following methods: sending copies of court documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate; directing counsel to transmit copies of documents filed or to be filed with the court to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate; or participating in two-way communications with the other court by telephone, video conference call or other electronic means. Furthermore, the courts may designate judges or administrative officials to act as the facilitator, initiating or receiving communications on behalf of either judge. However, the judges may by-pass the use of a facilitator if both judges are amenable.

40 Article 20(3) of the SG Model Law.

In the liquidation of Three Arrows Capital Ltd (3AC), which involved insolvency proceedings in both the British Virgin Islands and Singapore, the liquidators of 3AC obtained the Singapore Court's approval and adoption of a cross-border insolvency protocol which was modelled after the JIN Guidelines and Modalities.[41]

6.3 Other forms for recognition of judgments and reliefs granted under common law or any other legislations

6.3.1 How do foreign judgments become recognixed? What relief may be granted upon recognition of the foreign judgments in relation to the identification, tracing, recovery and preservation of assets of the debtor company which the foreign judgment relates to?

There are generally three ways by which foreign judgments may be recognised in Singapore. A foreign judgment may be enforced in Singapore at common law if it is an *in personam* final and conclusive foreign judgment rendered by a court of competent jurisdiction, which is also a judgment for fixed sum of money, unless it was procured by fraud, or its enforcement would be contrary to public policy, or the proceedings in which it was obtained were contrary to natural justice: *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [13] and [14]. Furthermore, judgments that involved the enforcement of foreign penal, revenue or other public laws would not be enforced: *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [78].

A foreign judgment may also be enforced via the Reciprocal Enforcement of Foreign Judgments Act 1959 (REFJA) if the judgment in question cannot be recognised or enforced in Singapore under the Choice of Court Agreements Act 2016 (CCAA), and if the judgments were issued from any of the countries specified under REFJA. Judgments enforceable under the REJFA include interlocutory or final judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party, and includes a consent judgment, a consent order and a judicial settlement. However, for countries specified under the Reciprocal Enforcement of Foreign Judgments (United Kingdom and the Commonwealth) Order 2023, only money judgments that are final and conclusive as between the parties to it are enforceable.

Judgments obtained from the courts of Contracting States of the Hague Convention may be enforced under the CCAA, which applies in every international case where there is an exclusive choice of court agreement concluded in a civil or commercial matter subject to certain statutory exceptions. The judgment to be enforced under the CCAA should be a final court decision on the merits, a consent order, a consent judgment or a judgment given by default; or a determination by a court of any costs or expenses relating to the court decision, consent order, consent judgment or judgment given by default: see *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [6]-[9].

7. Privacy related issues when investigating and tracing assets

7.1 Privacy law issues related to assets of the insolvent company

7.1.1 Which (privacy) laws and regulations govern the processing of personal data in asset tracing investigations?

In Singapore, the collection, use and disclosure of personal data is regulated under the Personal Data Protection Act 2012 (PDPA). Specifically, section 17(1) read with the First Schedule to the PDPA provides that an individual's personal data may be collected, used and disclosed without the individual's consent if it is necessary for any investigation or proceedings[42] and / or if it is necessary for an organisation to recover a debt owed by the individual to the organisation.[43]

7.1.2 Who is considered the controller within the meaning of article 4 par. 7 of the General Data Protection Regulation (GDPR) (e.g. for keeping the books and administration or processing personal data) during insolvency proceedings?

Singapore has not adopted the EU GDPR. Instead, the collection, use and disclosure of personal date is regulated under the PDPA. The Personal Data Protection Commission (PDPC) was established on 2 January 2013 to administer the PDPA. As such, the PDPC would be considered the equivalent of the "controller" as defined in the EU GDPR and does not change due to insolvency proceedings. However, liquidators and an organization's Data Protection Officer would be expected to work together in insolvency proceedings to ensure compliance with privacy laws: see further below.

41 *Three Arrows Capital Ltd and others v Cheong Jun Yoong* [2024] 1 SLR 419 at [42]. See also Russell Crumpler et al. v Cheong Jun Yoong et al. BVIHC (COM) 2023/0003; 2022/0119 at [19].

42 Paragraph 3 of Part 3 of the First Schedule to the PDPA.

43 Paragraph 4(a) of Part 3 of the First Schedule to the PDPA.

7.1.3 *If the GDPR is not applicable, who is considered the person (natural person or entity) responsible for compliance with privacy laws (e.g. for keeping the books and administration or processing personal data) during the insolvency proceedings?*

Section 11(3) of the PDPA stipulates that an organisation must designate one or more individuals to be responsible for ensuring that the organisation complies with the PDPA, commonly referred to as a Data Protection Officer (DPO).

In insolvency proceedings, section 243 of the IRDA requires any person, who in the opinion of the liquidator can give information that the liquidator requires, to provide such information and / or attend on the liquidator as required. Liquidators and DPOs are therefore expected to work together in insolvency proceedings to ensure compliance with privacy laws.

7.1.4 *Are there any legal requirements or obligations for obtaining and processing personal data within your jurisdiction, including sensitive data (e.g. criminal records), during the asset tracing process?*

In Singapore, the legal requirements for obtaining and processing personal data are not specific to the asset tracing process. Under section 243 of the IRDA, directors and employees of a company must give to the liquidator such information concerning the company and its promotion, formation, business, dealings, affairs or property as the liquidator may reasonably require. Specifically, under section 234(1)(a) of the IRDA, a person who does not fully and truly disclose to the liquidator all movable and immovable property of the company is guilty of an offence. Liquidators can also commence civil proceedings under Order 11 Rule 11(1) of the ROC against third parties (such as banks) to compel the production of documents and information to identify possible parties to any proceedings and to enable a party to trace the party's property.[44]

7.1.5 *Are there any other relevant obligations in relation to the processing of personal data in the course of insolvency proceedings?*

There are no specific statutes or rules governing the processing of personal data in the course of insolvency proceedings. Generally, the PDPA only allows the personal data of an individual to be collected, used and disclosed with that individual's consent unless it falls under one of the statutory exceptions specified in the PDPA: see section *7.1.1* above.

7.1.6 *Are there restrictions on sharing personal data with third parties (e.g. law enforcement or creditors) involved in the insolvency proceedings?*

Generally, under the PDPA, an individual's personal data may only be disclosed with that individual's consent. However, paragraph 4 of Part 3 of the Second Schedule to the PDPA provides that an individual's personal data may be disclosed to any officer of a prescribed law enforcement agency upon production of a written authorisation signed by the head or director of that agency certifying that the personal data is necessary for the purposes of the functions or duties of the officer. Prescribed law enforcement agencies include the Singapore Police Force and the Corrupt Practices Investigation Bureau.

7.1.7 *If the GDPR is not applicable, are there any restrictions for transfers of personal data to countries outside your jurisdiction?*

The transfer of personal data outside Singapore is governed by section 26 of the PDPA read with regulations 10 to 12 of the Personal Data Protection Regulations 2021 (PDPR).

There are two restrictions under this legal framework. First, the transferring organisation must take appropriate steps to ensure that the recipient is bound by legally enforceable obligations, including any law or other legally binding instrument. Second, the transferring organisation must provide the personal data with a standard of protection comparable to the protection under the PDPA. In the course of insolvency proceedings, this means that the transferring organisation must take reasonable steps to ensure that the personal data is not used or disclosed by the recipient for any other purpose.

7.1.8 *Are there pending legislative proposals or amendments that may impact the processing of personal data during asset tracing in insolvency proceedings?*

There are currently no pending legislative proposals or amendments in Singapore that may impact the processing of personal data during asset tracing in insolvency proceedings.

44 Order 11 Rule 11(1) of the ROC 2021.

7.2 Privacy law issues related to assets of directors or other parties

7.2.1 What legal grounds or exemptions allow the processing of personal data of directors or other parties during asset tracing, particularly when the insolvency representative considers actions or has initiated actions against them?

Section 17(1) read with the First Schedule to the PDPA provides that an individual's personal data may be collected, used and disclosed without the individual's consent if it is necessary for any investigation or proceedings and / or if it is necessary for an organisation to recover a debt owed by the individual to the organisation. Furthermore, paragraph 4 of Part 3 of the Second Schedule to the PDPA provides that an individual's personal data may be disclosed to any officer of a prescribed law enforcement agency upon production of a written authorization signed by the head or director of that agency certifying that the personal data is necessary for the purposes of the functions or duties of the officer.

7.2.2 Do these legal grounds or exemptions only apply to a (court appointed) insolvency representative, or also to other parties?

There is no legislation in Singapore concerning the regulation of personal data specifically in the insolvency context. Instead, the PDPA provides the overarching framework for the collection, use and disclosure of personal data, whether in everyday contexts or in specific situations such as insolvency.

8. Considerations when criminal law is involved

8.1 How should the insolvency representative or provisional insolvency representative or other authorised person deal with the authorities when criminal law is involved?

If any criminal activity is suspected, insolvency representatives may be required to file suspicious transaction reports (STRs) with the Singapore Police Force's Suspicious Transaction Reporting Office. Section 45 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 provides that where a person knows or has reasonable grounds to suspect that any property represents the proceeds of, was used in connection with and / or is intended to be used in connection with criminal activity, he must disclose such knowledge or suspicion by filing a STR. An individual who fails to do so may be liable to a fine not exceeding S $250,000 and / or to imprisonment for a term not exceeding 3 years.

Furthermore, under section 424 of the Criminal Procedure Code (CPC), any person aware of the commission of or the intention of any person to commit any of the arrestable offences specified under the CPC must immediately inform the police of the same. Examples of such arrestable offences include offences against the state, offences relating to unlawful assembly and offences affecting the human body such as murder.

8.2 Are there any relevant laws, authorities and considerations under criminal law which may be applicable in relation to an application made by the provisional insolvency representative or authorised person for any provisional measures?

Insolvency and bankruptcy related offences are generally set out in the IRDA. Part 9 Division 5 of the IRDA sets out the offences applicable in the judicial management and winding up processes. For instance, section 240 provides that where an officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the court has the power to compel such officer to repay or restore the money or property with interest, notwithstanding the fact that the offence is one for which the officer is criminally liable.

Part 20 of the IRDA sets out bankruptcy offences. For instance, under section 408 of the IRDA, it is an offence for a bankrupt to make any false statement or material omission relating to his / her affairs.

Furthermore, under section 243 of the IRDA, officers and employees of the company are under a duty to cooperate with liquidators by providing information concerning the company and its promotion, formation, business, dealings, affairs or property as the liquidator may reasonably require, and to also attend on the liquidator as may be reasonably required. Failure to comply with either is an offence punishable by a fine.

Section 244 of the IRDA also allows a liquidator to apply to the court for any officer or person known or suspected to have in his or her possession any property of the company or supposed to be indebted to the company to appear before the court, and to submit an affidavit containing an account the person's dealings with the company or to produce any books, papers or other records in the person's possession or under the person's control relating to the promotion, formation, business, dealings, affairs or property of the company. Any person so summoned who fails to appear before the court may have a warrant issued for his arrest and / or the seizure of any books, papers, records, money or goods in that person's possession.

9. Digital assets and crypto assets

9.1 Crypto as an asset and ownership issues

9.1.1 How is cryptocurrency classified?

In Singapore, cryptocurrency is generally regarded as property, no different from cash, money, and more traditional forms of security. Indeed, Order 22 of the ROC defines movable property as "including cash, debt, deposits of money, bonds, shares or other securities, membership in clubs or societies, and cryptocurrency or other digital currency". Like more traditional forms of movable property, cryptocurrency is capable of being subject to an enforcement order for seizure and sale. The Monetary Authority of Singapore (MAS) and Inland Revenue Authority of Singapore regard cryptocurrency as "digital payment tokens" that are subject to regulatory measures and controls. Bitcoins, Ether and Ripple are all examples of "digital payment tokens". As of 1 January 2020, suppliers of "digital payment tokens" have been exempt from goods & services tax.

The Singapore High Court had held that cryptocurrency is capable to being subject to a trust. In *ByBit Fintech Ltd v Ho Kai Xin and others* [2023] 5 SLR 1748, the Singapore High Court held that crypto assets were property capable of being held on trust. In that case, the Court declared that the respondent held cryptocurrency assets (specifically, United States Dollar Tether) on constructive trust for the claimant on the basis that they were stolen property. Moreover, the claimant was held to be entitled to trace the cryptocurrency assets. In this regard, the cryptocurrency assets were treated no differently from traditional forms of fiat currency.

9.1.2 What rights and interest do cryptocurrency exchanges or trading platforms have in the cryptocurrency held in accounts at the exchange or platforms?

In Singapore, cryptocurrency exchanges and trading platforms are regulated under the Payment Services Act 2019 (PSA). As of 4 April 2024, the new section 21A of the PSA empowers the MAS to prescribe requirements that cryptocurrency exchanges / trading platforms will have to adhere to. These requirements are set out in a new Division 2A of Part 2 of the Payment Services Regulations 2019 (PS Regs) and are intended to safeguard the cryptocurrency assets of customers received by cryptocurrency exchanges / trading platforms.

These requirements were given effect on 4 October 2024 and includes the requirement that any cryptocurrency assets belonging to a customer must be deposited in a trust account maintained by the exchange / platform failing which the assets will have to be returned to the customer.[45] Such assets in the trust account cannot be used for the payment of debts of the licensee and are not liable to be taken under or pursuant to an enforcement order or a process of any court.[46] However, the exchange / platform may deposit these assets in a trust account together with, and commingled with, assets belonging to other customers.[47]

9.1.3 Is cryptocurrency capable of being subject to a trust, secured creditor interest or custody arrangement?

In *ByBit Fintech Ltd v Ho Kai Xin and others* [2023] 5 SLR 1748, the Singapore High Court held that crypto assets were property capable of being held on trust. See section 9.1.1 above.

It follows that cryptocurrency would likely be regarded in Singapore as likewise capable of being subject to a secured creditor interest or custody arrangement.

9.2 Core issues in insolvency

9.2.1 When a cryptocurrency exchange / platform is subject to insolvency proceedings, what are the applicable legal standards for determining whether the exchange / platform or the accountholder owns the cryptocurrency held at the exchange / platform?

In the light of the upcoming changes to the PSA and the PS Regs, all cryptocurrency assets belonging to customers must be deposited into a trust account, although the exchange / platform may deposit and commingle these assets with assets belonging to other customers: see section 9.1.2 above.

Where such cryptocurrency assets have been commingled, it might be possible for a customer to trace and establish a direct ownership interest in his / her cryptocurrency assets, although the process might be complicated. For example, the transaction history of a freshly minted bitcoin is different compared to one that was minted many years ago and which has gone through many transactions. Using this transaction history, it might be possible to identify which wallet the comingled assets originated from. This method of analysing the cryptocurrency's transaction history is known as the UTXO (unspent transaction outputs) method. UTXO represent amounts of bitcoin that was received in an address and not yet spent, and so each UTXO is unique due to its history of transaction. That said, the actual tracing process can be a lot more complex than the example above, and where transactions involve mixers, it can obfuscate the trail and make tracing very difficult. In Singapore, the MAS issued guidelines on consumer protection measures by digital payment token service providers on 2 April 2024.

45 Rule 18B(1) of the Payment Services Regulations 2019.
46 Rule 18B(3) of the Payment Services Regulations 2019.
47 Rule 18C(2)(a) of the Payment Services Regulations 2019.

Under these new guidelines, digital payment token (DPT) firms will have to conduct daily reconciliation of customers' assets, keep proper records, as well as maintain access and operational controls of customers' DPTs in Singapore.[48]

In this regard, regulations 18D(e)(iii) and 18E(b) of the PS Regs stipulate that exchanges and platforms must disclose in writing to the customer the risks involved should it intend to commingle that customer's assets with the assets of other customers.

9.2.2 *Have there been any significant legal decisions regarding ownership of cryptocurrency in insolvency proceedings?*

In *Loh Cheng Lee Aaron and another v Hodlnaut Pte Ltd* (Zhu Juntao and others, non-parties) [2023] SGHC 323 (Hodlnaut), the Singapore High Court held that cryptocurrency funds held by a company from various creditors would count as "debts" within the meaning of section 125(1)(e) read with section 125(2)(c) of the IRDA, which provide that the court may order the winding up of a company if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in making the this determination the court must take into account both the contingent and prospective liabilities of the company. The court opined that the issuance of a winding-up order required the court to look at the holistic position of the company and consider both monetary and non-monetary "debts", the latter of which may ultimately be payable in money.[49]

The Hodlnaut decision contrasts with the decision in *Algorand Foundation Ltd v Three Arrows Capital Pte Ltd* (HC/CWU 246/2022) (30 March 2023) (General Division of the High Court, Singapore) (Three Arrows), where the failure to satisfy a statutory demand for payment in cryptocurrency did not satisfy the requirement in section 125(2)(a) – which provides that a company is deemed unable to pay its debts if it fails to satisfy a demand for a money sum.[50] There is currently no statute or case law in Singapore stating that cryptocurrency should be treated as money in the general sense.

9.2.3 *How is cryptocurrency valued in insolvency proceedings?*

All assets and liabilities (including cryptocurrency) are valued as at the date of the commencement of winding-up. Under section 126 of the IRDA, winding-up commences on the date when the relevant resolution is passed in the case of voluntary winding-up, or the date when the application was made in all other cases. For valuation purposes, they are converted to a master currency.

Cryptocurrency is no exception, and it is for the court to accept the valuation based on the evidence.[51] However, uncertainty remains as to ascertaining the value of the cryptocurrency, even with a fixed date of valuation. As the Singapore High Court observed in *Fantom Foundation Ltd v Multichain Foundation Ltd* [2024] SGHC 173 at [40], the unique nature of cryptocurrency means that its value is susceptible to wild movement which may raise difficult questions on what the most appropriate methodology would be for valuing such inherently volatile assets. Furthermore, whilst the IRDA empowers liquidators to do all things necessary to distribute the assets of the company, including the passing of resolutions to allow for the distribution of assets in kind, a key challenge faced by liquidators is to determine the appropriate methodology of assessing the company's liabilities and having a single denominator for liabilities.

One straightforward methodology is to rely on the cryptocurrency's historical value. This can be determined from the historical trading information available from exchanges or publicly available information on reputable websites that track such information. However, where the future value of a cryptocurrency is required, the assessment might be more complex as there are more factors to consider, such as (but not limited to):

- What is the intended current and future application of the digital asset?
- What is the underlying blockchain technology? Will it be able to support a broad range of digital assets?
- What is the supply and demand?
- What is the market sentiment?
- What is the global economic outlook? (Is cryptocurrency the preferred wealth preservation asset or hedge against inflation risks?)
- What is the value of the cryptocurrency compared against other cryptocurrencies?

9.2.4 *When a cryptocurrency / platform goes into insolvency, do customers have any special priority or are they treated as general unsecured creditors?*

In Singapore, section 203 of the IRDA sets out the priority of debts where a company enters insolvency. Generally, secured creditors and preferential creditors have priority. The latter includes the liquidators' costs and expenses, as well as wages and salary due and owing to the company's employee. It is only after secured and preferential creditors

48 Guidelines on Consumer Protection Measures by Digital Payment Token Service Providers: ps-g03_guidelines-on-consumer-protection-safeguards-by-dpt-service-providers_vf.pdf (mas.gov.sg)

49 *Loh Cheng Lee Aaron and another v Hodlnaut Pte Ltd (Zhu Juntao and others, non-parties)* [2023] SGHC 323 at [8].

50 Idem at [12].

51 Idem at [11].

have been paid are unsecured creditors then able to recover their debt based on the remaining assets of the company on a *pari passu* basis. As such, whether the customers of a cryptocurrency exchange or platform have any priority over general unsecured creditors depends on the manner in which the customer's cryptocurrency is being held.

9.2.5 *If the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, how can that law be used to assist with the tracing and recovery of cryptocurrency assets? Are there other laws or rules dealing with cross-border insolvency that can be used to assist with the tracing and recovery of cryptocurrency assets?*

Upon recognition of a foreign proceeding, a list of remedies are available under article 21 of the Model Law: see section 6.1 above.

Apart from the Model Law, there are civil remedies available as well, including the granting of production orders under Order 11 Rule 11 of the ROC (see section 9.4) and seeking freezing orders to prevent the dissipation of assets (see section *9.3.4*). Liquidators can also commence legal proceedings on behalf of the company against its directors for breach(es) of fiduciary duties that may have caused loss to the company, which would include any loss involving the company's cryptocurrency assets.

9.3 Clawback / recovery of cryptocurrency assets

9.3.1 *What types of non-insolvency claims are available to recover stolen / misappropriated cryptocurrency?*

One of the most common types of civil claims brought before the Singapore Court to recover stolen / misappropriated cryptocurrency is on the basis of fraudulent misrepresentation. In this regard, the manner in which a claimant proves his case is largely similar to any claim involving the recovery of any other kind of stolen / misappropriated property.

However, claims involving the recovery of cryptocurrency poses unique challenges, both with regard to its legal status (i.e. whether it should be considered property capable of being the subject of a proprietary injunction) as well as practical difficulties identifying the parties behind the fraud. In this regard, recent Singapore court decisions have provided some clarity on these issues. For instance, in *CLM v CLN* [2022] 5 SLR 273, the Singapore High Court held that cryptocurrency was capable of giving rise to proprietary rights, which could be protected via a proprietary injunction in that it was definable, identifiable by third parties, capable in its nature of assumption by third parties, and has some degree of permanence or stability. In that case, the victim whose cryptocurrency assets were stolen after they were withdrawn from his wallets without his knowledge or consent successfully obtained a proprietary injunction against defendants' whose identities were unknown at the time of the application. In doing so, the court not only recognised the proprietary nature of cryptocurrency, but also affirmed that it had jurisdiction to grant interim orders against persons unknown at the time of the application. This decision has had a significant impact on the ability of victims to prevent the dissipation of stolen cryptocurrency assets by obtaining the necessary freezing orders.

9.3.2 *Are there any clawback or avoidance claims under insolvency law that can be brought to recover cryptocurrency transferred from the debtor prior to commencement of insolvency proceedings?*

Part 9 Division 3 of the IRDA provides for the adjustment of transactions that took place prior to the liquidation. Examples of avoidable transactions include transactions at an undervalue,[52] transactions deemed to give an unfair preference to any person,[53] and extortionate credit transactions. Each of these avoidable transactions are subject to statutory time limits within which they must fall within to be avoidable. See section 5.4 above.

9.3.3 *Are there any special or unique issues in bringing a clawback / avoidance claim to recover cryptocurrency? Have there been any significant decisions in this area?*

There are no novel issues that have been brought before the Singapore courts for determination involving the use of clawback / avoidance claims to recover cryptocurrency. Possible issues that may arise include the proper valuation of cryptocurrency in such situations, a matter that has yet to be definitively addressed, whether in case law or statute. The difficulty in assessing the value of cryptocurrency lies in its inherently volatile nature: *Fantom Foundation Ltd v Multichain Foundation Ltd* [2024] SGHC 173 (Multichain) at [35]. The Singapore High Court in Multichain observed that the unique nature of cryptocurrency led to two valuation sub-issues: ascertaining its market value at any one point in time and determining the date of assessment of its value: see section 9.2.3 above.

52 Section 224 of the IRDA.
53 Section 225 of the IRDA.

9.3.4 *What remedies are available under both insolvency and non-insolvency law to freeze or compel the turnover of cryptocurrency assets? What are the legal standards / requirements for obtaining those remedies?*

Section 242 of the IRDA stipulates that the court may require any person who has in his or her possession or control any property, papers or records to which the company appears entitled to immediately surrender such property to the liquidator. Should such person not cooperate, liquidators can apply under section 244 of the IRDA to the court to compel any person known or suspected to have in his possession any property of the company to appear before the court and submit an affidavit accounting for that person's dealings with the company, failing which an arrest warrant may be issued and / or the books, papers, records, money or goods of that person seized. See section 8.2 above.

Outside of the IRDA, claimants can also apply to the Singapore courts for a freezing order to prevent the further dissipation of property. Such freezing orders (more commonly known as Mareva injunctions) are usually frequently obtained as a precursor to civil proceedings. In *CLM v CLN* [2022] 5 SLR 273, a proprietary injunction was issued against "persons unknown" to prevent the further dissipation of cryptocurrency assets. See sections 9.3.1 and 2.6 above.

9.4 Tracing of cryptocurrency

9.4.1 *What discovery or information gathering tools are available, under insolvency and non-insolvency law, to obtain information on the location of cryptocurrency and the owner of that cryptocurrency?*

Under section 334 the IRDA, the Official Assignee may require a bankrupt to produce and surrender any book or document relating to the bankrupt's property, which would include cryptocurrency.

Similarly, sections 243 and 244 of the IRDA place a duty on officers and employees to give to liquidators full disclosure regarding the company's affairs, and if necessary, empower liquidators to apply to the court for the relevant orders to compel any person known or suspected to have in his or her possession any property of the company to submit an affidavit contain an account of that person's dealings with the company, and / or to produce all books, papers and records in his / her possession. See section 8.2 above.

Order 11 Rule 11 of the ROC empowers the court to order the production of documents against parties in an action as well as non-parties to enable a party to trace the party's property. It is common for parties to apply for Bankers' Trust Orders against banks to compel the production of documents and information such as bank statements and account opening forms to identify the ultimate beneficial owner of a bank account and to trace monies that have passed through the same. The applying party will have to show, inter alia, that it had a good arguable case against the account holders, and that it is just and convenient to compel the banks to produce such documents notwithstanding their obligation to clients to keep customer information confidential under banking secrecy laws.

9.4.2 *What type of information are cryptocurrency exchanges / platforms required to collect from customers (including KYC information) when they open an account?*

The MAS issued MAS Notice PSN02 on 2 April 2024 requiring all cryptocurrency exchanges / platforms to at least obtain a customer's full name, identification number, residential or business address, date of birth or date of incorporation, as well as nationality or place of incorporation. Apart from such basic information, cryptocurrency exchanges / platforms are also expected to take further steps to verify the accuracy of the information provided using independent source date, documents, or information. If there exists a beneficial owner in relation to a customer, cryptocurrency exchanges / platforms are also expected to identify such beneficial owner(s) and verify their identities using reliable, independent sources.

9.4.3 *Can the KYC information about accountholders collected by a cryptocurrency exchange / platform be obtained through a formal discovery process? Are there any special issues to navigate in order to obtain such information?*

Order 11 of the ROC empowers the court to order the production of documents against parties in an action as well as non-parties to enable a party to trace the party's property.

9.4.4 *What type of forensic or tracing tools are available to assist with the tracing and recovery of cryptocurrency?*

As cryptocurrency becomes increasingly popular, both as a form of currency and investment, there is a plethora of forensic and tracing tools available to assist with the tracing and recovery of cryptocurrency. Due to the complexities of blockchain analysis, third party service providers are often engaged to assist with tracing and recovery. Popular service providers include Asset Reality and Chainalysis, both of which offer a full suite of services to facilitate the identification and tracing of cryptocurrency across blockchains using data analytics and intelligence gathering software. Other tools with similar capabilities include Elliptic, CipherTrace, TRM Labs and Merkle Science.

9.4.5 *What type of expert evidence is necessary to establish the tracing of stolen or misappropriated cryptocurrency to a particular account / wallet?*

Given the potential complexities of tracing cryptocurrency, it is often helpful to enlist the assistance of experts to identify the specific account or wallet where stolen or misappropriated cryptocurrency has been deposited. In this regard, it is increasingly common for third party service providers to be engaged to help trace cryptocurrency assets that have been stolen or misappropriated. These service providers often have access to software specifically designed to analyse movements on a blockchain and trace the movement of digital assets. The findings of such service providers are often used to supplement the available evidence provided by victims of cryptocurrency theft. When evaluating which service provider to engage, it might be useful to consider whether the service provider possesses the following skills and knowledge:

- Proficiency in using the specialised forensic tools.
- Knowledge of blockchain technology, wallets and transactions.
- Knowledge of legal and regulatory landscape.
- Subject matter expertise – expertise in conducting investigations and financial analysis (such as identifying suspicious transactions, illicit behaviour). Asset recovery procedures are also important, and may include, but is not limited to, liaising with VASPs (virtual asset service providers). Knowledge of other forensic procedures such as maintaining chain of custody and proper documentation for the purposes of presenting the evidence to court would also be important.
- Multidisciplinary knowledge and approach – coordination with other departments, law enforcement, financial institutions, cyber security which will increase the likelihood of recovery.

9.5 Government / regulatory intervention

9.5.1 *What governmental bodies or agencies have oversight over fraud or theft of cryptocurrency?*

The Commercial Affairs Department (CAD), which is a division of the Singapore Police Force, is Singapore's principal white-collar crime investigation agency which investigates into a spectrum of commercial and financial crimes including fraud and theft (which would include property such as cryptocurrency).

The primary government body that has oversight over the regulation of cryptocurrency is the Monetary Authority of Singapore (MAS). The MAS is Singapore's central bank and integrated financial regulator. Under the PSA, the MAS is empowered to impose requirements on digital payment token service providers that would help to combat money laundering and enhance user protection.

9.5.2 *Are there remedies available to law enforcement that could lead to the recovery or forfeiture of stolen / misappropriated cryptocurrency and the return of that cryptocurrency to the victims?*

Victims of stolen / misappropriated cryptocurrency can file a police report. The matter will likely be investigated by the CAD, which is Singapore's principal white-collar crime investigation. The CAD is vested with wide investigation powers and empowered to seize and / or freeze cryptocurrency assets held in Singapore cryptocurrency accounts. The seizure of property must be reported to the relevant court either one year after the date of seizure or when the property is deemed to no longer be relevant for purposes of any investigation, inquiry or trial (whichever is earlier).[54] Thereafter, under section 364 of the Criminal Procedure Code 2010, the court may make an order as it thinks fit for the disposal of any property produced before it.

54 ection 370(1) of the Criminal Procedure Code 2010.

THE NETHERLANDS

1. Before commencement of insolvency and restructuring proceedings (pre-order for insolvency and restructuring proceedings)

1.1 What are the relevant laws or rules and relevant provisional measures available in connection with the identification, tracing, recovery and preservation of assets before an application for an insolvency or restructuring proceeding is made?

Pursuant to the Dutch Code of Civil Procedure (DCCP), a creditor is able to levy pre-judgment attachments (*conservatoire beslagen*) on certain assets of a debtor. In order to be able to levy a pre-judgment attachment, a creditor needs to obtain leave from the judge in preliminary relief proceedings (*voorzieningenrechter*). Generally speaking, such leave is easily obtained in the Netherlands. However, if the attachment proves to be wrongful, the creditor who has levied the pre-judgment attachment is in principle liable for the damages that have been incurred by the debtor as a result of the attachment. Once a pre-judgment attachment has been levied, the creditor will have to initiate court proceedings on the merits within a period that is specified by the judge in preliminary relief proceedings. If the creditor is successful in such proceedings and obtains an enforceable judgment against the debtor, the pre-judgment attachment is automatically converted into an attachment in execution (*executoriaal beslag*).

The ability to secure assets in the preliminary stage is a powerful tool in the armoury of the insolvency practitioner. It allows a degree of certainty regarding the potential recovery which assists with determining the commerciality of the action as well as the potential recovery for the creditors within the estate.

As with all powerful tools they must be wielded with caution. The fact that there could be a considerable amount of cost in the event that the action fails should always be borne in mind. It is therefore essential to ensure that both the claim and the asset base on which to attach the claim are evidentially strong.

Article 194 DCCP allows for a party that has a legitimate interest to request a copy, an extract or the inspection of certain documents from another party. On 1 January 2025, the right to make such a request was transferred from article 843a DCCP (which no longer exists) to article 194 DCCP. With the introduction of article 194 DCCP, the legislator has intended to make it easier to gain access to documents outside of court. As a result, the right of inspection now has a more prominent position, and is now on more equal footing with other means of gathering evidence instead of being seen as an *ultimum remedium*.

Article 194 DCCP can potentially assist in identifying and tracing assets. Based on case law in conjunction with article 194 DCCP, it is also possible to file an application for the seizure of specific documents in order to safeguard them as evidence. For intellectual property cases, this possibility follows explicitly from article 1019b et seq. DCCP.

Pursuant to Regulation (EU) 655/2014, it is also possible for a creditor to request a Dutch court for permission to levy a pre-judgment attachment on a bank account of a debtor in a different Member State of the European Union (with the exception of Denmark). This is known as the European Account Preservation Order.

The ability for recognition and assistance within the EU again assists the insolvency practitioner by allowing to have a far easier reach into the bank accounts of those have potentially received assets that need repatriation. This should deter parties from merely picking another EU country to move their assets to with an expectation that the process to recover them will be more difficult or impossible.

As previously stated, a strong evidential basis for the claim, by carrying out a full investigation and evidence collection, will mitigate the risks of action in this regard. This should always be the key focus alongside securing assets in the first instance.

2. Summary of corporate insolvency and restructuring proceedings

2.1 Formal insolvency legislation for corporations

2.1.1 Does your jurisdiction have formal insolvency and restructuring legislation or a framework for corporations? What legislation(s), laws or rules govern the insolvency and restructuring of corporations? Does specific legislation, laws or rules exist for the identification, tracing, recovery and preservation of assets?

As the Netherlands is a member of the European Union, Regulation (EU) 2015/848 on insolvency proceedings (recast) applies in the Netherlands. The Dutch Bankruptcy Act provides for the following insolvency proceedings for corporations:

(1) bankruptcy (*faillissement*);

(2) suspension of payments (*surseance van betaling*); and

(3) private restructuring plans under the Act on the Confirmation of Private Restructuring Plans (*Wet homologatie onderhands akkoord*; – WHOA or Dutch Scheme).

In addition, there are special proceedings for banks, insurance companies and investment firms. For these special proceedings, in addition to the Dutch Bankruptcy Act, the Financial Supervision Act (*Wet op het Financieel Toezicht*) contains applicable provisions.

While there is no statutory basis (yet), pre-packs are allowed by some courts in the Netherlands in order to attempt a silent restructuring of the business of the debtor.

There is no specific legislation for the identification, tracing, recovery and preservation of assets. The creditors should rely on the options generally available under the Dutch law, while bankruptcy trustees have certain special powers under the Dutch Bankruptcy Act.

In specific cases, it can be relevant for the insolvency practitioner to engage a financial advisor (this can also be a forensic accountant) and for them to work alongside, focusing on the recovery angles. The right team with the right expertise will ensure that the right advice is given. It is not necessary to have specific laws for the identification, tracing, recovery and preservation if the functionality of this process can be achieved through domestic legislation. By being one team, it is possible to ensure a cohesive litigation strategy that allows all parties to work together to achieve a common goal for creditors.

2.2 Appointment of insolvency representative, provisional insolvency representative or authorised person

2.2.1 Upon the application of the insolvency or restructuring proceedings, does your jurisdiction have a legislative framework for the appointment of an authorised person or provisional insolvency representative who is entrusted with the administration or supervision of the debtor company's business or assets, or the realisation of all or part of the debtor company's assets?

2.2.2 Where an application for an insolvency or restructuring proceeding is not made, is there a similar legislative framework for the appointment of such an authorised person for the identification, tracing, recovery and preservation of the company's assets?

In bankruptcy proceedings, a bankruptcy trustee (*curator*) is appointed by the court to take charge of the liquidation of the debtor's assets. In view of maximising the value becoming available for distribution to the creditors as well as general interests such as the preservation of employment, the bankruptcy trustee will generally investigate a possible transfer of the business as a going concern. The bankruptcy trustee will shortly after his or her appointment inventorise the assets of the debtor and preserve these as much as possible. The bankruptcy trustee acts under the general supervision of a supervisory judge. The bankruptcy trustee requires the prior authorisation of the supervisory judge for certain acts, such as the continuation of activities, reaching amicable settlements, initiating legal proceedings, transferring (part of) the business as a going concern and terminating agreements with employees and landlords.

In the course of a pre-pack, without a statutory basis being present, a silent bankruptcy trustee (*beoogd curator*) can be appointed by the court in order to attempt a silent restructuring of the business of the debtor. Due to a lack of statutory basis, courts are unwilling or reluctant to appoint a silent bankruptcy trustee.

In suspension of payment proceedings, which is automatically granted by the court upon the filing of the application and can later be declared to be definitive after a hearing is held, an administrator (*bewindvoerder*) will be appointed by the court. During the suspension of payments, the business of the debtor is managed by the directors as usual, but the co-operation (approval / authorisation) of the administrator is required for acts binding / impacting the debtor. A suspension of payments can be converted by the court into a bankruptcy at its own initiative or at the request of the supervisory judge, the administrator or one or more creditors. As a straightforward restructuring tool, suspension of payments is rarely successful, as secured and preferred creditors (such as the tax authorities and employees) cannot be bound by a composition plan that is offered during suspension of payments proceedings.

The WHOA is a debtor in possession proceeding in which a restructuring officer (*herstructureringsdeskundige*) or an observer (*observator*) may be appointed. While both roles are different, both officers are required to look after the interests of the creditors but do not have authorisation to dispose of assets nor is the co-operation required for acts binding / impacting the debtor.

Dutch law does not specifically provide for representatives or authorised persons to be appointed for the identification, tracing, recovery and preservation of the debtor's assets. In case of mismanagement however, the Enterprise Chamber of the Amsterdam Court of Appeal can be requested to e.g. suspend directors or supervisory board members and / or (instead) appoint new directors and / or supervisory board members which will participate in decision-making regarding or take charge of the debtor's affairs. The Enterprise Chamber is able to order such steps as a preliminary measure, which is common in practice.

It is important to recognise the different roles and responsibilities to ensure that all parties are aware of their obligations. Directors should get very specific advice so as not fall foul of the current legislation and to ensure that asset disposals are not contrary to the current legislation. It is always imperative to understanding how assets are treated and who has the authority to deal with them in order to determine the right strategy in the right circumstances, ensuring that creditor interests are protected.

2.3 Effects and duties imposed on the debtor company

2.3.1 What are the effect(s) and duties imposed on the debtor's company upon the application of insolvency or restructuring proceedings in relation to the identification, tracing, recovery and preservation of assets? Is there a similar duty imposed on any party or company where an application for an insolvency or restructuring proceeding is not made?

Bankruptcy proceedings impose an obligation on the debtor and its officers (including shadow directors) to provide information and cooperate with the handling of the bankruptcy by the bankruptcy trustee. The books and records of the debtor should be handed over to the bankruptcy trustee. The debtor and its officers are obliged to disclose to the bankruptcy trustee information on all assets of the debtor. There is a similar right to information for the administrator in suspension of payments and the restructuring officer and observer in WHOA proceedings.

The collection of the books and records of the company forms an important part of the evidence gathering. It allows the insolvency practitioner and its financial advisors to review the affairs of the company during the period of time that it operated. It allows them to see both what happened to the assets in the company, how it functioned and what the thinking was behind the processes. This evidentially allows potential claims to be based on contemporaneous records and primary evidence. It forms a compelling evidence trail for where assets were sent and the beneficiary. In the event these have been misappropriated in some way, it provides the starting point to trace those assets through and potentially seize and return them or bring any other applicable claim against those that have unlawfully benefited.

There is no similar duty on the debtor or third parties outside of insolvency proceedings. Creditors should then rely on the regular framework under the Dutch Civil Code.

2.4 Stay of execution of assets

2.4.1 Upon the application of the insolvency or restructuring proceeding, is an automatic stay imposed on any existing, or the commencement of any new legal proceedings, or the realisation of assets (moveable and immoveable property) of the debtor company?

In bankruptcy, the basic principle under Dutch law is that creditors with pre-insolvency claims can only exercise rights against the debtor's estate through filing their claim. The bankruptcy trustee is solely authorised to dispose of the debtor's assets. Existing legal proceedings regarding pre-insolvency claims on the debtor are suspended and are only to be continued if a distribution on the claim is expected and the claim is disputed by the bankruptcy trustee. Suspension of payments and WHOA proceedings do not affect existing legal proceedings vis-à-vis the debtor or the commencement of new legal proceedings. However, actual enforcement can be prohibited, in case a cooling-off period (*afkoelingsperiode*) is imposed by the court. A cooling-off period prevents third parties from enforcing their rights.

Secured creditors are able to exercise their rights as if there were no bankruptcy, subject to a possible cooling-off period and / or a reasonable term set by the bankruptcy trustee for the enforcement to be completed. Suspension of payments does not affect creditors with preferential claims nor secured creditors. All three types of bankruptcy proceedings under Dutch law do not provide for an automatic stay regarding the debtor's assets applicable to secured creditors, but the court, or in bankruptcy the supervisory judge, can impose a cooling-off period of up to 2 months in bankruptcy or suspension of payments or of up to 4 months in WHOA proceedings. The maximum term in WHOA proceedings is 8 months. In bankruptcy or suspension of payments, the term can be extended once with up to 2months, which makes a maximum of 4 months in total.

During the cooling-off period, rights of third parties to take recourse against the assets of the debtor or bankrupt estate or to hand over assets that are in the possession of the debtor or bankrupt estate may only be exercised with the authorisation of the court (in WHOA proceedings) or the supervisory judge (in bankruptcy or suspension of payments), which is rarely granted. In WHOA proceedings, the debtor is obliged to ensure that the interests of secured parties or third parties are adequately protected.

Dutch law does not provide for a general stay or cooling-off period outside of insolvency proceedings. Creditors should rely on the options generally available under Dutch law to attach assets.

2.5 Power to restrain or order the transfer of assets

2.5.1 Does the insolvency representative, provisional insolvency representative or authorised person have the authority to limit the powers of the debtor company in respect of the transfer of its assets, or to issue a restraining order or injunction to any third party for the preservation or protection of assets of the debtor company?

Officers appointed in Dutch bankruptcy proceedings do not have the authority to (further) limit the powers of the debtor to dispose of its assets or to issue orders or injunctions to third parties.

In bankruptcy proceedings, the debtor automatically loses the right to dispose of its assets with effect from and including the day on which the bankruptcy is declared. In suspension of payments, the the co-operation (approval / authorisation) of the administrator is required for acts binding / impacting the debtor. If acts are taken in absence thereof, the administrator can request the conversion by the court into a bankruptcy. As a debtor in possession proceeding, under the WHOA neither the restructuring expert nor the observer can prevent the debtor from disposing of its assets. If acts detrimental to the creditors are taken by the debtor, the restructuring expert or observer can request with the court the repeal of its appointment.

From the perspective of the insolvency practitioner, it is important to ensure that an assessment of the assets is done quickly either by the insolvency practitioner or their financial advisor and those that may be removed are secured as soon as possible. This is especially important in circumstances where further authority is needed to do so.

Outside of bankruptcy proceedings, there are no specific options to have an officer appointed with the authority to measures to have the limit the powers of the debtor to dispose of its assets or to issue orders or injunctions to third parties. Creditors should rely on the options generally available under Dutch law, e.g. by requesting the preliminary relief judge (*voorzieningenrechter*) to issue a prohibition for the debtor or third parties to dispose of (certain) assets or to have these assets attached.

2.6 Safeguards, checks and balances

2.6.1 Does the insolvency representative, provisional insolvency representative or authorised person have to satisfy any test or legal threshold in order to obtain any reliefs in relation to the assets of the debtor company?

This is addressed collectively in the section below.

2.6.2 Is there a notice requirement by the provisional insolvency representative or authorised person to publicise any application for any provisional measures to be imposed against the debtor company, its creditors or any other third party? Is there an avenue for the debtor company, its officers, or any other third party to terminate or challenge the application for or imposition of any provisional measures? Is there a duration for which the provisional measures would be imposed?

In bankruptcy, the assets of the debtor are subject to a general bankruptcy attachment. All attachments made by individual creditors of the debtor expire. All assets of the debtor become part of the debtor's estate. This requires no further actions or applications by relief by the bankruptcy trustee, except of course where the title of the debtor to specific assets is disputed. The bankruptcy trustee should make use of the options generally available under Dutch law to, for example, attach assets or have assets handed over to the debtor's estate.

In WHOA proceedings, and in suspension of payments subject to the cooperation (approval / authorisation) of the administrator in suspension of payments, the debtor remains authorised to dispose of its assets.

3. Identification of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

3.1 Notice of insolvency proceedings

3.1.1 What effect(s) and duties imposed on the debtor's company upon the commencement of insolvency or restructuring proceedings in relation to the identification of assets?

Under Dutch law, there is no obligation on the debtor to notify creditors of a pending application for bankruptcy proceedings or bankruptcy proceedings being declared. Since bankruptcies and suspensions of payment are published in the central insolvency register (which is interconnected to the insolvency registers of other Member States of the European Union), it is assumed that third parties could have been aware of the bankruptcy proceedings. Therefore, such parties cannot invoke that they were unaware of the bankruptcy when dealing with a debtor which is subject to bankruptcy proceedings. Further to bankruptcy being declared, the bankruptcy trustee will generally address all creditors to request that they file their claims on the debtor. In suspension of payments, the creditors will be addressed by the administrator if a meeting of creditors is convened.

In WHOA proceedings, there is a difference between public and non-public WHOA proceedings. Public WHOA proceedings are published on the website of the judiciary while non-public WHOA proceedings should remain unknown to the public. While less relevant for the entering into transactions by the debtor (since the debtor remains in possession), the creditors will generally be addressed in WHOA proceedings to have their claims recorded properly and to be informed on the restructuring plan that is presented by the debtor or, if appointed, by the restructuring expert.

3.2 Identifying assets

3.2.1 How does your jurisdiction identify assets if the books and records are unreliable?

If the books and records of the debtor are not available or unreliable, assets could be traced through searches in public registers (land registry, vehicle registry, IP registers, etc). Other options are in general: (1) enquiries with third parties such as the tax authorities or banks (if necessary with the use of article 194 DCCP); or (2) obtaining information from (other) creditors which may generate new leads for investigations. In this respect, the EU Proposal for a Directive Harmonising Certain Aspects of Insolvency Law (COM(2022) 702 Final) provides insolvency practitioners with new instruments to recover assets belonging to the debtor's estate.

Being able to obtain, review and / or secure as much information as possible is vital to create a picture of the operation of the company and the ability to trace and identify assets within the estate. The longer it takes to obtain the records, the higher the chance that they can be destroyed or go missing.

3.3 Asset location

3.3.1 What legislation(s), laws or rules govern the insolvency and restructuring of asset location?

Under the Dutch Bankruptcy Act, the property of the insolvency estate includes all of the debtor's non-exempt assets, including the assets located on foreign territory. Some assets are excluded from the insolvency estate (see section 3.4 below).

If the non-exempt assets are located in a EU Member State (with the exception of Denmark), the European Regulation on Insolvency Proceedings (2015/848) applies. According to article 20 paragraph 1 of this Regulation, the effects of an insolvency procedure cannot be contested in other Member States and the bankruptcy trustee may exercise all powers granted by the law of the Member State where the procedure was opened, as long as no other insolvency procedure has been opened in that other Member State, and no conflicting protective measure has been taken following a request to open an insolvency procedure in that Member State. In exercising its powers, the bankruptcy trustee must respect the law of the Member State on the territory of which they intend to act.

In other cases, where the non-exempt assets are located in territories outside the European Union, in spite of the principle in the Dutch Bankruptcy Act that the bankruptcy trustee can exclusively dispose of all non-exempt assets that are part of the bankruptcy estate, the relevant foreign laws and regulations determine the extent to which a Dutch bankruptcy has effect in that jurisdiction and the extent to which the bankruptcy trustee can actually exercise its powers abroad.

3.4 Asset exclusions

3.4.1 What assets may be considered exempt property?

In case of bankruptcy proceedings, section 21 Dutch Bankruptcy Act stipulates that, in short, the following assets are considered exempt property:

(i) to the extent they are not excessive:

- (a) the household effects of the residence occupied by the debtor;
- (b) the clothing of the debtor and the debtor's family;
- (c) the stock of foodstuffs present in the residence of the debtor;
- (d) property which the debtor and the debtor's family reasonably need for personal care and the general daily necessities of life;
- (e) property present in the residence which the debtor and the debtor's family reasonably need to acquire the necessary means of living or for their education or study;
- (f) highly personal property (such as wedding rings, photobooks, etc); and
- (g) pet animals of the debtor and his family, as well as the items necessary for the care of these animals;

(ii) the income of the debtor, if and insofar the supervisory judge determines this to be exempt;

(iii) funds that are provided to the debtor in compliance with a legal maintenance obligation;

(iv) an amount determined by the supervisory judge relating to the proceeds of a parental usufruct, in order to meet the charges attached to such a usufruct and to pay the costs for the care and upbringing of the child;

(v) the amount paid into judicial consignment in connection with limited ship liability;

(vi) the debtor's assets that are placed under a fiduciary administration of property, if no creditors have presented themselves who can recover these assets unencumbered by the fiduciary administration; and

(vii) an entitlement to the balance of a life annuity savings account.

In addition, section 22a of the Dutch Bankruptcy Act stipulates that with respect to a life insurance agreement, the following falls outside of the bankruptcy estate:

(1) the right to surrender a life insurance in return for the surrender value if the beneficiary or policy holder is unreasonably disadvantaged by the surrender;

(2) the right to change the beneficiary of the life insurance, unless such a change is made on behalf of the bankruptcy estate and the beneficiary or policy holder is not unreasonably disadvantaged by the change; and

(3) the right to borrow money on the life insurance policy.

3.5 Collecting assets

3.5.1 Once assets included in the books and records or outside the books and records have been identified, what methodologies are in place to collect those assets? Does an insolvency representative need to have possession of the assets? Is the insolvency representative required to put a lien on the assets? How does the insolvency representative collect assets outside the jurisdiction?

The declaration of bankruptcy is considered as a judicial attachment of all the debtor's assets for the benefit of the collective creditors, thereby nullifying all prior attachments. Non-exempt assets can no longer be disposed of or managed by the debtor or any other third party. The authority to dispose of and manage these identified non-exempt assets is vested in the bankruptcy trustee. The bankruptcy trustee is also granted the power to annul certain legal acts performed by the debtor prior to the declaration of the bankruptcy if these acts have prejudiced the collective creditors by attempting to hide their assets or making preference payments to particular creditors.

To prevent the debtor from misappropriating assets from the estate or altering records, the bankruptcy trustee ensures that the non-exempt assets belonging to the estate are secured. If business activities are not continued, the bankruptcy trustee may take possession of documents and other data carriers, funds, securities and other valuable papers. Some assets will remain in the possession of the debtor or third parties until the bankruptcy trustee has sold them. The bankruptcy trustee may access any location to the extent reasonably necessary for the execution of their duties.

The bankruptcy trustee may proceed immediately with the liquidation and monetisation of all non-exempt assets belonging to the estate without requiring the debtor's or creditor's consent or cooperation. The assets are sold either publicly through an auction or privately with the approval of the supervisory judge.

Creditors with a right of retention over an asset belonging to the estate do not lose this right as a result of the bankruptcy declaration. The bankruptcy trustee may claim and sell the asset, without affecting the priority granted to the creditor. If it is in the interest of the estate, the bankruptcy trustee may also return the asset to the estate by satisfying the claim against which the right of retention can be exercised.

For non-exempt assets located on foreign territory, the bankruptcy trustee will only pursue and liquidate these assets if this is in terms of value beneficial to the bankruptcy estate. The costs associated with identifying and liquidating these assets should not exceed the proceeds.

If the foreign assets are located on territory of an EU Member State, the European Regulation on Insolvency Proceedings (2015/848) applies. This Regulation allows the bankruptcy trustee to exercise all powers granted to him by the law of the Member State, permitting the removal and / or liquidation of the debtor's non-exempt assets located there. In exercising these powers, the bankruptcy trustee must respect the law of the Member State on the territory of which they intend to act, particularly the regulations concerning the liquidation of assets.

In other cases, where the assets are located in territories outside the European Union, in spite of the principle in the Dutch Bankruptcy Act that the bankruptcy trustee can exclusively dispose of all non-exempt assets that are part of the bankruptcy estate, the relevant foreign laws and regulations determine the extent to which a Dutch bankruptcy trustee can remove from and / or liquidate the debtor's assets in the territory where they are located.

The main objective will always be to collect in as much of the property in the estate as possible and to maximise the realisations for creditors. This means very carefully considering the disposal strategy and understanding the market for the property, consulting with sector experts and subject matter experts where appropriate.

3.6 Asset inventory and valuation

3.6.1 How does an insolvency representative ensure that the value of the assets on the books and records is accurate?

The bankruptcy trustee has to prepare an inventory of the bankruptcy estate (article 94 para 1 of the Dutch Bankruptcy Act). The Dutch Bankruptcy Act does not contain any provisions with regard to the valuation of the assets belonging to the bankruptcy estate.

In most cases, the bankruptcy estate will make use of the services of a valuation firm to determine the value of the assets. The most common valuation methods used in this regard are the liquidation value (*liquidatiewaarde*) and the private sale value (*onderhandse verkoopwaarde*).

In order to be able to offer a restructuring plan under the WHOA, the reorganisation value and the expected proceeds in case of a bankruptcy of the debtor have to be determined (article 375 paragraph 1 under (e) and (f) of the Dutch Bankruptcy Act). The principles and assumptions that were used in calculating these values also have to be stated in the restructuring plan (article 375 paragraph 1 under (g) of the Dutch Bankruptcy Act). While it is not mandatory to make use of an independent valuator to determine the reorganisation value and / or the expected proceeds in case of a bankruptcy, this is generally preferred, especially when there is discussion with regard to these values. In most cases, the discounted cash flow method will be used to determine the reorganisation value. When it comes to the expected proceeds in case of a bankruptcy, different scenarios will have to be evaluated, such as a sale of the assets separately, the sale of the business activities, or a combination of these two approaches.

In certain circumstances, it will be important to get a number of valuations to determine the veracity of valuation given and ensure that creditors are obtaining the best possible return. In certain circumstances, this might not be possible due to speed affecting the market value of the property for example or the sensitive nature of the property in a particular sector or industry. Confidentiality and market sensitivity should be considered too.

4. Recovery of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

4.1 Court-based remedies

4.1.1 What tools are available to recover assets e.g. freezing orders, seizure orders or orders for judicial sale?

The declaration of bankruptcy is considered as a judicial attachment of all the debtor's assets for the benefit of their collective creditors, thereby nullifying all prior attachments. This enables the bankruptcy trustee, using the powers granted to him by law, to locate and recover assets, without the need for court intervention. However, at times the bankruptcy trustee must seek recourse through the court to secure certain assets, for instance, by initiating summary proceedings.

- Injunction or order in summary proceedings

  Under article 3:296 paragraph 1 of the Dutch Civil Code, the bankruptcy trustee may seek an injunction or order from the court in summary proceedings against a third party who is intending to transfer assets belonging to the estate to another party.

- Surrender or delivery of assets in summary proceedings

  If a third party refuses to return assets to the estate, the bankruptcy trustee may, under article 730 DCCP, request the surrender or delivery of the assets that belong to the estate.

In these circumstances, identifying the assets you intend to recover is absolutely key to ensuring the most effective solution is enacted for the recovery.

4.1.2 Do all or only some insolvency representatives have powers to use these tools? Which ones?

The ability to file a claim for an injunction or for the surrender of an asset in in summary proceedings is not an exclusive power of the bankruptcy trustee. Any insolvency representative or any other party with a sufficient urgent interest may initiate such a procedure.

This allows all those with an interest to seek redress by assisting in the process of securing assets that could be dissipated.

4.1.3 Can a party approach the court on a confidential, ex parte basis? What notice is required to be given to the holder of the assets (or potential defendant)?

A summary proceeding is not an *ex parte* procedure. Both parties will be given the opportunity to present their views.

Under Dutch law, in cases where the urgency is so pressing, it is possible to initiate an *ex parte* procedure. However, *ex parte* orders are very rare and are primarily used in cases involving infringements of intellectual property rights. The preliminary relief judge must set a reasonable time frame for instituting the claim in main proceedings.

4.1.4 *If applying on an ex parte basis, is there a duty to make full and frank disclosure?*

A request for an *ex parte* procedure must meet the same requirements as an application in main proceedings, but there is no formal duty of full and frank disclosure.

4.1.5 *What elements are required to be proven, and to what standard of proof, in order to succeed? Is this a more onerous standard than usual?*

Under the Dutch Bankruptcy Act, the bankruptcy trustee can annul legal actions without court intervention in order to recover assets *(actio pauliana)*. Under article 42 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul voluntary legal actions performed by the debtor if the debtor knew or should have known that these actions would result in prejudice to creditors.

Under article 47 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul compulsory legal actions performed by the debtor if it is demonstrated that the party receiving the payment knew that the debtor's bankruptcy had already been filed or if there was collusion between the parties intended to favour the receiving party over other creditors.

According to article 3:296 paragraph 1 of the Dutch Civil Code, the following requirements must be met for the issuance of a court injunction or order:

- there must be a threat of a violation of a legal obligation;
- the order or injunction must be requested by a party to whom the respondent is obligated to give, do, or refrain from doing something; and
- the order or injunction must align with the legal obligation in question (the so-called requirement of congruence (*congruentie-vereiste*).

According to article 730 DCCP, anyone who has the right to the surrender of a movable asset or delivery of a property, or who can obtain such a right through a court ruling for annulment or dissolution, may seize the asset or property to safeguard this right.

By reviewing the records, interviewing interested parties and speaking to the debtor, the insolvency practitioner and the financial advisor will be in a position to evidence what the state of knowledge was in the relevant person(s) at the relevant time. This is the key test to allow for the successful annulment.

4.1.6 *Are there any other requirements in order to obtain the orders? For example, an undertaking to pay damages associated with the freezing of assets and, if required, security for such an undertaking.*

To initiate a claim in summary proceedings, it is required that the claimant has an urgent interest in filing the claim. If there is no urgent interest, the claim can be filed in regular main proceedings.

4.1.7 *What safeguards can the court require to be in place?*

The court in summary proceedings will decide independently on a claim issued by the claimant. However, if such a claim is granted by the court, a main proceeding must be initiated within a reasonable period in which the claim will be examined in full by the designated court.

4.1.8 *What mechanisms are available to expedite claims against non-responsive or other defendants? For example, summary judgments or judgment in default. Is a final judgment required to enforce against a defendant?*

If a defendant fails to appear, the judge will issue a default judgement. The defendant may file an opposition to the default judgement. If a timely opposition is filed, the case will be reconsidered, with the opportunity for a hearing on the merits, by the same court that issued the default judgment. If the defendant fails to file an opposition, the default judgement will become final and irrevocable.

4.1.9 *What ancillary orders may be available?*

Under article 194 DCCP, access to or copies of documents and files that are generally known to the claimant but not in their possession can be requested. The article grants an independent right to those who have a legitimate interest. This can be done either in a separate proceeding or (for example, as a preliminary claim) within an ongoing proceeding.

4.1.10 *In your jurisdiction, who enforces against assets?*

Under the Dutch Bankruptcy Act, it is the responsibility of the bankruptcy trustee to enforce against assets. In some cases, a bailiff will be involved – for example, to serve a writ.

4.1.11 Are there specific causes of action or remedies that are only available to insolvency representatives to recover assets and / or books and records of the company? Do all or only some insolvency representatives have these powers?

Under article 92 of the Dutch Bankruptcy Act, the bankruptcy trustee immediately takes possession of the documents and other data carriers, funds, valuables, securities, and other papers of value. The debtor is obliged to surrender the administration and accounting records to the appointed bankruptcy trustee. This obligation also extends to third parties, such as accountants, who hold these documents in their possession. If the debtor refuses to surrender these documents, their delivery can be enforced through legal proceedings.

If these documents reveal that there have been fraudulent transfers and preferential payments, the bankruptcy trustee is authorised to annul the transactions. Under the Dutch Bankruptcy Act, the bankruptcy trustee can annul legal actions without court intervention in order to recover assets *(actio pauliana*). Under article 42 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul voluntary legal actions performed by the debtor if the debtor knew or should have known that these actions would result in prejudice to creditors.

Under article 47 of the Dutch Bankruptcy Act, the bankruptcy trustee can annul compulsory legal actions performed by the debtor if it is demonstrated that the party receiving the payment knew that the debtor's bankruptcy had already been filed or if there was collusion between the parties intended to favour the receiving party over other creditors

Outside of bankruptcy proceedings, creditors can, under article 3:45 of the Dutch Civil Code, also annual such fraudulent transactions.

4.2 Out-of-court assistance

4.2.1 What mechanisms are available to the insolvency representative to identify and secure assets without court assistance?

4.2.2 What is required to utilise these mechanisms? Are there costs or time barriers involved?

No court intervention is required for the bankruptcy trustee to identify and secure the assets. The debtor is obligated to share all requested information with the bankruptcy trustee, and to inform the bankruptcy trustee of his own volition of all relevant facts and circumstances with regard to the bankruptcy estate, including all assets (article 105 paragraph 1 of the Dutch Bankruptcy Act). The debtor is also obligated to inform the bankruptcy trustee of all foreign assets, and to provide cooperation to allow the bankruptcy take possession of these foreign assets (article 105 paragraph 2 of the Dutch Bankruptcy Act). In addition, the debtor is obligated to provide the books and records of the company to the bankruptcy trustee (article 105a of the Dutch Bankruptcy Act). These mechanisms allow the bankruptcy trustee to identify the assets.

There is no specific provision in the Dutch Bankruptcy Act that states that parties holding assets that are a part of the bankruptcy estate will have to relinquish these assets to the bankruptcy trustee, but this follows from general property law. If parties do not relinquish the assets in question, court intervention may be required.

4.3 Powers to examine and investigate

4.3.1 What powers are available to investigate the affairs of the company to identify and recover assets? Do these extend to individuals involved in the company or recipients of funds? What tools are available for the liquidator to investigate the location and nature of assets to satisfy a judgment?

4.3.2 What criteria are required to be satisfied before activating any powers of investigation regarding assets?

The debtor has to provide all requested information to the bankruptcy trustee and also has to inform the bankruptcy trustee of all relevant facts and circumstances regarding the estate (see section 4.2 above). In case of a bankrupt company, these duties extend to the management board and supervisory directors of the company (article 106 of the Dutch Bankruptcy Act).

If the debtor (or in the case of a company, its managing directors and / or supervisory directors) does not comply with the obligations imposed by law due to the bankruptcy, which includes the aforementioned duty to provide requested information to and to inform the bankruptcy trustee, the court can be requested to hold the debtor (or in the case of a company, its managing directors and / or supervisory directors) in custody.

The ultimate penalty of custody is a strong impetus for those with knowledge to provide it to the insolvency practitioner and to comply with them.

5. Tracing of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

5.1 Verification of assets

5.1.1 Has the Model Law been implemented or enacted as part of local legislation? What remedies can be obtained under the Model Law for the verification of assets?

Although it is in the crosshairs of the Dutch legislator, the Netherlands has not (yet) enacted UNCITRAL Model Law. A draft bill focusing on international insolvency law is expected, but it is uncertain when it will be published.

5.2 Completeness of books and records

5.2.1 What criminal offences (if any) have been implemented for misrepresentation or incomplete information?

In the bankruptcy of a debtor, one of the statutory duties of the bankruptcy trustee is to investigate whether there are "irregularities" at hand which caused or contributed to the bankruptcy of the debtor being declared, have complicated the handling of the bankruptcy or have increased the deficit and therefore were detrimental to the creditors. The bankruptcy trustee is obliged to report to the supervisory judge. If the bankruptcy trustee or the supervisory judge deems it necessary, the bankruptcy trustee will report or declare the irregularities to the competent authorities. The absence or incompleteness of books and records is one of the grounds for the bankruptcy trustee reporting to the fiscal intelligence and investigation service (FIOD).

The irregularities themselves constitute criminal offences under Dutch law, including the failure to supply information to the bankruptcy trustee, the failure to provide or keep books and records in compliance with applicable laws and committing actions that were detrimental to the creditors.

5.3 Avoidable transactions – fraudulent conveyances and preference actions

5.3.1 What are the rules governing transaction avoidance?

For the protection of creditors, in a bankruptcy the bankruptcy trustee may – if certain requirements are met – by notice in writing or in court avoid any transaction pursuant to which other creditors' rights are prejudiced (*actio pauliana* – comparable to fraudulent preference / conveyance).

Firstly, the bankruptcy trustee may void a transaction entered into by the debtor without a prior legal obligation to do so if the interests of the other creditors are prejudiced by that transaction and if both the debtor and its counterparty to the transaction were aware or should have been aware that the transaction was prejudicial to the interest of the other creditors. The burden of proof rests upon the bankruptcy trustee, but the aforementioned knowledge is assumed if the transaction is entered into within one year prior to the bankruptcy of the debtor and, among others:

(1) the value of the obligation of the creditor is substantially exceeded by the value of the obligation of the debtor;

(2) payment has been made of, or security has been granted for, a debt which is not due and payable; or

(3) the debtor and creditor are related parties / entities.

Secondly, the bankruptcy trustee may void transactions that are entered into with the legal obligation to do so if the other party at the time the transaction was entered into knew that an application had been made for the bankruptcy of the debtor, or where the transaction is the result of discussions between the company and the other party with the purpose to prefer the latter to the detriment of the debtor's other creditors.

EU Proposal for a Directive Harmonising Certain Aspects of Insolvency Law (COM(2022) 702 Final) intends to harmonise the criteria on transaction avoidance in alle member states of the European Union.

In order to prove any case, the collection of data and evidence to support the position of knowledge at the time of the transactions will be key to successfully voiding these types of transactions.

5.4 Time limits for commencement of avoidance actions

5.4.1 Is there a limitation period for the commencement of avoidance action? Are there different limitation periods for concealed transactions?

There is no real look-back period under Dutch law, but in connection with the test for avoidance (see section 5.3 above), there are evidentiary presumptions in relation to certain types of transactions entered into within 1 year prior to the bankruptcy. The limitation period for voidable preference claims is 3 years from the date on which the bankruptcy trustee discovered the detrimental effect of the relevant transaction. Interruption of the limitation period is possible and as such there is no real time limit in relation to, for example. commencement of avoidance actions in court.

6. Recognition of judgments in relation to asset tracing and recovery

6.1 UNCITRAL Model Law on cross-border insolvency

6.1.1 Has the Model Law been implemented or enacted as part of its local legislation, and what remedies can be obtained under the Model Law for the identification, tracing, recovery and preservation of assets?

As noted, the Netherlands has not (yet) enacted UNCITRAL Model Law. A draft bill focusing on international insolvency law is expected, but it is uncertain when it will be published.

6.2 Judicial insolvency network

6.2.1 Have the JIN Guidelines been adopted, and what tools are available under the JIN Guidelines to facilitate court-to-court communication in respect of any recognition application made to court or any court filings for the purpose of identifying, tracing, recovering and preserving assets?

The Judicial Insolvency Network (JIN) Guidelines have not been adopted in the Netherlands, except by the District Court Midden-Nederland (one of the 11 district courts in the Netherlands). The JIN Modalities have also not been adopted in the Netherlands.

Neither Dutch law nor regulations provide for a framework or tools for court-to-court communication by the other 10 courts. Regulation (EU) 2015/848 on insolvency proceedings (recast) provides for conditional intentions for cooperation in insolvencies with debtors in different member states between the judges in such member states.

In WHOA proceedings, courts are in practice facilitating international parallel proceedings when scheduling hearings and in view of sharing information and documents.[1] In bankruptcies and suspensions of payment, it is practice that there are informal contacts between courts in different jurisdictions regarding bankruptcy proceedings with bankrupt debtors in multiple jurisdictions.

6.3 Other forms for recognition of judgments and reliefs granted under common law or any other legislations

6.3.1 How do foreign judgments become recognised? What relief may be granted upon recognition of the foreign judgments in relation to the identification, tracing, recovery and preservation of assets of the debtor company which the foreign judgment relates to?

Within the EU (except for Denmark), Regulation (EU) 2015/848 on insolvency proceedings (recast) provides for automatic recognition in the Netherlands of foreign insolvency proceedings (listed in the aforementioned regulation) opened on or after 26 June 2017. If the matter involves the recognition foreign non-EU insolvency proceedings, domestic Dutch law is applicable.

The Dutch Bankruptcy Act contains no provisions with regard to the recognition of a foreign insolvency. UNCITRAL Model Law or (other) rules based on comity have not been implemented in the Netherlands. The Dutch Bankruptcy Act dates back to 1893, at which time it was considered undesirable to include rules that would allow for the recognition of foreign insolvencies. As a consequence of this, the Dutch Supreme Court applied the “territoriality principle” in its case law, so an insolvency from a country with which the Netherlands has no relevant treaty (such treaties are exceptionally rare) does not include any assets in the Netherlands, and a foreign insolvency practitioner may not act on the basis of it with respect to such assets to the extent doing so would result in the deterioration of the position of (individual) creditors and their (individual) recourse rights.

However, softening this principle of territoriality somewhat and relevant to the relief that may be granted, the Dutch Supreme Court has ruled, in short, that a foreign insolvency practitioner can effectively exercise their powers in the Netherlands if they act within the scope of the lex concursus (i.e. the law of the country of the opening of the insolvency proceedings) and if such exercise does not lead to a deterioration of the position of the creditors of the insolvent company as described above. When exercising their powers, the foreign bankruptcy trustee must respect all existing attachments on Dutch assets by individual creditors. No prior court decision on recognition or relief (as required under the UNCITRAL Model Law) or exequatur is required for such exercise of powers. If an interested party believes that a foreign insolvency order violates Dutch public policy, it is up to that party to prevent the foreign bankruptcy trustee from exercising their powers by initiating court proceedings in the Netherlands in order to obtain an injunction in that respect.

1 See e.g. District Court Amsterdam 4 April 2024, ECLI:NL:RBAMS:2024:3806.

7. Privacy related issues when investigating and tracing assets

7.1 Privacy law issues related to assets of the insolvent company

7.1.1 Which (privacy) laws and regulations govern the processing of personal data in asset tracing investigations within your jurisdiction?

Until 25 May 2018, privacy legislation in the Netherlands was governed by the *Wet bescherming persoonsgegevens* (Personal Data Protection Act) (Wbp). Since then, the General Data Protection Regulation (GDPR) of the EU, has been in effect. In the Netherlands, this is implemented through the *Uitvoeringswet AVG* (GDPR Implementation Act). This privacy legislation regulates, among other things, when personal data may be processed, the rights of the data subject, and how compliance with the law is monitored.

7.1.2 Who is considered the controller within the meaning of article 4 par. 7 of the General Data Protection Regulation (GDPR) (e.g. for keeping the books and administration or processing personal data) during insolvency proceedings?

The Dutch Bankruptcy Act regulates the procedures for

(1) bankruptcy;

(2) suspension of payments;

(3) the WHOA; and

(4) debt restructuring of natural persons (Wsnp).

Article 68 of the Dutch Bankruptcy Act assigns the bankruptcy trustee the responsibility for managing and liquidating the bankrupt estate. Article 215 of the Dutch Bankruptcy Act states that, during a suspension of payments, the administrator manages the debtor's affairs together with the debtor. Article 316 of the Dutch Bankruptcy Act gives the Wsnp administrator the duty to oversee the debtor's compliance with Wsnp obligations and to manage and liquidate the estate.

The bankruptcy trustee, the administrator during suspension of payments, and the Wsnp administrator often process personal data while performing their legal duties. This data includes information about the bankrupt individual or, if the bankrupt entity is a company, its directors; employees of the bankrupt company; customers of the company; and creditors involved in the bankruptcy. The GDPR applies to this processing.

The bankruptcy trustee is the data controller during bankruptcy. The same applies to the administrator during the suspension of payments if they process personal data independently, and to the Wsnp administrator during a Wsnp process.

7.1.3 If the GDPR is not applicable within your jurisdiction, who is considered the person (natural person or entity) responsible for compliance with privacy laws (e.g. for keeping the books and administration or processing personal data) during the insolvency proceedings?

The GDPR is applicable in the Netherlands.

7.1.4 Are there any legal requirements or obligations for obtaining and processing personal data, including sensitive data (e.g. criminal records), during the asset tracing process?

The GDPR applies, so every processing of personal data needs a legal basis as stated in article 6 of the GDPR. According to article 9 of the GDPR, it is generally forbidden to process personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership. It is also forbidden to process genetic data, biometric data for identifying a person, health data, or data about a person's sexual behavior or orientation.

Article 11 of the GDPR states that personal data related to criminal convictions and offences, or related security measures, can only be processed under the supervision of the government or if allowed by EU or national law that provides appropriate safeguards for the rights and freedoms of the individuals concerned. Comprehensive registers of criminal convictions can only be maintained under government supervision.

7.1.5 Are there any other relevant obligations in relation to the processing of personal data in the course of insolvency proceedings?

A bankruptcy trustee, as a data controller, must be able to demonstrate the lawfulness and fairness of the processing of personal data in accordance with article 5, paragraph 2 of the GDPR (accountability obligation).

7.1.6 Are there restrictions on sharing personal data with third parties (e.g. law enforcement or creditors) involved in the insolvency proceedings?

The GDPR is also guiding: personal data must be collected for specific, explicitly stated, and legitimate purposes. Insolvency officers must not further process the data in a manner that is incompatible with the original purpose of collection (purpose limitation principle).

7.1.7 If the GDPR is not applicable, are there any restrictions for transfers of personal data to countries outside your jurisdiction?

The GDPR is applicable in the Netherlands.

7.1.8 Are there pending legislative proposals or amendments that may impact the processing of personal data during asset tracing in insolvency proceedings?

Under the EU Proposal for a Directive Harmonising Certain Aspects of Insolvency Law, it is proposed that insolvency practitioners: (1) can gain indirect access to bank account information by making a request to designated courts in the EU Member State; (2) direct access to beneficial ownership information; and (3) direct access to national asset registers (where available). There is also a national proposal for new legislation pending that involves the processing of personal data in insolvency proceedings, but it does not directly affect asset tracing.

7.2 Privacy law issues related to assets of directors or other parties

7.2.1 What legal grounds or exemptions allow the processing of personal data of directors or other parties during asset tracing, particularly when the insolvency representative considers actions or has initiated actions against them?

The bankruptcy trustee has a legal duty to address irregularities (article 68 of the Dutch Bankruptcy Act). This duty involves, on one hand, the obligation to investigate any irregularities that may have contributed to the bankruptcy, complicated the liquidation, or increased the shortfall in the estate (the causes investigation) and, on the other hand, the obligation to report identified irregularities to the supervisory judge. If the bankruptcy trustee and / or the supervisory judge deem it necessary, the bankruptcy trustee can take civil legal action against the directors or supervisory board members.

In this context, the Tax Authorities can, based on article 36.2 of the Collection Guidelines 2008, provide the bankruptcy trustee with information at no cost regarding recourse against the directors and / or supervisory board members of the bankrupt company. This specifically includes access to the most recent tax returns of these individuals, revealing their income and assets.

The government agency "Dienst Justis" manages a database to support the handling of irregularities, containing information on all public limited companies (NVs) and private limited companies (BVs) in the Netherlands. The bankruptcy trustee can use this database to request a network diagram showing the relationships between a legal entity or multiple legal entities and the associated individuals and companies. This network diagram provides important leads for the bankruptcy trustee's recovery investigation, as it reveals which legal and natural persons are involved with the legal entity.

7.2.2 Do these legal grounds or exemptions only apply to a (court appointed) insolvency representative, or also to other parties?

The aforementioned powers are exclusively granted to the insolvency practitioner in the performance of their duties.

8. Considerations when criminal law is involved

8.1 How should the insolvency representative or provisional insolvency representative or other authorised person deal with the authorities when criminal law is involved?

Article 68 paragraph 2 under (c) of the Dutch Bankruptcy Act stipulates that the bankruptcy trustee shall report irregularities to the competent authorities if either the bankruptcy trustee or the supervisory judge considers this necessary.

In case of (suspected) bankruptcy fraud, the bankruptcy trustee can file a report with the Central Bankruptcy Fraud Reporting Point of the fiscal intelligence and investigation service (FIOD) through a standard form.

8.2 Are there any relevant laws, authorities and considerations under criminal law which may be applicable in relation to an application made by the provisional insolvency representative or authorized person for any provisional measures?

The Dutch Criminal Code contains several provisions regarding crimes that are related to bankruptcies, such as excessive spending prior to a bankruptcy (articles 340 and 342 of the Dutch Criminal Code), intentional prejudice to the creditors prior or during the bankruptcy (articles 341 and 343 of the Dutch Criminal Code), the failure to comply with disclosure obligations during insolvency proceedings (article 194 of the Dutch Criminal Code), the failure to provide the books and records to the insolvency practitioner (article 344a of the Dutch Criminal Code) and the failure to keep books and records (article 344b of the Dutch Civil Code).

9. Digital assets and crypto assets

9.1 Crypto as an asset and ownership issues

9.1.1 How is cryptocurrency classified?

Under Dutch law, property is comprised of all things (*zaken*), defined under Dutch law as corporeal objects which can be subject to human control, and of all proprietary rights and interests (*vermogensrechten*). While it is clear that cryptocurrencies do not fall under the definition of a "thing", there is discussion in legal literature whether cryptocurrencies can be considered a proprietary right or interest pursuant to Dutch law. No definitive case law exists on this issue.

From a regulatory perspective, it is clear that cryptocurrencies do not qualify as money (*geldmiddelen*) or as legal tender (*wettig betaalmiddel*). Whether a cryptocurrency qualifies as a financial instrument (*financieel instrument*), a participation right in an alternative investment fund (*alternatieve beleggingsinstelling*) or an investment object (*beleggingsobject*) has to be determined on a case by case basis.

As far as the Dutch tax authorities are concerned, cryptocurrencies are considered savings and investments, and are taxable as such.

9.1.2 What rights and interest do cryptocurrency exchanges or trading platforms have in the cryptocurrency held in accounts at the exchange or platforms?

Generally speaking, this will depend on the agreement (including the general terms and conditions) between the cryptocurrency exchange / trading platform and the customer. If no specific arrangements are made in this regard, the cryptocurrency held in accounts by customers will likely fall within the bankruptcy estate in the case of a bankruptcy.

9.1.3 Is cryptocurrency capable of being subject to a trust, secured creditor interest or custody arrangement?

Dutch law does not provide for the creation of trusts, which means that cryptocurrency are not capable of being subject to a trust. Due to the uncertainty of the legal classification of cryptocurrencies under Dutch law, it is also uncertain whether cryptocurrencies can serve as collateral for secured creditors. For example, it is possible for a cryptocurrency exchange to establish a foundation (*stichting*) to act as a bankruptcy-remote vehicle that safeguards the funds of its users.

9.2 Core issues in insolvency

9.2.1 When a cryptocurrency exchange / platform is subject to insolvency proceedings, what are the applicable legal standards for determining whether the exchange / platform or the accountholder owns the cryptocurrency held at the exchange / platform?

In principle, in the case of insolvency of a cryptocurrency exchange / platform where the cryptocurrency is being held and controlled by the legal entity that has become insolvent, the exchange / platform would be considered the owner of the cryptocurrency from a legal perspective.

9.2.2 Have there been any significant legal decisions in your jurisdiction regarding ownership of cryptocurrency in insolvency proceedings?

There have been no significant legal decisions in the Netherlands in this regard.

9.2.3 How is cryptocurrency valued in insolvency proceedings?

Generally speaking, if a bankruptcy estate contains cryptocurrency, the bankruptcy trustee is able to liquidate the cryptocurrency by selling it for the market value. If a creditor has a claim based on cryptocurrency holdings, in principle, this claim is valued in bankruptcy proceedings at the euro equivalent on the date the bankruptcy of the debtor was declared.

9.2.4 When a cryptocurrency / platform goes into insolvency, do customers have any special priority or are they treated as general unsecured creditors?

Customers do not have any special priority in case of insolvency of a cryptocurrency platform, and are treated as general unsecured creditors. If the cryptocurrency is not held by the bankrupt entity but by a separate, bankruptcy-remote vehicle, the customers would in principle be able to claim their cryptocurrency from this separate vehicle.

9.2.5 If the UNCITRAL Model Law on Cross-Border Insolvency has been enacted in your jurisdiction, how can that law be used to assist with the tracing and recovery of cryptocurrency assets? Are there other laws or rules dealing with cross-border insolvency that can be used to assist with the tracing and recovery of cryptocurrency assets?

The UNCITRAL Model Law on Cross-Border Insolvency has not been enacted in the Netherlands, nor are there any other laws or rules related to cross-border insolvency that can be used to assist specifically with the tracing and recovery of cryptocurrency assets.

9.3 Clawback / recovery of cryptocurrency assets

9.3.1 What types of non-insolvency claims are available to recover stolen / misappropriated cryptocurrency?

A claim could be based on – for example – tort, unjust enrichment or breach of contract. This would depend on the specific facts and circumstances at hand.

9.3.2 Are there any clawback or avoidance claims under insolvency law that can be brought to recover cryptocurrency transferred from the debtor prior to commencement of insolvency proceedings?

It is possible that such transfers can be avoided based on the *actio pauliana* (see section 5.3 above).

9.3.3 Are there any special or unique issues in bringing a clawback / avoidance claim to recover cryptocurrency? Have there been any significant decisions in this area?

There have been no significant decisions in this area in the Netherlands. From a legal perspective, there are no special or unique issues in bringing an avoidance claim to recover cryptocurrency. In a practical sense, issues can arise, due to the decentralized nature of cryptocurrencies. For example, cryptocurrency that have been transferred to a third party may have been sent to a cryptocurrency tumbler such as Tornado Cash, obfuscating the end location of the cryptocurrency that have been sent there.

9.3.4 What remedies are available under both insolvency and non-insolvency law to freeze or compel the turnover of cryptocurrency assets? What are the legal standards / requirements for obtaining those remedies?

Although there is uncertainty when it comes to the exact legal qualification of cryptocurrency (see section 9.1 above), it has been argued in legal literature that it is possible to levy a pre-judgment attachment on cryptocurrency. If that is indeed the case, in principle, the legal standards / requirements would be the same as for other pre-judgment attachments (see paragraph, chapter 1).

9.4 Tracing of cryptocurrency

9.4.1 What discovery or information gathering tools are available, under insolvency and non-insolvency law, to obtain information on the location of cryptocurrency and the owner of that cryptocurrency?

Both in and out of bankruptcy it is possible to request a copy, an extract or the inspection of certain documents from another party pursuant to article 194 DCCP. This provision could be used to obtain information regarding the location and owner of cryptocurrency.

9.4.2 What type of information are cryptocurrency exchanges / platforms required to collect from customers (including KYC information) when they open an account?

Centralised cryptocurrency exchanges / platforms have to adhere to Know-Your-Customer (KYC) protocols under Dutch law. As decentralised cryptocurrency exchanges facilitate peer-to-peer exchanges without an intermediary authority, such decentralised exchanges generally will not do any KYC checks.

9.4.3 Can the KYC information about accountholders collected by a cryptocurrency exchange / platform be obtained through a formal discovery process? Are there any special issues to navigate in your jurisdiction in order to obtain such information?

There is no case law in the Netherlands on this issue. As there is no formal discovery process in the Netherlands, a request for KYC information with a cryptocurrency exchange / platform based in the Netherlands would have to be obtained through a request pursuant to article 194 DCCP. If the cryptocurrency exchange / platform does not comply with the request, legal proceedings may be required. Whether such proceedings would be successful, depends heavily on the specific facts and circumstances of the case.

9.4.4 *What type of forensic or tracing tools are available to assist with the tracing and recovery of cryptocurrency?*

As cryptocurrencies do not fall within the borders of a certain jurisdiction, the same forensic and tracing tools are available in the Netherlands as in any other jurisdiction. Examples are wallet.dat files, blockchain explorers, blockchain analysis software (such as Chainalysis), hardware devices and seed phrases and passwords.

9.4.5 *What type of expert evidence is necessary in your jurisdiction to establish the tracing of stolen or misappropriated cryptocurrency to a particular account / wallet?*

There is no case law on this point, but generally speaking no specific type of expert evidence is necessary. It is possible to make use of certain cryptocurrency tracing software.

9.5 Government / regulatory Intervention

9.5.1 *What governmental bodies or agencies have oversight over fraud or theft of cryptocurrency?*

In principle, such matters would have to be reported with the police. In addition, the fiscal intelligence and investigation service (FIOD) has a department focused on cybercrime, the Financial Advanced Cyber Team (FACT). It is possible to report cryptocurrency fraud directly with the FIOD.

9.5.2 *Are there remedies available to law enforcement that could lead to the recovery or forfeiture of stolen / misappropriated cryptocurrency and the return of that cryptocurrency to the victims?*

Generally speaking, law enforcement will have more possibilities to request information from third parties than private parties, such as cryptocurrency exchanges / platforms.

UNITED KINGDOM

1. Before commencement of insolvency and restructuring proceedings (pre-order for insolvency and restructuring proceedings)

1.1 What are the relevant laws or rules and relevant provisional measures available in connection with the identification, tracing, recovery and preservation of assets before an application for an insolvency or restructuring proceeding is made?

(a) Relevant legislation, laws for identification / tracing / recovery

(i) The White Book 2024 and the common law

The White Book 2024 contains the sources of law relating to the practice and procedures of the High Court and the County Court for the handling of civil litigation, including the Civil Procedure Rules (CPR), and is supplemented by substantial and comprehensive expert commentary. The provisional measures listed below find their roots within the common law, and have become established in their own right as useful tools for practitioners to utilise within this given context.

(1) Search Orders

Search orders (formerly called Anton Piller orders) are a form of interim mandatory injunction which permit inspection of the defendant or respondent's premises and civil search for and seizure of relevant materials and documents.

Search orders originated from the case of *Anton Piller KG v Manufacturing Processes Ltd*, which dealt with the theft of trade secrets. The High Court has power to grant search orders pursuant to section 7 of the Civil Procedure Act 1997 and CPR 25.1(1)(h). The purpose of a search order is to preserve evidence which may be in danger of destruction or concealment. It is important to note that there are high evidential standards associated with search orders, as they are not to be used as a mere investigatory tool – rather, for the preservation of vital evidence. They require the applicant to demonstrate amongst other things, a strong prima face case on an accrued course of action, satisfaction to the court that the potential or actual loss to the applicant would be serious, and clear evidence that the respondent in question has in its possession the relevant information.

(2) Freezing Injunctions

Freezing orders (previously known as Mareva injunctions) are interim injunctions prohibiting a potential defendant in criminal or civil litigation proceedings from dissipating assets. Typically, such an injunction is sought to preserve a defendant's assets until a judgment can be obtained. Freezing orders can be obtained to prevent the disposal of assets within the United Kingdom or worldwide (worldwide freezing order). Within the legislation, the court has power to make a freezing order generally under section 37 of the Senior Courts Act 1981 and CPR 25.1(1)(f). Relevant case law has established that there are strict conditions which need to be adhered to in order to grant a freezing order. These include establishment of an underlying legal or equitable right, a good arguable case, the existence of assets and risk of dissipation and a cross-undertaking in damages must be provided.

(3) Norwich Pharmacal Order

A Norwich Pharmacal order (NPO) compels a respondent to disclose specific documents or information to the applicant. These orders are normally used to identify the proper defendant to an action or to obtain (and therefore protect) information required to plead a claim. The jurisdiction of this order has been developed under common law and is preserved by CPR 31.18.

An NPO was first granted in 1974 by the House of Lords in *Norwich Pharmacal Co. v Customs and Excise Commissioners*, which concerned the alleged violation of a patent by unknown importers – through the NPO, the identity of the wrongdoer was able to be disclosed.[1] In making an NPO application, the applicant has an onerous duty to give full and frank disclosure of all material facts – especially if the application is made without notice. Usually, the applicant would also be required to pay the respondent's legal costs as well as the reasonable costs of the disclosure itself, in addition to certain other undertakings to be provided to the court.

(4) Order to deliver up goods

Section 4 of the Torts (Interference with Goods) Act 1971 and CPR 25.1(e), provides that the court may grant an interim remedy for the delivery up of goods which have been wrongfully interfered with.[2] This remedy compels the return of goods or other such items.

1 White Book 2024, 31.18.
2 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25#25.1

(5) Court appointed receivership (pre and post judgement)

Court appointed receivers (both before and after judgement) have rapidly gained popularity as a method for both preserving property whilst litigation is in progress and of effecting execution after judgement has been obtained. The jurisdiction of the courts to appoint a receiver is set out in section 37(1) of the Senior Courts Act 1981 – the relevant wording being where it is "just and convenient to do so". The power of a receiver is specific to each case and is set out in the court order by which the receiver is appointed. The primary duty of a receiver is to collect / preserve the property / assets over which they are appointed, although as independent officers of the court, they are to act fairly and impartially and for the benefit of all interested parties.

2. Summary of corporate insolvency and restructuring proceedings

2.1 Formal insolvency legislation for corporations

2.1.1 Does your jurisdiction have formal insolvency and restructuring legislation or a framework for corporations? What laws or rules govern the insolvency and restructuring of corporations? Does specific legislation, laws or rules exist for the identification, tracing, recovery and preservation of assets?

(i) Formal for corporations / laws and rules

(1) Liquidation

Liquidation in the United Kingdom is a terminal process. The procedure for liquidation is set out in the Insolvency Act 1986 and the Insolvency Rules 2016. A liquidator is appointed to take control of the company and to collect, realise and distribute its assets. Once the liquidation has been completed, the company is dissolved. Liquidation can be initiated voluntarily by the company where solvent – through a members' voluntary winding up (MVL, Part 4, Chapter 3 of the Act). If the company is insolvent then the process is either initiated by a resolution of the directors of the company as a creditors' voluntary winding up (CVL, Part 4, Chapter 4 of the Act) or by a court order usually based on a creditor's petition (Part 4, Chapter 6 of the Act).

(2) Administration

Administration in the United Kingdom is a collective rehabilitation proceeding within which the company can continue trading albeit under the control of an appointed administrator. The procedure for administration is set out within Part 2 of the Insolvency Act 1986. The primary objective of an administration is to rescue the company as a going concern – unless to do so would not be reasonably practicable in which case the further sequential objectives are to try and achieve a better result for firstly secured and then unsecured creditors. There are also a series of Special Administration Regimes (SARs), which are based on the administration system but are designed for use by systemically important companies to ensure continuity of services – for instance, water companies, electricity providers and financial services companies. These are used rarely and won't feature further in this analysis.

(3) CVAs, RPs, schemes

Additionally, company voluntary arrangements (CVAs – available under Part 1 of the Insolvency Act 1986), schemes of arrangement (schemes – available under Part 26 of the Companies Act 2006) and restructuring plans (a recent addition under the Corporate Insolvency and Governance Act 2020) are available to a company wishing to reach an enforceable settlement with groups of its members and / or creditors. In broad terms, these require 75% of a class of creditors to vote in value but have different rules regarding whether that figure must also represent 50% by number. The scheme does not require formal insolvency and the restructuring plan allows cross-cramdown.

(4) Fixed charge receiver

Fixed charge receivers are those who are appointed to realise assets over which a creditor has a fixed charge (i.e. registered security). Whilst the company itself does not enter an insolvency process, the process is nevertheless significant as it allows the secured creditor to precipitate the control and sale of secured assets to repay their debt.

(5) Administrative receiver

Administrative receivers are rare and limited to certain capital markets transactions which won't be dealt with further for the purposes of this analysis.

(i) Identification, recovery and preservation of assets

(1) Liquidator / administrator powers

(A) Tracing

When a company is in administration, provisional liquidation or liquidation, section 234 of the Insolvency Act 1986 provides powers to the office holder to obtain any property, books, papers or records to which the company appears to be entitled.

Sections 235-237 of the Insolvency Act 1986 allow the officeholder to enforce compliance with their investigations into the company's dealings.

(B) Recovery / preservation

Sections 238-245 of the Insolvency Act allow the officeholder to set aside certain prior transactions. The provisions include the timescale and orders that the court can be asked to make regarding defined transactions at an undervalue, preferences and extortionate credit transactions, and allow the avoidance of certain floating charges over the company. In addition, section 423 allows the officeholder to apply to set aside defined transactions which defraud creditors.

2.2 Appointment of insolvency representative, provisional insolvency representative or authorised person

2.2.1 Upon the application of the insolvency or restructuring proceedings, does your jurisdiction have a legislative framework for the appointment of an authorised person or provisional insolvency representative who is entrusted with the administration or supervision of the debtor company's business or assets, or the realisation of all or part of the debtor company's assets?

2.2.2 Where an application for an insolvency or restructuring proceeding is not made, is there a similar legislative framework for the appointment of such an authorised person for the identification, tracing, recovery and preservation of the company's assets?

(i) Legislative framework for appointment of authorised person

In the United Kingdom, an insolvency practitioner (IP) is an individual who is qualified as defined by section 390A of the Insolvency Act 1986. A liquidator, provisional liquidator or administrator (amongst other restructuring appointments) is required to be a licensed IP. In matters where there are either insufficient assets to support the appointment of such an individual or there are matters of public policy importance, the Official Receiver (OR) will act to represent the company.

(1) Provisional liquidator

(A) Filing winding up petition at court

Between the presentation of a winding-up petition and the making of a winding-up order against a company, the court may appoint a provisional liquidator (as per section 135 of the Insolvency Act 1986). A provisional liquidator only has the powers and functions conferred on him or her by the court and set out in the court order (as per section 135(4) of the Insolvency Act 1986). In a typical case, the objective of the provisional liquidator is to preserve the assets of the company but may include investigatory powers.

(B) Interim relief

Applications for the appointment of a provisional liquidator can also be made as a form of interim relief on filing a winding up petition. The applicant must provide a cross-undertaking in damages. Such applications are usually made by a creditor of the company, often made in cases involving fraud, as there is a greater risk of the dissipation of assets.

(2) Liquidator / administrator / CVA supervisor all have to be an IP

(A) Liquidation – shareholder resolution then meeting of creditors / decision process or court order – Insolvency Act and Rules

(B) Administration – QFCH who appoints or court or creditor

(C) CVA - nominated by company and approved by creditors

(3) Restructuring plan / scheme

In restructuring plans and schemes, there does not need to be an IP, and the company remains in control of assets. The position is similar in a CVA, although this may provide that the supervisor, who is an IP, undertakes an investigation where that represents part of the arrangement.

(4) Where there is no insolvency or restructuring proceeding:

Unless injunctive relief is invoked or provisional liquidation is commenced, the company remains under the control of its directors who are responsible for its day-to-day operations and decisions.

2.3 Effects and duties imposed on the debtor company

2.3.1 What are the effect(s) and duties imposed on the debtor's company upon the application of insolvency or restructuring proceedings in relation to the identification, tracing, recovery and preservation of assets? Is there a similar duty imposed on any party or company where an application for an insolvency or restructuring proceeding is not made?

(i) In a voluntary company liquidation or an administration, the directors have a duty to submit a sworn statement of the company's affairs which details the company's assets / liabilities and antecedent transactions in a winding up by the court a questionnaire has to be completed for the Official Receiver which also details the assets / liabilities and other key information concerning the company. Failure to provide this information or to provide inaccurate information could lead to a director's disqualification.

(ii) When a company is in administration, provisional liquidation or liquidation, section 234 of the Insolvency Act 1986 provides powers to the office holder to obtain any property, books, papers or records to which the company appears to be entitled.

(iii) Sections 235-237 of the Insolvency Act 1986 allow the officeholder to enforce compliance with their investigation into the company's dealings of third parties capable of giving such information.

2.4 Stay of execution of assets

2.4.1 Upon the application of the insolvency or restructuring proceeding, is an automatic stay imposed on any existing, or the commencement of any new legal proceedings, or the realisation of assets (moveable and immoveable property) of the debtor company?

(i) Compulsory liquidation

In a compulsory liquidation no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose. This is set out in section 130 (Consequences of winding-up order) of the Insolvency Act 1986.

(ii) CVA

The fact that a company has gone into a creditors' voluntary liquidation does not automatically stay litigation proceedings but the liquidator can apply for a stay pursuant to section 112(1) of the Insolvency Act 1986 as the liquidator is unlikely to wish to continue with litigation. In assessing a stay application, the court will exercise its discretion and consider whether it is useful to award a stay – taking into account all of the circumstances.

(iii) Administration

When a company enters into administration, it becomes subject to a moratorium that prevents creditors from enforcing their claims against the company. The jurisdiction for this is found in paragraphs 42-43 from Schedule B1 in the Insolvency Act 1986. The moratorium is automatic and is in place as soon as administrators are appointed to a company.

It is possible for a stay of execution to be obtained, even where an application for an insolvency or restructuring proceeding is not made. This can be granted on a party's application, or on the court's own initiative (as per CPR 3.3). The application procedure varies depending on the circumstances and the grounds for it. Given that the court has broad case management powers under the CPR, it can assess the merits of the case, the impact on creditors and whether there could be any alternative remedies that could resolve the situation.

(iv) Restructuring plan

In a restructuring plan, there is no automatic stay of proceedings that is imposed. However, the plan itself can include a moratorium or stay on legal proceedings. Once it has made an order convening hearings, the court may temporarily stay other conflicting court proceedings against the plan company, even if those proceedings pre-dated the plan being proposed, provided the wider interests of creditors are better served by the plan proceedings moving forward unhindered.

(v) Scheme of arrangement

In a scheme of arrangement, no automatic stay of proceedings is imposed. However, creditors can take steps to agree to measures that facilitate such a stay indirectly. For instance, the creditors can apply to the court for an injunction (as aforementioned) to stay proceedings that might interfere with the scheme. Under CPR 3.1(2)(f), the court has the power to stay the whole or part of any proceedings or judgment either generally or until a specified date or event. However, this must be justified, in part by showing that it is necessary to protect the interests of creditors and the scheme and that there is sufficient creditor support for it. Additionally, the scheme proposal itself could include terms that creditors agree to refrain from taking certain actions, effectively imposing a moratorium or standstill on creditors.

2.5 Power to restrain or order the transfer of assets

2.5.1 Does the insolvency representative, provisional insolvency representative or authorised person have the authority to limit the powers of the debtor company in respect of the transfer of its assets, or to issue a restraining order or injunction to any third party for the preservation or protection of assets of the debtor company?

(a) Liquidators, provisional liquidators and administrators all have full control over the debtor company. Whilst directors of a company in administration theoretically have some residual powers (e.g. to contest the validity of the administrators' appointment) they cannot deal with assets of the company without the Administrator's consent.

(b) Liquidators, provisional liquidators and administrators have wide ranging powers, some of which require creditor committee or court approval to utilise, but which allow them to issues such process as they think appropriate to preserve the assets of the debtor company.

2.6 Safeguards, checks and balances

2.6.1 Does the insolvency representative, provisional insolvency representative or authorised person have to satisfy any test or legal threshold in order to obtain any reliefs in relation to the assets of the debtor company?

These issues are dealt with collectively in the section below.

2.6.2 Is there a notice requirement by the provisional insolvency representative or authorised person to publicise any application for any provisional measures to be imposed against the debtor company, its creditors or any other third party? Is there an avenue for the debtor company, its officers, or any other third party to terminate or challenge the application for or imposition of any provisional measures? Is there a duration for which the provisional measures would be imposed?

A provisional liquidator is appointed by court order at the request of a creditor that files a winding up petition and seeks that appointment (see section 2.2 above). It is necessary to show jeopardy to assets and the court will usually require a cross undertaking in damages for any loss caused if it subsequently transpires that the appointment was not justified. The provisional liquidator is responsible to the court and any party can apply to the court to seek their removal or an order requiring them to undertake or refrain from undertaking any specific action. The provisional liquidator must also be a licensed IP (again, see section 2.2 above) and will be subject to a disciplinary process arising from any valid complaint to their licensing body.

A liquidator or administrator has full control of the assets of the company and can seek a creditor or court sanction to exercise certain powers. They are officers of the court (whether or not appointed by a court process) and can seek court assistance in carrying out their duties.

Creditors may apply to court if they are dissatisfied with the conduct of the liquidator or administrator and can seek their removal in certain circumstances (see para 74 of Schedule B1 and sections 168 and 172 of the Insolvency Act 1986). In common with provisional liquidators, they are licensed IPs and complaint can be made to their professional bodies leading to sanction where there are failures of professional conduct.

All of these appointments are noted at Companies House and formally advertised in the London Gazette.

3. Identification of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

This section contemplates the various ways to identify assets in your jurisdiction in relation to asset tracing and recovery after the commencement of the insolvency and restructuring proceedings (i.e. after the order for insolvency and restructuring proceedings has been made).

3.1 Notice of insolvency proceedings

3.1.1 What effect(s) and duties imposed on the debtor's company upon the commencement of insolvency or restructuring proceedings in relation to the identification of assets?

(a) The immediate effects of commencement of insolvency for companies

One of the most immediate effects of commencement of insolvency proceedings is that it terminates the power of the company to dispose of its property and fixes the status and liability of contributories. Liquidation is usually a termination event in contracts with customers or suppliers or provides a ground to terminate at their instance.

(b) Inspecting a company's register of members changes following filing of winding up petition

(c) Liquidators and administrators have powers to obtain books and records, investigate and can exercise recovery rights in relation to various prior transactions (see section 2.1 above) that the liquidator is to personally guarantee the payment of the relevant charges. However, the catch is that the condition made cannot extend to any outstanding charges. So while the notice may not advise the supplier or suggest termination (given the condition for payment that can be imposed), there are restrictions and amendments that come into play.

3.2 Identifying assets

3.2.1 How does your jurisdiction identify assets if the books and records are unreliable?

Liquidators or administrators are able to use the information obtained from their initial enquiries, the Preliminary Information Questionnaire (PIQC), the company director(s), the company's financial records and third parties (e.g. creditors) in order to be able to identify the assets that are discoverable and available.

In addition, these officeholders have the discretion to obtain fuller information in order to paint a more accurate picture of the assets that are in play. For instance, they may obtain a tax agent or accountant's working files and electronic records that may be available. Requesting the services of asset tracing companies can also be a diligent approach, as these entities are able to undertake a thorough approach to locating and possessing the necessary spectrum of documentation and records, and have the professional knowhow to do so in a legal and compliant manner.

Further detail is provided in section 2.1 above.

3.3 Asset location

3.3.1 What laws or rules govern the insolvency and restructuring of asset location?

(a) Geographical limitations and applicable legislation

(i) English law regards all of the worldwide assets of an insolvent company to be under the control of the liquidator / administrator. In reality, the intersection of cross border recognition and reciprocation is more complex and requires consideration on an individual company basis.

(ii) UNCITRAL Model Law on Cross-Border Insolvency

The United Kingdom has adopted the UNCITRAL Model Law on Cross-Border Insolvency through the CBIR. Participation with the UNCITRAL Model Law on Cross-Border Insolvency helps provide an efficient and effective mechanism from which entities and their officeholders are able to better deal with cases of cross-border insolvency, where foreign assets come into play.

3.4 Asset exclusions

3.4.1 What assets may be considered exempt property?

An insolvent corporate has no property that is exempt from its creditors. All property can be collected in and realised by the liquidator / administrator.

3.5 Collecting assets

3.5.1 Once assets included in the books and records or outside the books and records have been identified, what methodologies are in place to collect those assets? Does an insolvency representative need to have possession of the assets? Is the insolvency representative required to put a lien on the assets? How does the insolvency representative collect assets outside the jurisdiction?

There are 3 principal methods through a liquidator is able to recover assets that have been identified:

(a) One of these is the traditional method of utilising court assistance, which would be through instituting proceedings against the relevant counterparty.

(b) The second is through the use of a summary order for delivery (as under section 234 of the Insolvency Act 1986), which acts to secure property which is in the possession of the officers, agents or members of the company.

(c) Lastly, misfeasance proceedings can also be initiated, which involve holding a charge against a company director who has been considered to have breached their fiduciary duties.

3.6 Asset inventory and valuation

3.6.1 How does an insolvency representative ensure that the value of the assets on the books and records is accurate?

The primary document for this is the statement of affairs but many IPs / the OR once appointed will employ an independent expert to value assets, if funds exist in the matter to pay for their services. They should be exposed to sale in a process that achieves the best market value in the circumstances and liquidators / officeholders can be held responsible for any culpable undervalue sale.

It is a primary duty of each office holder to obtain the best value possible for the assets under their control but there is no obligation to spend their own funds in enhancing the value of such assets unless they choose to do so.

4. Recovery of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

This section includes tools specific to the preservation and recovery of assets by insolvency representatives or other stakeholders in your jurisdiction, after the commencement of the insolvency and restructuring proceedings (i.e. after the order for insolvency and restructuring proceedings has been made).

4.1 Court-based remedies

4.1.1 What tools are available to recover assets e.g. freezing orders, seizure orders or orders for judicial sale?

Liquidators may turn to the courts in order to assist them in recovering assets from third parties. Liquidators may apply for the same types of orders set out in section 1 above, namely: search orders, freezing injunctions, Norwich Pharmaceutical Orders and delivery-up orders.

An office holder can also apply to the court for disclosure / identification, tracing and preservation orders under the Insolvency Act 1986 once a company is in administration, administrative receivership, provisional liquidation or liquidation. There is a prior transaction regime to effect a recovery in certain circumstances. The powers and clawback provisions are set out above in section 2.1 above.

4.1.2 Do all or only some insolvency representatives have powers to use these tools? Which ones?

Liquidators and administrators can apply to court for relief. However, apart from the government's Official Receiver, only licensed insolvency practitioners are allowed to oversee United Kingdom insolvency procedures.

4.1.3 Can a party approach the court on a confidential, ex parte basis? What notice is required to be given to the holder of the assets (or potential defendant)?

Usually, notice should be provided to the other side in civil proceedings. The court has held that to grant an interim measure in the form of an injunction without notice "is to grant an exceptional remedy". Of course, in circumstances where giving notice would defeat the purpose of the order – as with freezing orders or search orders – it is possible to not give notice.

4.1.4 If applying on an ex parte basis, is there a duty to make full and frank disclosure?

Yes. A primary reason for the duty to make full and frank disclosure is that where applications are made without notice, the court becomes entirely dependent on the information provided to it by the applicant as it does not have a chance to receive or hear submissions from the respondent.

4.1.5 What elements are required to be proven, and to what standard of proof, in order to succeed? Is this a more onerous standard than usual?

When deciding whether to grant an interim injunction, the guidelines set out in *American Cyanamid Co (No 1) v. Ethicon Ltd* will be considered by the court. This test considers:

- whether there is a serious question to be tried;
- whether damages would be an adequate remedy;
- who the balance of convenience favours; and
- any special factors.

The standard of proof is on the "balance of probabilities". The more serious the allegation (e.g. fraud or dishonesty), the higher the degree of proof and the more convincing the evidence required. It is important to note that the standard of proof will not itself be different, but rather the seriousness of the issue will become part of the circumstances to be considered by the court in deciding whether or not the burden of proof has been discharged.

4.1.6 Are there any other requirements in order to obtain the orders? For example, an undertaking to pay damages associated with the freezing of assets and, if required, security for such an undertaking.

The applicant is normally required to give an undertaking in damages, should an injunction or order be granted. Such an undertaking is referred to as a "cross-undertaking", in order to reflect the fact that it is the applicant who bears the burden, rather than the respondent. The extent of the undertaking may extend to parties connected to the respondent that may indirectly suffer loss as a consequence of the order, while the amount of the undertaking itself can potentially be unlimited in certain circumstances.

4.1.7 What safeguards can the court require to be in place?

An independent supervising solicitor is necessary for certain types of search order.

4.1.8 What mechanisms are available to expedite claims against non-responsive or other defendants? For example, summary judgments or judgment in default. Is a final judgment required to enforce against a defendant?

If a defendant remains non-responsive or fails to involve and engage themselves in the matter at hand, then it is possible for the claimant to file a request to the court for a default judgement to be entered. This default judgement will serve to clarify either the date at which the debt must be paid (in full), a schedule of instalments, or the date on which goods are to be delivered – contextually dependent.

Failure of any party to comply with court orders can render individuals to be liable for contempt of court punishable by a fine and / or a maximum sentence of 2 years imprisonment.

4.1.9 What ancillary orders may be available?

Typical examples of ancillary orders to a freezing order include items such as an order for a court appointed receiver, delivery of a passport or an order for cross-examination.

The court does have power in appropriate circumstances to keep certain evidence confidential. The court can also make an order requiring an individual to file an affidavit regarding certain matters – e.g. their knowledge of the business, assets and affairs of the company.

4.1.10 In your jurisdiction, who enforces against assets?

Within the United Kingdom, the responsibility for enforcement against assets lies primarily with the creditor. Methods available include "taking control of the debtor's goods" (through the instruction of an enforcement agent), obtaining a charging order over the debtor's land or securities, third part debt orders, attachment of earnings or equitable execution.

Where there is an insolvency process the officeholder (i.e. the liquidator / administrator) will recover assets and pay creditors. Where there is security over those assets the officeholder will consult and seek agreement from the secured creditor in most circumstances.

4.1.11 *Are there specific causes of action or remedies that are only available to insolvency representatives to recover assets and / or books and records of the company? Do all or only some insolvency representatives have these powers?*

As discussed above at sections 2.1 and (in more detail) 4.1(1) above, officeholders have specific powers to apply to the court for disclosure / identification, tracing and preservation orders under the Insolvency Act 1986 once a company is in administration, administrative receivership, provisional liquidation or liquidation. They also have specific powers to recover assets in relation to certain defined transactions which are also set out at section 2.1 above.

4.2 Out-of-court assistance

4.2.1 *What mechanisms are available to the insolvency representative to identify and secure assets without court assistance?*

4.2.2 *What is required to utilise these mechanisms? Are there costs or time barriers involved?*

An officeholder has full power to deal with the insolvent company's assets from appointment. This means that they have authority to use the company name to request delivery of assets. If that is refused, then court assistance is required.

4.3 Powers to examine and investigate

4.3.1 *What powers are available to investigate the affairs of the company to identify and recover assets? Do these extend to individuals involved in the company or recipients of funds? What tools are available for the liquidator to investigate the location and nature of assets to satisfy a judgment?*

4.3.2 *What criteria are required to be satisfied before activating any powers of investigation regarding assets?*

These are set out at section 2.1 above above. Importantly section 236 of the Insolvency Act 1986 allows the liquidator / administrator to apply to the court for an order against any officer, or person known or suspected of having property of the company in their possession or having information regarding the promotion, formation, business, dealings, affairs or property of the company.

The court can make an order that the person provides an account of their dealing, produces books, paper or records in their possession and attend before the court for examination. Failure to comply with such a court order without reasonable excuse can lead to arrest, seizure of documents and potentially committal to prison for contempt of court.

5. Tracing of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

5.1 Verification of assets

5.1.1 *Has the Model Law been implemented or enacted as part of local legislation? What remedies can be obtained under the Model Law for the verification of assets?*

The United Kingdom has adopted the UNCITRAL Model Law on Cross-Border Insolvency through the Cross-Border Insolvency Regulations 2006 (CBIR), and the Cross-Border Insolvency Regulations (Northern Ireland) 2007, which together provide a basis for the recognition of foreign insolvency proceedings in the United Kingdom, and for assistance to be provided to foreign insolvency officeholders.

Schedule 1 of the CBIR 2006 replicates, in large part verbatim, the provisions of the Model Law in full. Foreign insolvency proceedings to which the CBIR 2006 apply are: "collective judicial or administrative proceedings in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation".

5.2 Completeness of books and records

5.2.1 *What criminal offences (if any) have been implemented for misrepresentation or incomplete information?*

- *Criminal offences under the Insolvency Act 1986 relating to false / misleading*

  The Insolvency Act 1986 provides that the following constitute criminal offences (all of which are punishable by a fine and / or imprisonment):

(a) falsification of a company's books (destroying, mutilating, altering) or even being "privy to" the making of any false or fraudulent entries (see section 209);

(b) "material omissions" (under section 210); and

(c) "fraudulent representations" (under section 211).

- *Misfeasance*

  Section 212 of the Insolvency Act 1986 contains a general provision of misfeasance, where "any misconduct involving a breach of substantive rules of company law, which resulted in loss to the company and gave rise to a right of action against the wrongdoer". Examples of this include:

  - retention of secret profits;
  - abuse of directors' powers resulting in loss to the company;
  - misapplication of company funds;
  - misappropriation of money or property belonging to the company; and
  - payment of company for improper purposes and much more.

  The court may compel a wrongdoer to repay the money or property with interest as the court may think fit or may award compensation as the court thinks just.

- *Fraudulent trading*

  It is an offence to carry on the business of a company with an intent to defraud creditors. Sections 213 of the Insolvency Act 1986 and section 993 of the Companies Act 2006 offer civil and criminal liabilities respectively. While the sections themselves are similar in nature, procedure and standards of proof differentiate them. In the civil proceeding under section 213, the standard of proof is on the balance of probabilities, whereas in the criminal matter it is beyond reasonable doubt.

5.3 Avoidable transactions – fraudulent conveyances and preference actions

5.3.1 What are the rules governing transaction avoidance?

(a) The main transaction avoidance provisions are transactions at an undervalue, preferences, extortionate credit transactions, avoidance of certain floating charges and transactions defrauding creditors. We have referenced these at section 2.1 above and focus on the main two below.

(b) Transactions at an undervalue.

Section 238 of the Insolvency Act 1986 sets out the criteria for a transactions at an undervalue. These are transactions which were made for a value significantly less than the market value of the asset concerned, and the liquidator is able to challenge such transaction. On a successful challenge the court has a wide range of powers to restore the position to what it would have been had the company not entered into that transaction.

(c) Preference actions

Preferences are transactions that result in one creditor being in a better position than they otherwise would have been in the event of insolvency. Section 239 of the Insolvency Act 1986 sets out the requirements which include an intention to create the effect. Again on a successful challenge, the court has a wide range of powers to restore the position to what it would have been had the company not entered into that preference.

5.4 Time limits for commencement of avoidance actions

5.4.1 Is there a limitation period for the commencement of avoidance action? Are there different limitation periods for concealed transactions?

(a) Limitation periods

(i) Avoidance actions

For transactions at an undervalue, 2 years before the commencement of the liquidation / administration if to a connected party or 6 months for non-connected parties (section 238 of the Act).

As per section 240(1), transactions occurring within 2 years before the onset of insolvency can be challenged (with respect to non-connected parties).

For preferences, 6 months before the commencement of the liquidation / administration.

The time bar for bringing actions which occur within the relevant time set out above are covered by section 8 of the Limitation Act 1980, with there being a 12-year time limit in which office-holders are able to commence proceedings, from the date on which the cause of action accrued.

It should be noted that a transaction to defraud creditors is, effectively, a transaction at an undervalue but with a mental element; the intention to defraud. This has no limitation period.

(ii) Concealed transactions

The time bar in respect of concealed transactions is governed by section 32 of the Limitation Act 1980 where the cause of action concerns fraud, concealment or mistake. Here, the limitation period does not run until the individual bringing the action has discovered or could have discovered it, provided there was reasonable diligence. The effective "postponement" helps with effectively extending for instance the limitation periods for those instances aforementioned above as well as in instances of fraudulent trading and wrongful trading (sections 213 and 214 respectively).

6. Recognition of judgments in relation to asset tracing and recovery

This section addresses the availability of cross-border assistance between jurisdictions and courts in relation to the recognition of judgments in relation to the preservation, protection and recovery of assets of the debtor company.

6.1 UNCITRAL Model Law on Cross-Border Insolvency

6.1.1 Has the Model Law been implemented or enacted as part of its local legislation, and what remedies can be obtained under the Model Law for the identification, tracing, recovery and preservation of assets?

As noted, the United Kingdom has adopted the UNCITRAL Model Law on Cross-Border Insolvency through the CBIR. The CBIR is the Cross-Border Insolvency Regulations 2006, and the Cross-Border Insolvency Regulations (Northern Ireland) 2007, which together provide a basis for the recognition of foreign insolvency proceedings in the United Kingdom, and for assistance to be provided to foreign insolvency officeholders.[3]

Schedule 1 of the CBIR 2006 replicates, in large part verbatim, the provisions of the Model Law in full. Foreign insolvency proceedings to which the CBIR 2006 apply are: "collective judicial or administrative proceedings in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation".

6.2 Judicial Insolvency Network

6.2.1 Have the JIN Guidelines been adopted, and what tools are available under the JIN Guidelines to facilitate court to court communication in respect of any recognition application made to court or any court filings for the purpose of identifying, tracing, recovering and preserving assets?

The JIN Guidelines were incorporated into law in England and Wales on 5 May 2017 through an amendment to the Chancery Guide.

Article 21.79 of the Chancery Guide (2022) states that communication between courts in different jurisdictions may be of assistance in the efficient conduct of cross-border insolvency cases.

The Chancery Guide includes links to the following three guidelines relating to court-to-court communications in cross-border insolvency cases (at paragraphs 21.79-21.80):

(i) The American Law Institute / International Insolvency Institute's Guidelines for Court-to-Court Communications in International Insolvency Cases

(ii) The EU Cross-Border Insolvency Court-to-Court Cooperation Principles

(iii) JIN's Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters

The guidelines outlined in subsection (c) are relevant to court-to-court communications in cross-border insolvency cases in England and Wales.

3 Ibid.

6.3 Other forms for recognition of judgments and reliefs granted under common law or any other legislation

6.3.1 How do foreign judgments become recognised? What relief may be granted upon recognition of the foreign judgments in relation to the identification, tracing, recovery and preservation of assets of the debtor company which the foreign judgment relates to?

(a) International conventions and agreements

(i) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)

The United Kingdom is party to a number of international conventions and agreements on enforcement of judgements or arbitral awards. For instance, the United Kingdom is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). The reference to the New York Convention can be found within the Arbitration Act 1996, under section 101 which states that "a New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland".

With respect to subsequent steps which may be taken, upon recognition the successful party would be able to avail of the domestic capabilities available to it with respect to asset tracing, recovery and preservation (freezing injunctions), as aforementioned within earlier sections of this guide.

(ii) Extension of territorial application

The United Kingdom has submitted notifications extending the territorial application of the New York Convention to Gibraltar, the Isle of Man, Bermuda, Cayman Islands, Guernsey, Jersey and the British Virgin Islands (BVI). This extension greatly expands the scope with respect to the recognition of foreign judgements across the United Kingdom's associated territories and is impactful given the relative financial significance of much of these jurisdictions.

(iii) Geneva Convention on the Execution of Foreign Arbitral Awards of 1927

The United Kingdom is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. Within legislation, this can be seen within the Arbitration (Foreign Awards) Order 1984, in which the Convention is referenced. Upon recognition, domestic methods can be utilised in order to proceed with assets.

(b) Inherent jurisdiction

In addition, it is clear that the courts in England and Wales possess an inherent jurisdiction to assist foreign office holders. In addition to providing assistance, the courts also have the power to recognise a foreign insolvency judgement. For instance, apart from where the provisions of the EC Regulation on Insolvency Proceedings 2000 or the CBIR apply, the recognition of foreign insolvency proceedings is based on case law, subject to limits on the grounds of public policy.

In the absence of any agreement on jurisdiction and enforcement, it is held that English common law shall apply to the enforcement of a foreign judgement. As per CPR 74, the definition of a foreign judgement is clarified as being "any judgement given by a foreign court or tribunal, whatever the judgement may be called".

Critically, the leading Court of Appeal case, Joint Stock Company *Aeroflot-Russian Airlines v. Berezovsky and anr*, held that a foreign judgment would be final and binding if it "would have precluded the unsuccessful party from bringing fresh proceedings in the [foreign] jurisdiction".

Again, upon successful recognition of a foreign judgement, parties have all the tools discussed above within this guide to assist them with respect to the identification, preservation and recovery of assets.

7. Privacy related issues when investigating and tracing assets

7.1 Privacy law issues related to assets of the insolvent company

7.1.1 Which (privacy) laws and regulations govern the processing of personal data in asset tracing investigations?

The processing of personal data within the United Kingdom is chiefly governed by the retained EU law version of the General Data Protection Regulation ((EU) 2016/679) (UK GDPR) and the Data Protection Act 2018 (DPA). The UK GDPR is the retained EU law version of the General Data Protection Regulation. The DPA essentially helps adapts the EU's (now the UK's) GDPR into the UK framework and outlines regulation and enforcement within the UK.

7.1.2 *Who is considered the controller within the meaning of article 4 par. 7 of the General Data Protection Regulation (GDPR) (e.g. for keeping the books and administration or processing personal data) during insolvency proceedings?*

An Insolvency Practitioner may be both data controller and data processor. The recent case of *Green v SCL Froup (and Ors)* [2019] EWHC 954 (Ch), 2019 WL 01645671 (centred on the Cambridge Analytica Group), illustrated some of the many complexities in this area. In this case, the High Court found that administrators are not automatically a controller for data protection purposes. The court stated that:

> "where a company holds and processes data then it is the company alone (and not the company and its directors together) which is the data controller; and the fact that the company becomes subject to an insolvency process does not of itself make the office holder a 'data controller'. The office holder will only become a 'data controller' if he takes decisions about the processing of the data as principal in his capacity as liquidator (or administrator) rather than as agent of the company."

Here the court reinforced the position established earlier in the case of *Re Southern Pacific Personal Loans* [2013] EWHC 2485 (Ch), where it was held liquidators were not automatically data controllers.

The key takeaway here is that where the insolvency practitioner takes active decisions on the processing of data, they will become the data controller.

7.1.3 *If the GDPR is not applicable within your jurisdiction, who is considered the person (natural person or entity) responsible for compliance with privacy laws (e.g. for keeping the books and administration or processing personal data) during the insolvency proceedings?*

This section is not relevant because the GDPR is applicable.

7.1.4 *Are there any legal requirements or obligations for obtaining and processing personal data, including sensitive data (e.g. criminal records), during the asset tracing process?*

Under the data protection framework of the United Kingdom, insolvency practitioners (especially those who cross the data controller threshold) should include privacy notices within their appointment notices.

7.1.5 *Are there any other relevant obligations in relation to the processing of personal data in the course of insolvency proceedings?*

The Financial Conduct Authority (FCA), the Information Commissioner's Office (ICO) and the Financial Services Compensation Scheme (FSCS) recently issued a joint statement to Insolvency Practitioners; regarding the selling of data. As per the statement: "By passing on personal data, companies may be failing to meet their obligations under the Data Protection Act 2018 and the GDPR".

The ICO act as the independent supervisory authority for data protection in the United Kingdom. Insolvency practitioners need to be aware that if they become a data controller, they will have to register as such with the Information Commission and pay the required fee under the Data Protection (Charges and Information) Regulations 2018.

7.1.6 *Are there restrictions on sharing personal data with third parties (e.g. law enforcement or creditors) involved in the insolvency proceedings?*

The United Kingdom data protection framework does not prohibit the sharing of personal data with law enforcement. The UK GDPR and the DPA permit this type of sharing where it is necessary and proportionate.

7.1.7 *If the GDPR is not applicable, are there any restrictions for transfers of personal data to countries outside your jurisdiction?*

This section is not relevant because the GDPR is applicable.

7.1.8 *Are there pending legislative proposals or amendments that may impact the processing of personal data during asset tracing in insolvency proceedings?*

(i) Indirect access by insolvency representatives to bank account information by requesting the designated courts in the EU Member State to access and run searches (artcile16).

(ii) Direct access by insolvency representatives to beneficial ownership information (article 17).

(iii) Direct access by insolvency representatives to national asset registers, where available (article 18).

The United Kingdom Government previously proposed the Data Protection and Digital Information Bill. One of its core objectives was to reform and upgrade the United Kingdom's data protection framework in a post-

Brexit landscape. However, at the time of writing, the Bill has yet to have passed into law and it is unclear if this proposed legislation will remain a priority.

7.2 Privacy law issues related to assets of directors or other parties

7.2.1 What legal grounds or exemptions allow the processing of personal data of directors or other parties during asset tracing, particularly when the insolvency representative considers actions or has initiated actions against them?

Within the UK GDPR, the grounds for the lawful processing of data (non-special category) can be found within article 6. One of the key grounds is for "legitimate interests" as set out below:

> "Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."

7.2.2 Do these legal grounds or exemptions only apply to a (court appointed) insolvency representative, or also to other parties?

The UK GDPR does not distinguish between insolvency practitioners and other data controllers.

8. Considerations when criminal law is involved

8.1 How should the insolvency representative or provisional insolvency representative or other authorised person deal with the authorities when criminal law is involved?

There are a number of sections of the Insolvency Act 2006 that provide for criminal sanction in which circumstances the officeholder will need to engage with criminal authorities.

More importantly, the officeholder may need to deal with the SFO if they are undertaking an investigation.

- *IPs may need to deal with the SFO if it decides to investigate the insolvent entity*

  The Serious Fraud Office (SFO) may undertake investigations into insolvent entities, pursuant to its investigative powers in section 2 of the Criminal Justice Act 1987 and section 218(5) of the Insolvency Act. There are circumstances where the investigatory powers of the officeholder are curtailed by the right of an interviewee to refuse to answer so as not to incriminate themselves.

8.2 Are there any relevant laws, authorities and considerations under criminal law which may be applicable in relation to an application made by the provisional insolvency representative or authorised person for any provisional measures?

See section 5.2 of this guide above.

9. Digital assets and crypto assets

9.1 Crypto as an asset and ownership issues

9.1.1 How is cryptocurrency classified?

- *Cryptocurrency as property*

  English insolvency law has been required to become increasingly flexible to cater for new assets, both as a matter of common law and statute. In the United Kingdom, cryptoassets (including cryptocurrencies) fall within the broad definition of property in the Insolvency Act 1986 (IA 1986):

  > "'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property."

  This outlook has been supported by both the English Courts and the UK Jurisdiction Taskforce's (UKJT) various legal statements. In November 2019, the UKJT stated that cryptoassets by way of common law have "all the indicia of property", which was subsequently supported by the English High Court in *AA v Persons Unknown* to be "an accurate statement as to the position under English law" and are then "a form of property capable of being the subject of a proprietary injunction".

  This position that cryptocurrency is property in the ordinary legal sense has been reconfirmed in the UKJT's latest statement of April 2024, whereby it concluded that digital assets fall firmly in this definition. The Law

Commission has even concluded that this should go further, proposing that a third category of property rights should be created ("data objects"), in addition to "things in possession" and "things in action" to expressly accommodate digital assets.

- *Cryptocurrency as money*

  However, as noted by the UKJT's April 2024 statement, cryptocurrencies are not yet treated as money, given they do not represent a liquidated sum, and from this, are not a form of foreign currency pursuant to the Insolvency (England and Wales) Rules 2016 (IR 2016). Consequently, they cannot form part of a statutory demand, and are not currently subject to the rules in the Financial Conduct Authority's (FCA) Client Assets Sourcebook (CASS) which supersedes the common law rules of tracing.

  It remains to be seen whether, once digital assets become a more widely accepted means of exchange or there is an increase in central bank digital currencies, this outlook could change to allow digital assets to even form the basis for statutory demands or another form of classification.

- *Cryptocurrency as a security*

  To date, the United Kingdom's approach on the classification of securities and investments has been to rely on the United Kingdom's established regulatory regime for investments. In 2023, the FCA introduced its phased approach for the wider regulation of digital assets, to begin to capture digital assets in its regulatory remit, firstly by tackling their financial promotion. Currently, cryptoassets which exhibit properties of "investments" (for example, by entitling holders to a share in a profit of an underlying enterprise) would be caught within the United Kingdom's existing investment regime, and features of those assets should be considered on a case-by-case basis (including whether such digital assets would be "securities" for the purposes of the Investment Bank Special Administration Regulations 2011 (IBSAR 2011), which also supersedes the common law rules of tracing).

9.1.2 What rights and interest do cryptocurrency exchanges or trading platforms have in the cryptocurrency held in accounts at the exchange or platforms?

Given that the United Kingdom has not, to date, often been the jurisdiction of choice for cryptocurrency exchanges (save for local subsidiaries), there have been limited opportunities for English courts to consider what rights or interests the exchanges or the customers can expect to have.

In the absence of any regulatory rules (such as the proposal by the FCA to extend CASS to digital assets), the rights of cryptocurrency exchanges and trading platforms will depend on the nature of the exchange and the specific terms agreed between the parties when deposited. Where a proprietary right can be established (most likely through the creation of a trust, as discussed further below), holders may be entitled to rights in priority of unsecured creditors. Where only a personal claim can be established (for example, only a contractual right under the exchange's terms of service to the monetary value of the cryptoasset held in an account), rights are likely limited to an unsecured creditor claim.

9.1.3 Is cryptocurrency capable of being subject to a trust, secured creditor interest or custody arrangement?

- *Trusts*

  The English courts have recognised that constructive trusts can arise in relation to cryptocurrency, as was the case in *Jones v Persons Unknown* [2022]. Further, it is the view of UKJT in its April 2024 statement that cryptocurrency is capable of being subject to a trust arrangement, with the effect of this being the holder would have a proprietary claim in the asset. This is subject to the three certainties of trust law being met, being"

  (i) intention;

  (ii) sufficient identification of beneficiary; and

  (iii) sufficient identification of the assets (in this case being the cryptocurrencies) themselves.

- *Secured creditor interest*

  Following the establishment that cryptocurrency is property under English law, it follows that they can be subject to a security interest. If the party seeking to rely on the cryptocurrency holds a proprietary interest, it follows the holder would be a secured creditor and rank higher in the order of priority on a winding up.

- *Custody arrangement*

  Third-party custodians and providers of storage and security services can be used as a means of holding cryptocurrencies, including through establishment of an express or implied trust, in such a way they are not considered property of the custodian. In the absence of a trust (for example, where the custodian does not identify the assets separately from its own), the rights of holders to custody arrangements are likely to be limited to a contractual claim.

9.2 Core issues in insolvency

9.2.1 When a cryptocurrency exchange / platform is subject to insolvency proceedings, what are the applicable legal standards for determining whether the exchange / platform or the accountholder owns the cryptocurrency held at the exchange / platform?

Unlike in the case of the United States bankruptcy of Celsius, where a distinction between custody and interest-bearing accounts impacted the New York court's assessment of ownership, the English courts have not considered this distinction in the same amount of detail.

9.2.2 Have there been any significant legal decisions in your jurisdiction regarding ownership of cryptocurrency in insolvency proceedings?

Legal decisions relating to cryptocurrency in insolvency has, to date, been limited in the English courts.

9.2.3 How is cryptocurrency valued in insolvency proceedings?

As detailed in section 9.1 above, cryptocurrency has been recognised as a form of property which has some value attributed to it (although the means and timing of such a valuation are contested). This means it is an asset which would need to be considered as either part of or outside the parameters of an insolvent estate. It is also noteworthy that an insolvency practitioner has the duty to obtain the best price when dealing with an insolvent estate. As discussed further in this chapter, that English law provides for distributions in specie may be helpful given the volatility of value of digital assets.

9.2.4 When a cryptocurrency / platform goes into insolvency, do customers have any special priority or are they treated as general unsecured creditors?

In the United Kingdom, the treatment of customers when a cryptocurrency platform becomes insolvent would vary based on the manner in which the assets are held, as further discussed in section 9.1 above. If the assets were held on trust, parties would be able to assert their proprietary interest against specific assets and these cryptoassets would not be compromised in certain insolvency processes, such as CVAs, schemes and restructuring plans. Conversely, in the absence of a trust, customers would rank as general unsecured customers, with the potential for their assets to be subsumed into those same insolvency processes.

9.2.5 If the UNCITRAL Model Law on Cross-Border Insolvency has been enacted in your jurisdiction, how can that law be used to assist with the tracing and recovery of cryptocurrency assets? Are there other laws or rules dealing with cross-border insolvency that can be used to assist with the tracing and recovery of cryptocurrency assets?

As noted, the United Kingdom has enacted the UNCITRAL Model Law on Cross-Border Insolvency through The Cross-Border Insolvency Regulations 2006 (CRIB 2006). See also the responses in sections 5.1 and 6.1 above.

9.3 Clawback / recovery of cryptocurrency assets

9.3.1 What types of non-insolvency claims are available to recover stolen / misappropriated cryptocurrency?

In light of cryptocurrencies being considered as property by the English courts, general principles of English criminal law will apply. Applicable non-insolvency claims may then include, inter alia, those for breach of contract, negligence, fraud offences and those as provided for by the Theft Act 1968.

9.3.2 Are there any clawback or avoidance claims under insolvency law that can be brought to recover cryptocurrency transferred from the debtor prior to commencement of insolvency proceedings?

The Insolvency Act 1986 provides for a variety of mechanisms to claw back cryptocurrency transferred from the debtor prior to the commencement of insolvency proceedings. These antecedent transactions compromise of the following: transactions at an undervalue, preferences (with orders for TUVs and preferences being contained in section 241), avoidance of certain floating charges, transactions defrauding creditors and avoidance of property dispositions.

See also the responses in sections 2.1, 3.6 and 5.3 above.

9.3.3 *Are there any special or unique issues in bringing a clawback / avoidance claim to recover cryptocurrency? Have there been any significant decisions in this area?*

There are various challenges associated with the recovery of cryptocurrency, each of which are not unique to the United Kingdom. In addition to the extent of anonymity in this space and the dissipation risks (including through the use of mixers), the fact that the private key is required to move any cryptoasset results in difficulties with retrieving assets, even where they have been identified. It is advised to act as quickly as possible and invoke any powers available to identify wallet addresses and holders of private keys in the hope of identifying the source and movement of any misappropriated assets and options for recovery.

From a jurisdictional perspective, the question of whether it falls under the English court's purview will also require consideration. However, it has been confirmed that, at least for the meantime, the well-established test relating to centre of main interests (COMI) will continue to be used. Where COMI is not applicable, however, *lex situs*, that is the view that the location of the digital asset is the place where the owner is located, may also be used to allocate jurisdiction.

Another unique issue relates to how to realise value and convert the cryptocurrency into a fiat currency, such as sterling. There is a requirement that conversion needs to take place at the "relevant date" (that being when the company first enters administration and liquidation); the volatility of the cryptocurrency market renders establishing this point in time a much more complex task. Further, the immutable nature of blockchains means that the undoing of transactions is not practically possible. For instance, a judge may be required to order an equal and opposite transfer in contrast to a simple undoing, which again has its own complexities.

9.3.4 *What remedies are available under both insolvency and non-insolvency law to freeze or compel the turnover of cryptocurrency assets? What are the legal standards / requirements for obtaining those remedies?*

As cryptocurrency assets are largely viewed as equal to other forms of property, the same remedies would be available to the holder (dependent on the nature of their interest), such as NPOs (particularly when served against third parties who hold the private keys (such as a digital asset exchange or custodian) over the wallet where disputed cryptoassets are held or through which they have been transferred), the enforcement of judgments against crypto assets, asset preservation orders and freezing injunctions (requesting a freeze and / or destruction of assets remotely, which can, for a very limited type of token, but done through a smart contract). See also the response in section 1 above.

9.4 Tracing of cryptocurrency

9.4.1 *What discovery or information gathering tools are available, under insolvency and non-insolvency law, to obtain information on the location of cryptocurrency and the owner of that cryptocurrency?*

English law provides insolvency officeholders with a variety of interlocutory, investigation and enforcement procedures to assist with information collection. Please note these powers as provided for between sections 234 and 236 of the Insolvency Act 1986 are only available when a company is in administration, administrative receivership, provisional liquidation or liquidation. These are as follows:

- *Getting in the company's property*

  The court may require the delivery of certain property or records (such as private keys, wallets and passwords) to the insolvency practitioners as part of the process and to mitigate any potential claims for loss or damage through seizure. Issues may arise if the keyholder is based in a foreign jurisdiction or their identity is unknown.

- *Duty to cooperate with officeholder*

  Parties must provide information as "reasonably required", which applies to broad range of persons, including officers and persons involved with the company up to one year prior to insolvency.

- *Inquiry into the company's dealings*

  This contains the power for disclosure and the requirement to produce records or account of dealings on demand. This is particularly pertinent for cryptocurrency transactions which are often complex and require explanation by the parties involved.

See also the responses in sections 2.1 and 3.5 above. Additionally, as discussed in section 9.3(d), NPOs, as a disclosure tool, can be used to follow the blockchain and movement of assets, where they have been transferred to a different exchange, for example.

9.4.2 *What type of information are cryptocurrency exchanges / platforms required to collect from customers (including KYC information) when they open an account?*

Since January 2020, United Kingdom cryptocurrency exchanges and platforms have been required to register with the FCA if they fall within the scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017).

Provided the activity is carried on by way of business in the UK, cryptoexchanges are caught, which requires the exchange to carry out KYC checks (appropriate for the particular kind of person). This may include:

(i) legal name;

(ii) birth date;

(iii) address; and

(iv) national ID number (if applicable).

In any event, United Kingdom cryptocurrency exchanges falling within MLR 2017 must conduct customer due diligence on all clients, use of a risk-based approach, ongoing monitoring of transactions and enhanced due diligence for clients which are deemed to be a higher risk.

9.4.3 *Can the KYC information about accountholders collected by a cryptocurrency exchange / platform be obtained through a formal discovery process? Are there any special issues to navigate in your jurisdiction in order to obtain such information?*

Yes. See "inquiry into a company's dealings" above if subject to an insolvency process and use of NPOs. For example, a party may serve an NPO on a cryptocurrency exchange requesting that they share KYC information on the account to which they were credited.

9.4.4 *What type of forensic or tracing tools are available to assist with the tracing and recovery of cryptocurrency?*

There are various third-party providers which are beneficial to be engaged in support of expediting the process to trace and recover cryptocurrency. Given the inherent global nature of digital assets, these services are also able to be used across multiple jurisdictions and are not unique to those in the United Kingdom seeking to trace and recover. To provide a popular example, Chainalysis is a cryptocurrency tracing intelligence tool used by many law enforcement agencies, which has capabilities such as visualisation tools to track the asset flow from suspicious addresses. Other services can assist to acquire and assess details such as IP addresses, address clusters and attributions.

9.4.5 *What type of expert evidence is necessary to establish the tracing of stolen or misappropriated cryptocurrency to a particular account / wallet?*

Given the complex nature of recovery, parties are advised to engage forensic blockchain investigators to identify, trace and recover stolen or misappropriated cryptoassets. Such experts are able to take advantage of the tools, as described, above to decipher issues derived from a lack of information and identify known 'black-listed' or sanctioned wallets.

9.5 Government / regulatory intervention

9.5.1 *What governmental bodies or agencies have oversight over fraud or theft of cryptocurrency?*

Presently, consumers can report stolen or misappropriated cryptocurrency to the police or Action Fraud (the United Kingdom's national reporting centre for fraud and cybercrime), who are assisted by the National Fraud Intelligence Bureau (NFIB). In light of concerns over its efficacy, Action Fraud is expected to be replaced by a new service, established by the City of London Police and supported by suppliers, such as Capita PLC and PWC, to provide a specialist fraud and cybercrime reporting service. The international nature of the asset class also often necessitates relationships with international enforcement bodies and the utilisation of mutual legal assistance requests.

From a regulatory perspective, the FCA has commenced plans for increased regulation of cryptoassets, such as the publication of discussion paper DP23/4 and the introduction of a phased approach to regulation, initially focusing on fiat-backed stablecoins, before introducing a wider cryptoasset regulatory regime.

9.5.2 *Are there remedies available to law enforcement that could lead to the recovery or forfeiture of stolen / misappropriated cryptocurrency and the return of that cryptocurrency to the victims?*

As of April 2024, the National Crime Agency (NCA), together with the National Economic Crime Centre (NECC), have been afforded greater powers under the Economic Crime and Corporate Transparency Act 2023 (ECCTA 2023) (specifically sections 179 to 181) in relation to the recovery and seizure of cryptoassets. These include:

(i) the end of the requirement to make a prior arrest before seizing cryptoassets;

(ii) widened scope of seizures to include written passwords and memory sticks;

(iii) the ability to seek to transfer cryptoassets into a controlled and protected electronic wallet;

(iv) the ability to seek to destroy cryptoassets; and

(v) a new application process whereby victims can apply for release of funds stored in cryptocurrency accounts.

UNITED STATES OF AMERICA

1. Before commencement of insolvency and restructuring proceedings (pre-order for insolvency and restructuring proceedings)

1.1 What are the relevant laws or rules and relevant provisional measures available in connection with the identification, tracing, recovery and preservation of assets before an application for an insolvency or restructuring proceeding is made?

In the United States, preliminary injunctions and temporary restraining orders (TROs) can be pursued under the Federal Rules of Civil Procedure (FRCP) rule 65 to prevent asset disposition or imminent harm. Attachment procedures, which vary by state and certain federal contexts, enable creditors to secure a debtor's property in anticipation of a potential judgment or insolvency proceeding.

The FRCP's discovery rules can also assist in the identification and tracing of assets.

While *Mareva* Injunctions, which freeze assets on an *ex parte* basis, are unavailable for money damage claims due to the Supreme Court case of *Grupo Mexicano de Desorrollo, S.A. v. Alliance Bond Fund, Inc.*,[1] they can be issued when the claim is equitable in nature[2] or seeks a mix of legal and equitable relief where the movant can demonstrate there is a nexus between the injunctive relief and the equitable relief ultimately sought.[3]

2. Summary of corporate insolvency and restructuring proceedings

2.1 Formal insolvency legislation for corporations

2.1.1 Does your jurisdiction have formal insolvency and restructuring legislation or a framework for corporations? What laws or rules govern the insolvency and restructuring of corporations? Does specific legislation, laws or rules exist for the identification, tracing, recovery and preservation of assets?

In the United States, corporate insolvency and restructuring are principally governed by the United States Bankruptcy Code. Chapter 7 governs liquidations, wherein a corporation's assets are sold to repay creditors. Chapter 11 governs business reorganisations, allowing corporations to renegotiate with creditors and modify debt arrangements. For cross-border cases, Chapter 15 (adopting the UNCITRAL Model Law on Cross-Border Insolvency) provides a framework for the recognition of foreign insolvency proceedings in the United States.

Chapter 5 of the Bankruptcy Code (which applies in Chapter 7 and Chapter 11 cases) is instrumental in the identification, tracing, recovery and preservation of assets, and enables the bankruptcy trustee, and in some cases creditors, to pursue claims to avoid pre-bankruptcy asset transfers (including fraudulent transfer and preference claims). Outside of a bankruptcy proceeding, the FRCP provides discovery powers that facilitate asset discovery. State laws may also offer additional mechanisms for asset identification and recovery.

For example, under Illinois law, "citation-to-discover-assets proceeding" is a supplementary proceeding designed to provide an efficient and expeditious procedure for the discovery of assets and income of a judgment debtor, and to compel the application of discovered non-exempt assets or income towards payment of a judgment.[4] Similarly, under rule 5224(a)(3) of the New York Civil Practice Law and Rules, a creditor may issue an information subpoena to a judgment debtor. The judgment debtor is obligated to answer the questions attached to the information subpoena under oath, and each question will need to be answered separately and fully. Information subpoenas can be served on an individual or entity other than the judgment debtor, such as an individual, corporation or partnership, if the judgment creditor believes the information sought will assist the creditor in collecting the judgment.[5]

Additionally, under a United States federal statute, 28 U.S.C. § 1782 (section 1782), an "interested party" to a foreign proceeding can apply to a federal district court for information to be used in a "foreign proceeding."

Section 1782 provides a mechanism, outside of formal insolvency proceedings, to pursue the identification of assets from United States-based sources (e.g. from United States banking institutions). Some courts have concluded that a foreign insolvency proceeding constitutes the "foreign proceeding" for the purposes of section 1782, thereby enabling an insolvency representative to use the statute in support of asset tracing.[6] However, it is arguable that a foreign insolvency representative must first seek and obtain recognition under Chapter 15 before availing himself or herself of the remedies under aection 1782.

1 *Grupo Mexicano de Desorrollo, S.A. v. Alliance Bond Fund, Inc.* 527 U.S. 308 (1999).

2 *See New Falls Corp. v. Soni Holdings, LLC, No. CV19449ADSAKT,* 2019 WL 4015170, at *10 (E.D.N.Y. July 5, 2019) ("Grupo Mexicano does not . . . preclude courts from entering asset-freezing preliminary injunctions in cases in which the movant seeks equitable relief . . . and the preliminary injunction is ancillary to the final relief.").

3 *See, Matrix Partners VIII, LLP v. Nat. Res. Recovery, Inc., No. 1:08-CV-547, 2009 WL 175132, at *5 (E.D. Tex. Jan. 23, 2009) (finding "a nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets").*

4 See IL ST CH 735 § 5/2-1402; In Re FBN Food Services, Inc. 158 B.R. 756, 757 (Bkrtcy,N.D.Ill. 1993).

5 Rule 5224(a)(3)(i), CPLR (NY).

6 *See, e.g., In re Octaviar Admin. Pty Ltd*, 511 B.R. 361, 366 n.16 (Bankr. S.D.N.Y. 2014).

2.2 Appointment of insolvency representative, provisional insolvency representative or authorised person

2.2.1 Upon the application of the insolvency or restructuring proceedings, does your jurisdiction have a legislative framework for the appointment of an authorised person or provisional insolvency representative who is entrusted with the administration or supervision of the debtor company's business or assets, or the realisation of all or part of the debtor company's assets?

In the United States when a corporation enters into liquidation under Chapter 7, a trustee is appointed to gather and liquidate the debtor's assets, distributing the proceeds to creditors. In Chapter 11 reorganisations, the company typically continues as a "debtor-in-possession" (DIP), with existing management overseeing the company's assets unless a trustee is appointed for reasons such as fraud. The DIP must secure court approval for significant business transactions but may continue to trade the business and dispose of assets in the ordinary course. In cross-border cases under Chapter 15, United States courts may recognise foreign representatives and grant relief in respect of foreign corporations undergoing insolvency proceedings in other jurisdictions.

2.2.2 Where an application for an insolvency or restructuring proceeding is not made, is there a similar legislative framework for the appointment of such an authorised person for the identification, tracing, recovery and preservation of the company's assets?

Outside of formal bankruptcy proceedings, in certain scenarios such as where there is fraudulent activity, non-bankruptcy courts can appoint receivers to manage and protect a company's assets.

2.3 Effects and duties imposed on the debtor company

2.3.1 What are the effect(s) and duties imposed on the debtor's company upon the application of insolvency or restructuring proceedings in relation to the identification, tracing, recovery and preservation of assets? Is there a similar duty imposed on any party or company where an application for an insolvency or restructuring proceeding is not made?

Debtors, especially during Chapter 11 reorganisations, must file comprehensive schedules of assets and liabilities, current income and expenditures, and a statement of financial affairs. The United States Trustee (the arm of the United States Department of Justice that oversees bankruptcy cases) or creditors may request the debtor to produce books, records and other documents during the proceedings. Debtors can also be examined under oath in creditors' meetings, facilitating asset identification and validation.

Whether in Chapter 7 or Chapeter 11, debtors have a fiduciary duty to conserve and optimise the bankruptcy estate's assets for creditors. Outside of formal bankruptcy, when receivers are appointed in civil litigations over assets or as a result of fraudulent activity, receivers generally have a duty to maintain accurate records of all property received and disbursed. Moreover, in civil proceedings, parties may be obliged under the FRCP (particularly during the discovery phase) to produce relevant financial documents, records and information that can assist in asset identification, even if no formal insolvency or restructuring proceeding is underway. Note, however, that while bankruptcy trustees and DIPs owe fiduciary duties to the bankruptcy estate as a whole, receivers appointed (particularly when appointed at the request of a single creditor) may not have such expansive duties.

2.4 Stay of execution of assets

2.4.1 Upon the application of the insolvency or restructuring proceeding, is an automatic stay imposed on any existing, or the commencement of any new legal proceedings, or the realisation of assets (moveable and immoveable property) of the debtor company?

Upon filing for bankruptcy in the United States, an "automatic stay" as provided in section 362 of the Bankruptcy Code comes into effect. This halts the majority of collection efforts, lawsuits and other actions aimed at the debtor or its property, including both movable and immovable assets. The breadth of the stay is significant, stopping the commencement or continuation of legal actions, the enforcement of judgments, attempts to control or possess the property of the estate, and actions to create or perfect liens against the estate.

The stay is also extra-territorial, and applies to all actions against the debtor whether inside or outside the United States. Activation of the automatic stay is instantaneous on the filing of the bankruptcy petition, negating the need for additional requirements to be satisfied by the debtor. This is critical to ensure that assets remain safeguarded during the bankruptcy process. While the automatic stay provides a protective umbrella for debtors, creditors or other parties can request the court for relief from the stay to pursue certain actions. Some actions, like criminal proceedings or certain regulatory endeavors, may also continue despite the imposition of the stay.

Outside of formal bankruptcy proceedings, no direct equivalent to the automatic stay exists. Nevertheless, in circumstances where a receiver is appointed in civil litigation, courts might issue orders pausing actions against specific assets. These orders are at the discretion of the court, and arise from the court's inherent authority to oversee its cases and safeguard the property in receivership. For a stay in non-bankruptcy situations, the petitioning party usually needs to demonstrate potential irreparable harm if the stay is not granted.

2.5 Power to restrain or order the transfer of assets

2.5.1 Does the insolvency representative, provisional insolvency representative or authorised person have the authority to limit the powers of the debtor company in respect of the transfer of its assets, or to issue a restraining order or injunction to any third party for the preservation or protection of assets of the debtor company?

Trustees or debtors-in-possession may, if they deem it essential for asset protection, seek approval for a court order protecting the debtor's property in the hands of third party. In essence, they might request the court to forestall third parties from either disposing of or meddling with assets that form part of the bankruptcy estate. Generally, they need to demonstrate the asset is part of the bankruptcy estate, highlight the potential harm if the action is not enjoined, and assert that the relief is in line with the overarching objective of equitable asset allocation among creditors.

Outside of formal bankruptcy cases, United States courts still maintain extensive authority to issue protective orders for assets, especially in civil litigation scenarios where there is the possibility of asset dissipation or fraudulent activity. When a receiver is appointed in such circumstances, they are able to petition the court for orders mirroring those in bankruptcy, such as asset freezing. To secure these orders, the receiver typically has to establish potential harm if the order is not granted and argue that safeguarding the asset is in the best interest of all parties involved.

2.6 Safeguards, checks and balances

2.6.1 Does the insolvency representative, provisional insolvency representative or authorised person have to satisfy any test or legal threshold in order to obtain any relief in relation to the assets of the debtor company?

This is addressed collectively in the section below.

2.6.2 Is there a notice requirement by the provisional insolvency representative or authorised person to publicise any application for any provisional measures to be imposed against the debtor company, its creditors or any other third party? Is there an avenue for the debtor company, its officers, or any other third party to terminate or challenge the application for or imposition of any provisional measures? Is there a duration for which the provisional measures would be imposed?

A debtor-in-possession (DIP) enjoys a considerable degree of autonomy in managing the business. Under Section 363 of the Bankruptcy Code, a DIP can conduct business operations in the "ordinary course" without specific court approval, ensuring minimal disruptions to daily operations. However, when a DIP or trustee aims to divest assets out of the ordinary course of business, they must satisfy the "business judgment" test. For transactions involving "insiders", courts invoke a heightened scrutiny to confirm the sale's fairness, seeking to ensure it is free from bias, preferential treatment or conflicts of interest. Before a sale out of the ordinary course of business, the DIP or trustee must give notice to creditors and other involved parties. They are given a specific period to raise any concerns. If objections arise, a court hearing is held to address them.

When the DIP fails to perform its duties, creditors or the United Trustee can petition the court to appoint a Chapter 11 trustee to replace the DIP.[7] This trustee takes over the management of the business, assets and bankruptcy process, ensuring the bankruptcy is conducted in the best interests of the creditors and other stakeholders. A Chapter 11 trustee may be appointed for cause, including fraud, dishonesty, incompetence or gross mismanagement by the debtor's current management, either before or after the bankruptcy filing, or when such appointment is in the best interests of creditors, equity security holders and the estate. This action is considered an extraordinary measure.

Parties may also move for the conversion of a Chapter 11 case to a Chapter 7 case or its outright dismissal. However, the court will not convert or dismiss the case if the debtor or another party opposes the motion and demonstrates that, among other things, there are sufficient prospects for an effective reorganisation. If a Chapter 11 case is not converted or dismissed, the case will proceed until a plan of reorganisation is confirmed.

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7 11 U.S.C. § 1104.

3. Identification of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

3.1 Notice of insolvency proceedings

3.1.1 What effect(s) and duties imposed on the debtor's company upon the commencement of insolvency or restructuring proceedings in relation to the identification of assets?

For all bankruptcy filings, as per § 521 of the Bankruptcy Code, the debtor is required to file a list of creditors, a schedule of assets and liabilities, a schedule of current income and current expenditures and a statement of the debtor's financial affairs.

The debtor must also cooperate with the trustee as necessary, which may include surrendering to the trustee all property of the estate and any recorded information, including books, documents, records, and papers. If requested by the trustee, the debtor must also provide any documents establishing the identity of the debtor. Debtors can also be examined under oath in creditors' meetings, facilitating asset identification and validation.

3.2 Identifying assets

3.2.1 How does your jurisdiction identify assets if the books and records are unreliable?

A trustee will not solely rely on books and records for identifying assets, regardless of the reliability of the documents. Trustees may also employ various methods to locate and identify assets not disclosed in the schedule provided by the debtor, including but not limited to completing a public record search, reviewing payroll slips to identify funds being deposited into unlisted bank accounts, reviewing bank records, reviewing tax returns and reviewing financial statements.

Digital means serve as open sources of information and are useful in identifying assets (such as online registers, databases and social networks). The use of social media in the search for hidden assets has become a valuable investigative method. Modern investigative methods and forensic technology facilitate the tracing of both physical and digital assets across jurisdictions, in particular by alleviating the need to deal with administrative barriers and bureaucratic hurdles and inertia.

In bankruptcy cases, rule 2004 of the FRBP empowers a trustee or debtor-in-possession and other stakeholders to conduct broad investigations into the financial affairs of the debtor or any matter which may affect the administration of the debtor's estate. For a detailed discussion on rule 2004 examinations, refer to Section 4.3.

3.3 Asset location

3.3.1 What laws or rules govern the insolvency and restructuring of asset location?

Under the United States Bankruptcy Code, property of a debtor's estate is worldwide, and subject to certain exceptions extends to all the debtor's property "wherever located and by whomever held."[8] The bankruptcy court has jurisdiction over all of the debtor's non-exempt assets regardless of the assets' location.[9]

Chapter 15 of the Bankruptcy Code was created to incorporate the UNCITRAL Model Law on Cross-Border Insolvency to provide effective mechanisms for dealing with cases of cross-border insolvency. This allows for cooperation between the courts of the United States, United States trustees, examiners, debtors and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases. Unlike a plenary United States bankruptcy case (i.e. a Chapter 11 or Chapter 7 bankruptcy), and consistent with the principles underlying the UNCITRAL Model Law, a Chapter 15 bankruptcy case is generally confined to the debtor's assets located within the United States.

3.4 Asset exclusions

3.4.1 What assets may be considered exempt property?

Asset exemptions only apply to Chapter 7 and Chapter 13 bankruptcy filings. An asset exemption in Chapter 7 filings prevents the bankruptcy court from liquidating non-exempt assets. Although assets are not subject to mandated liquidation under Chapter 13, asset exemptions still apply to this type of filing as the repayment plan is formulated based on the total value of the property that is not exempt from bankruptcy.

The types of assets that are usually excluded in respect of natural persons include assets that are necessary for the debtor to earn a living, post-application earnings from the provision of personal services, and personal and household items necessary to satisfy the basic domestic needs of the debtor and his or her family. Further exemptions may apply to joint assets such as matrimonial property. Section 522(d) of the Bankruptcy Code lists the property that may be exempt as including:

- The debtor's aggregate interest, not to exceed US $15,000 in value, in real property or personal property that the debtor or their depended uses as a residence.
- The debtor's interest, not to exceed US $2,400 in value, in one motor vehicle.

8 11 U.S.C.§ 541.
9 28 U.S.C. § 1334(e).

- The debtor's interest, not to exceed US $400 in value, in any particular item or US $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for personal, family, or household use of the debtor or their dependent.
- The debtor's aggregate interest, not to exceed US $1,000 in value, in personal jewelry held by the debtor or their dependent.
- Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under the Internal Revenue Code.

3.5 Collecting Assets

3.5.1 Once assets included in the books and records or outside the books and records have been identified, what methodologies are in place to collect those assets? Does an insolvency representative need to have possession of the assets? Is the insolvency representative required to put a lien on the assets? How does the insolvency representative collect assets outside the jurisdiction?

In a Chapter 7 bankruptcy filing, a court appointed trustee takes possession of non-exempt assets of the debtor, liquidates the assets and distributes the proceeds to creditors. This includes non-exempt assets that were previously transferred that are identified and obtained by the bankruptcy estate. This is the only type of filing in which a trustee will automatically take possession of assets and will legally control all assets of the estate (in filings under other chapters, including Chapter 11, the debtor presumptively remains "in possession" of its assets, but is vested with both the rights and duties of a trustee).

Under a bankruptcy liquidation, all non-exempt assets belong to the bankruptcy estate, including assets held domestically or internationally or assets in the possession of third parties. It may be the case that the assets remain in the debtor's possession until the asset is administered by the trustee or it may be the case that the trustee or a representative of the trustee will arrange to collect non-exempt assets or may arrange to have the assets delivered to the trustee to protect or preserve an asset.

While assets belong to the bankruptcy estate, neither a debtor, a person or a business can use or transfer an asset that belongs to the estate unless there is a court order or notice from the trustee. No liens will be put on the assets by the trustee, but the trustee holds all the rights and powers of a judgement lien creditor. The trustee is also granted avoidance powers, which allows them to negate or nullify certain transfers or transactions made by the debtor before filing the bankruptcy estate. This helps prevent debtors attempting to hide their assets by transferring them to an insider or from making preference payments to particular creditors.

For non-exempt assets located outside of the United States, the trustee will seek to pursue and liquidate internationally held assets only if they enhance the value of the bankruptcy estate. If the returns from liquidating the foreign asset will assist in paying back a significant portion of domestically held debts, the trustee will seek to obtain control of the asset and sell it. Section 1505 of the Bankruptcy Code specifically allows the bankruptcy court to authorise the trustee or debtor-in-possession to act in a foreign country, including by appointing an individual to act as "foreign representative" for purposes of recognition of the United States bankruptcy proceeding under cross-border insolvency law.

3.6 Asset inventory and valuation

3.6.1 How does an insolvency representative ensure that the value of the assets on the books and records is accurate?

As per section 506(a) of the Bankruptcy Code, value may be determined "in light of the purpose of the valuation and of the proposed disposition or use of such property (i.e. the replacement value of property without deduction of costs of sale, or the price a retail merchant would charge the property given the age and condition of the property)."

The Bankruptcy Code does not mandate any particular valuation methods since the valuation process relies heavily on interpretation of available information and application of sound judgement. Instead, it is up to the trustee representative to ensure that the valuation is focused on the interest of the debtor in the property and not necessarily on the value of the property itself.

When it comes to estimating the value of assets, there are three common valuation methods utilised under United States Generally Accepted Accounting Principles (GAAP) to determine the fair value measurement with each method producing varying results:

(1) market Approach;

(2) income approach; and

(3) cost approach.

GAAP defines fair value as "the amount that would be obtained to sell an asset or pay to transfer a liability in an orderly transaction between market participants at the measurement date." Fair value estimation involves judgement and depends on the inputs available at the time the valuation takes place. For a Chapter 11 restructuring that involves the valuation of the company itself and not just its assets, traditional valuation analysis methods such as the discounted cash flow method or the comparable company method may be used to assist in estimating the company's overall value.

4. Recovery of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

4.1 Court-based remedies

4.1.1 What tools are available to recover assets e.g. freezing orders, seizure orders or orders for judicial sale?

United States law provides a number of remedies to assist in the recovery of misappropriated assets, but generally those remedies need to be pursued within the context of an action against a particular party.

Importantly, as previously noted, *Mareva*-type freezing orders are not available in cases seeking money damages because of the United States Supreme Court's decision in *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999). In that case, the Supreme Court held that United States federal courts do not possess the authority to issue such injunctions in cases that solely seek monetary damages and where the plaintiff does not claim an equitable interest in the defendant's assets. The Court's decision was rooted in the distinction between equitable and legal remedies under United States law, with the Court noting that historically, United States courts of equity did not provide such relief in similar cases.

- *Replevin* orders

  In cases where personal property is allegedly illegally obtained or wrongfully detained, a bankruptcy trustee or examiner may apply for a replevin order from the state court on an *ex parte* basis. In the application, the claimant must file a verified complaint (or a complaint supported by an affidavit) and post bond to compensate the defendant for any wrongful taking. If granted, the party being served with a replevin order must hand over the property to the court or face penalties. The asset in question will be held in court custody until the court resolves the issue of who is entitled to lawful possession. Note that money is typically not subject to replevin orders.

- *Prejudgment writs of attachment*

  Prejudgment writs of attachment permit a plaintiff (e.g. a creditor or fraud victim) to attach or seize an asset before any rights have been legally established against the defendant.[10] Subject to the court having jurisdiction over the subject property, a court may grant a prejudgment writ of attachment if the court reasonably believes that the defendant is absconding, secreting property, fraudulently disposing of property, or removing themselves or their property from the jurisdiction.[11] The applicant must post a bond to cover costs and damages a defendant incurs if the court later determines that the writ should not have been issued.[12]

- *Temporary restraining orders and preliminary injunctions*

  A temporary restraining order (TRO) can be obtained pursuant to rule 65(b) of the FRCP, but a TRO must be sought in a plenary action and not as a stand-alone remedy.[13] The court may issue a TRO without written or oral notice to the adverse party or its attorney if specific facts in an affidavit or a verified complaint clearly shows that immediate and irreparable injury, loss or damage will result to the movant before the adverse party can be heard in opposition,[14] and the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.[15] The TRO must also state the date and hour in which the TRO is granted, and cannot exceed a period of 14 days.[16]

  If the TRO is issued *ex parte*, a motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion, and the court is bound to dissolve the order if the party decides not to proceed with the motion.[17] The adverse party may apply to the court for a motion to dissolve if they provide 2 days' notice to the party who obtained the TRO on an *ex parte* basis.[18] If a preliminary injunction is ordered, the terms of the TRO can be extended until the conclusion of the litigation. While security typically needs to be provided as a condition to obtaining a TRO or preliminary injunction,[19] the Bankruptcy Rules allow a bankruptcy trustee or debtor to be exempted from that requirement.[20]

- *Receiverships*

  Receiverships over specific assets are available under both Untied States federal and state proceedings within the context of pre- or post-judgment proceedings. However, because receiverships can be very intrusive and disruptive, the appointment of a receiver is generally considered an extraordinary remedy, and usually

10 Nathan Wadlinger, Carl Pacini, Nicole Stowell, William Hopwood, Debra Sinclair, 'Domestic Asset Tracing and Recovery of Hidden Assets and the Spoils of Financial Crime' [2018] 49 St. Mary's L.J. 609, 653.
11 Ibid.
12 Ibid.
13 U.S.C. FRCP Rule 65(b).
14 U.S.C. FRCP Rule 65(b)(1)(A).
15 U.S.C. FRCP Rule 65(b)(1)(B).
16 U.S.C. FRCP Rule 65(b)(2).
17 FRCP Rule 65(b)(3).
18 FRCP Rule 65(b)(4).
19 FRCP Rule 65(c).
20 Fed. R. Bankr. P. 7065.

granted only where there is no less drastic remedy that will preserve the target's assets. As such, there is generally a high burden in persuading a United States court to appoint a receiver. The movant will have a good case for appointment of a receiver where the judgment debtor has dissipated assets or engaged in fraud, or otherwise has a track record of disregarding court orders (thereby providing little comfort that the judgment debtor will abide by an injunction or freezing order). The powers of a receiver (unlike those of a bankruptcy trustee) are typically established by the court – within its broad discretion – and not enumerated by statute. This makes it very important for the party seeking a receiver to explain in the application the powers the receiver should have and why those powers are necessary. Relatedly, the applicant should also include a proposed order (if permitted) that delineates the powers of the receiver. Because the order will specify what the receiver can do, the proposed order is arguably the most important document in the receivership application and should be drafted with care and precision.

4.1.2 *Do all or only some insolvency representatives have powers to use these tools? Which ones?*

Avoidance actions (including fraudulent transfer and preference actions) are available to the bankruptcy trustee or the DIP itself (if a trustee has not been appointed), and in some cases, creditors, if they can meet certain conditions, for example, they have requested the bankruptcy trustee to initiate clawback actions and the trustee refuses.

A bankruptcy trustee may also utilise the tools mentioned above, available under non-bankruptcy law, as part of a recovery action pursued in the United States bankruptcy court or another United States court of competent jurisdiction.

4.1.3 *Can a party approach the court on a confidential, ex parte basis? What notice is required to be given to the holder of the assets (or potential defendant)?*

Bankruptcy Rule 9003 generally prohibits parties in interest and their attorneys, accountants, and employees from *ex parte* communications with the court; this also applies to the United States trustee and his or her employees or agents.[21]

4.1.4 *If applying on an ex parte basis, is there a duty to make full and frank disclosure?*

Generally, not relevant to the United States as applications on an *ex parte* basis are prohibited, except in rare cases where the moving party can show a risk of asset dissipation or irreparable harm if notice is given. In those circumstances, there is no formal duty of full and frank disclosure, but the court will generally only grant relief on an *ex parte* basis for a limited time period, and require the affected party to receive notice and an opportunity to be heard as soon as practicable.

4.1.5 *What elements are required to be proven, and to what standard of proof, in order to succeed? Is this a more onerous standard than usual?*

Under the United States Bankruptcy Code, there are key tools to recover assets, notably through fraudulent transfers and preferences. For fraudulent transfers, these can be categorised as either actual or constructive. Actual fraudulent transfers involve a debtor intentionally transferring property to hinder, delay or defraud a creditor. Constructive fraudulent transfers, on the other hand, do not require proving intent but focus on transactions where the debtor received less than a reasonably equivalent value when they were insolvent or rendered insolvent by the transaction, typically occurring within 2 years before bankruptcy. Preferences pertain to payments made by an insolvent debtor to a creditor within 90 days before filing for bankruptcy (or within 1 year if to an insider[22]) that allow the creditor to receive more than they would in a Chapter 7 liquidation. The party seeking to avoid the transfer must prove these elements by a preponderance of the evidence.

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21 Fed. R. Bankr. P. 9003.

22 Pursuant to 11 U.S.C. § 101 (31): The term "insider" includes –

(A) If the debtor is an individual –
- i. Relative of the debtor or of a general partner of the debtor;
- ii. Partnership in which the debtor is a general partner;
- iii. General partner of the debtor; or
- iv. Corporation of which the debtor is a director, officer, or person in control;

(B) If the debtor is a corporation—
- i. Director of the debtor;
- ii. Officer of the debtor;
- iii. Person in control of the debtor;
- iv. Partnership in which the debtor is a general partner;
- v. General partner of the debtor; or
- vi. Relative of a general partner, director, officer, or person in control of the debtor;

(C) If the debtor is a partnership—
- i. General partner in the debtor;
- ii. Relative of a general partner in, general partner of, or person in control of the debtor;
- iii. Partnership in which the debtor is a general partner;
- iv. General partner of the debtor; or
- v. Person in control of the debtor;

(D) If the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) Affiliate, or insider or an affiliate as if such affiliate were the debtor; and

(F) Managing agent of the debtor.

4.1.6 *Are there any other requirements in order to obtain the orders? For example, an undertaking to pay damages associated with the freezing of assets and, if required, security for such an undertaking.*

United States courts generally require the posting of a bond as financial security for the freezing or attachment of assets. However, FRBP rule 7065 provides an exception to this rule, allowing the court to excuse the trustee or debtor from this requirement.

4.1.7 *What safeguards can the court require to be in place?*

In cases of suspected wrongdoing or mismanagement by a debtor's existing management, the court might appoint a Chapter 11 trustee. This trustee is vested with authority to oversee the debtor's operations and assets, serving as an independent and neutral party to ensure the integrity of the bankruptcy process. One of the pivotal tools at the trustee's disposal are the Bankruptcy Code's avoidance powers. These powers enable the trustee to undo certain transactions made by the debtor prior to filing for bankruptcy, such as fraudulent transfers or preferential payments, as described above. By employing these powers, the trustee can recover assets that were improperly transferred or paid out, thereby ensuring that creditors are treated equitably and assets are fairly distributed.

4.1.8 *What mechanisms are available to expedite claims against non-responsive or other defendants? Is a final judgment required to enforce against a defendant?*

If a defendant in a fraudulent transfer or preference action remains non-responsive, the bankruptcy court may directly enter an order for relief if the plaintiff can provide proof of service, show that the time for the defendant to answer has expired, and provide some evidence supporting the merits of the claim. If undisputed facts demonstrate the plaintiff's entitlement to relief as a matter of law, the plaintiff may pursue summary judgment to quickly resolve the matter. Further, the court can invoke contempt proceedings in the event of non-compliance with orders, and can issue injunctions to protect assets upon cause shown.

4.1.9 *What ancillary orders may be available?*

The court may seal or redact specific sensitive details in documents to protect trade secrets, personal or other privileged information. To obtain approval for sealing or redaction, a party must illustrate that the necessity for the exercise of discretion outweighs the public's right to access the data in the context of a bankruptcy proceeding, where there is an emphasis on transparency.

4.1.10 *In your jurisdiction, who enforces against assets?*

In the United States, when a bankruptcy court order requires enforcement against assets, it is primarily the responsibility of the bankruptcy trustee or the debtor-in-possession to carry out such enforcement. In some cases, United States Marshals may be involved, especially if there is a need to seize property.

4.1.11 *Are there specific causes of action or remedies that are only available to insolvency representatives to recover assets and / or books and records of the company? Do all or only some insolvency representatives have these powers?*

The bankruptcy trustee, in its capacity as representative of the estate tasked with investigating the financial affairs of the debtor, is empowered to examine the debtor's books and records. In fact, aection 542 of the Bankruptcy Code automatically requires the debtor and third parties to turn over to the trustee non-exempt property of the estate, including books and records. Clawback or avoidance actions, including fraudulent transfer and preference, are also available to the bankruptcy trustee, and in some cases, creditors.

4.2 Out-of-court assistance

4.2.1 *What mechanisms are available to the insolvency representative to identify and secure assets without court assistance? What is required to utilise these mechanisms? Are there costs or time barriers involved?*

In the United States bankruptcy framework, the bankruptcy trustee can identify and secure assets without immediate court intervention. They can review the debtor's books, records, and financial statements. In addition, pursuant to aection 542 of the Bankruptcy Code, entities holding estate property, including the debtor, must relinquish that property to the trustee without a preceding court order.

The bankruptcy trustees can review the debtor's books and records, typically at minimal administrative cost and time. On the other hand, while the turnover process under section 542 is designed for efficiency, if parties resist turnover, trustees might need court intervention, potentially incurring additional legal costs and delays.

4.3 Powers to examine and investigate

4.3.1 What powers are available to investigate the affairs of the company to identify and recover assets? Do these extend to individuals involved in the company or recipients of funds? What tools are available for the liquidator to investigate the location and nature of assets to satisfy a judgment?

These issues are addressed collectively in the section below.

4.3.2 What criteria are required to be satisfied before activating any powers of investigation regarding assets?

In United States bankruptcy proceedings, rule 2004 of the FRBP empowers a trustee or debtor-in-possession and other stakeholders to conduct broad investigations into the financial affairs of the debtor. This "2004 examination" is likened to a "fishing expedition," allowing the investigator to probe into any matter that may relate to the debtor's estate or the formulation of a plan. Its scope extends beyond the company to encompass individuals involved in the company, recipients of transfers and other related entities. Under this rule, the investigator can require the production of documents, conduct oral examinations and gather other necessary information to ascertain the location and nature of assets. This tool is pivotal for the trustee when trying to locate and understand assets that might satisfy a judgment or claim in the bankruptcy.

A rule 2004 examination is a flexible tool, primarily requiring that the inquiry relates to aspects of the debtor's conduct, assets, liabilities or any matter influencing the estate's administration. While there is no stringent threshold like a "reasonable basis of a claim," the request should be made in good faith and not merely as a fishing expedition. The bankruptcy court, while generally permissive, retains discretion in granting or restricting the examination based on its breadth, potential burden, or perceived improper intent.

A trustee in a bankruptcy case may request a "rule 2004 Examination" in order to assist in investigating the debtor's property, debts, financial condition, financial transactions, the accuracy of the bankruptcy schedules provided, any issues relating to non-exempt assets including their location, and any matters that may affect a debtor's right to a discharge.

A rule 2004 examination operates similar to the form of a deposition, with an objective to conduct an examination of any person or entity who may possess knowledge relevant to discovery of assets, financial transactions and affairs, or potential fraudulent acts by the debtor. Its scope extends beyond the company to encompass individuals involved in the company, recipients of transfers, and other related entities. Under this rule, the investigator can require the production of documents, conduct oral examinations, and gather other necessary information to ascertain the location and nature of assets.

5. Tracing of assets post-commencement of insolvency and restructuring proceedings (post-order for insolvency and restructuring proceedings)

5.1 Verification of assets

5.1.1 Has the Model Law been implemented or enacted as part of local legislation? What remedies can be obtained under the Model Law for the verification of assets?

As previously detailed in section 2.2.3, Chapter 15 of the Bankruptcy Code was added in 2005 to incorporate the UNCITRAL Model Law on Cross-Border Insolvency. This Chapter provides for cooperation between United States courts and foreign courts in bankruptcy cases filed outside the United States. For these types of bankruptcy cases, Chapter 15 allows a foreign representative to obtain access to the United States court system as a way to provide an efficient process for address cross-border insolvency. The Model Law defines a cross-border insolvency as one where the insolvent debtor has assets in more than one state, or where some of the creditors of the debtor are not from the state where the insolvency proceeding is taking place.

As per section 1501 of the Bankruptcy Code, the objective of Chapter 15 is to foster cooperation between United States courts, trustees, examiners, debtors and the courts or other competent authorities of foreign countries involved in cross-border insolvency cases in order to provide for fair and efficient administration of cross-border insolvencies that protects the interests of all creditors as well as protection and maximisation of the value of the debtor's assets. As such, foreign debtors, trustees, liquidators and administrators may seek relief in the United States Courts under Chapter 15.

Upon recognition of a foreign insolvency proceeding constituting a "foreign main proceeding," the automatic stay of the United States Bankruptcy Code comes into effect, and prevents third parties from attempting to interfere with or exercise control over the debtor's property located in the United States.[23] Additionally, among the relief a foreign insolvency representative may seek on a discretionary basis following recognition, and in aid of asset recovery, is the "entrustment" of the debtor's assets located in the United States and the power to pursue discovery (i.e. issue subpoenas for documents and testimony) from parties located in the United States.[24]

23 11 U.S.C. § 1520(a).

24 11 U.S.C. § 1521(a)(4) & (5).

Separately, and outside bankruptcy laws, Know Your Client (KYC) standards aim at facilitating identification of ultimate beneficiaries of funds and protect businesses and financial institutions against fraud, corruption, money-laundering and terrorist financing. They usually require, apart from the verification of beneficial ownership, client identification, politically exposed persons and sanctions checks, the sourcing of funds and wealth checks, enhanced due diligence in the case of high risks or red flags within the client relationship, documentation and notification duties and the freezing of assets. Furthermore, the "travel rule" applies which requires financial institutions to pass on certain information related to transfers of funds to the next financial institution during wire transfers or similar transmittal of funds.

5.2 Completeness of books and records

5.2.1 What criminal offences (if any) have been implemented for misrepresentation or incomplete information?

The concealment of assets in a bankruptcy case under 18 U.S.C. § 152 is a federal felony charge. This law makes it illegal to knowingly and fraudulently:

- conceal property from a creditor or United States Trustee;
- make a false oath or account in relation to a bankruptcy case;
- make a false declaration, certification, verification or sworn statement in relation to a bankruptcy case;
- present any false claim or proof in relation to a bankruptcy case;
- receive any material property from someone filing bankruptcy to help them avoid losing the property through bankruptcy;
- give, offer, or receive or attempt to receive any money or property to help someone conceal assets in a bankruptcy;
- transfer money or property to another person or corporation to conceal assets in a bankruptcy;
- falsify, conceal, alter, destroy or making a false entry in any recorded information relating to the property of the debtor during a bankruptcy; or
- withhold any recorded information relating to the property or financial affairs of the debtor from the court or any authorised officer of the court.

The federal law regarding the concealment of assets can be found within Chapter 9 of Title 18 of the United States Code relating to bankruptcy.

5.3 Avoidable transactions – fraudulent conveyances and preference actions

5.3.1 What are the rules governing transaction avoidance?

Fraudulent conveyances – also known as fraudulent transfers – occur when a debtor transfers assets to a third party within a certain period before the initiation of a bankruptcy proceeding. These transfers, when performed with the intent to defraud a creditor, are considered fraudulent conveyances. A trustee is granted the power to void these transactions and recover the transferred assets.

As per section 548 of the Bankruptcy Code, the trustee may avoid transfers or obligations made or incurred by debtor within 2 years of the filing:

1) if made with actual intent to hinder, delay or defraud creditors; or

2) if made for less than a reasonably equivalent value and:

(a) the debtor was insolvent or became insolvent as a result of the transaction;

(b) the debtor was engaged in business and the debtor's capital remaining after the transaction was unreasonably small for that business; or

(c) the debtor intended to incur debts beyond his ability to pay them as they matured.

Additionally, section 544 of the Bankruptcy Code provides the trustee with standing to pursue fraudulent transfer actions that are available to creditors under applicable United States state law. The "look back" period in most states (those that have adopted the Uniform Fraudulent Transfer Act) extends back 4 years, thereby enabling the trustee to claw back transfers that occurred prior to the 2-year period under section 548.

Correspondingly, preference actions under the Bankruptcy Code permit a trustee to recapture payments made by debtor prior to the initiation of a bankruptcy proceeding. The objective of a bankruptcy proceeding is to ensure equal treatment of creditors to ensure one creditor is not given a preference over the others by receiving preliminary payments from the debtor.

A "preference" claim is defined by section 547 of the Bankruptcy Code as:

1) a "transfer" of an interest of the debtor in property;
2) on account of an "antecedent" debt;
3) to or for the benefit of a "creditor";
4) made while the debtor was "insolvent";
5) to a non-insider creditor, within 90 days of the filing of the bankruptcy; and
6) that left the creditor better off than it would have been if the transfer had not been made and the creditor asserted its claim in a Chapter 7 liquidation

5.4 Time limits for commencement of avoidance actions

5.4.1 Is there a limitation period for the commencement of avoidance action? Are there different limitation periods for concealed transactions?

As stated in section 5.3 above, depending on the type of avoidance action, the trustee may avoid transfers or obligations made or incurred by debtor in the "look back" period applicable to the relevant action. Generally speaking, under section 546 of the Bankruptcy Code, the trustee must commence any avoidance actions within 2 years after the filing.

6. Recognition of judgments in relation to asset tracing and recovery

6.1 UNCITRAL Model Law on Cross-Border Insolvency

6.1.1 Has the Model Law been implemented or enacted as part of its local legislation, and what remedies can be obtained under the Model Law for the identification, tracing, recovery and preservation of assets?

The United States has adopted the UNCITRAL Model Law on Cross-Border Insolvency through Chapter 15 of the United States Bankruptcy Code, providing a well-defined statutory framework for the recognition of foreign insolvency proceedings in the United States. Under Chapter 15, once a foreign main proceeding is recognised, an automatic stay is imposed, protecting the debtor's United States assets. The court can further direct the turnover of any United States-located debtor assets to the foreign representative. In addition, foreign representatives are endowed with discovery rights, permitting the examination of witnesses and production of documents linked to the debtor's assets and liabilities. Post-recognition, courts may provide various discretionary forms of relief, such as entrusting the administration or realisation of United States assets to the foreign representative.

6.2 Judicial Insolvency Network

6.2.1 Have the JIN Guidelines been adopted, and what tools are available under the JIN Guidelines to facilitate court to court communication in respect of any recognition application made to court or any court filings for the purpose of identifying, tracing, recovering and preserving assets?

The following United States Bankruptcy Courts have adopted the JIN Guidelines:[25] the Bankruptcy Court for the Southern District of New York, the Bankruptcy Court for the Eastern District of New York, the Bankruptcy Court for the District of Delaware, the Bankruptcy Court for the Southern District of Florida, and the Bankruptcy Court for the Southern District of Texas. Major Chapter 11 cases, and particularly those involving cross-border aspects, are often filed in those courts.

Under the JIN Guidelines, courts are to cooperate extensively with foreign courts and representatives. They have the authority to communicate directly with foreign entities, and trustees or other authorised personnel are similarly encouraged to collaborate and communicate under court supervision. Moreover, when adopting the JIN Guidelines, United States courts have the flexibility to undertake various forms of cooperation with foreign main proceedings, such as appointing specific personnel for coordination, sharing information through appropriate channels, overseeing the debtor's assets and affairs in tandem, agreeing on proceedings coordination, and managing concurrent procedures concerning the same debtor.

6.3 Other forms for recognition of judgments and reliefs granted under common law or any other legislation

6.3.1 How do foreign judgments become recognised? What relief may be granted upon recognition of the foreign judgments in relation to the identification, tracing, recovery and

25 Judicial Insolvency Network, 'Members and Observers of the Judicial Insolvency Network' (*Judicial Insolvency Network*, 2018) <Judicial Insolvency Network (jin-global.org)> (last accessed 17 July 2023).

preservation of assets of the debtor company which the foreign judgment relates to?

In the United States, the mechanism for the recognition of foreign insolvency judgments can be obtained under Chapter 15 of the United States Bankruptcy Code, including as "appropriate relief" that can be provided under section 1521(a).

Once a United States court has granted recognition and given full force and effect to a foreign judgment, that judgment essentially stands on an equal footing with judgments that are issued by United States courts. This means that the foreign judgment can be enforced in the United States as if it were a domestic judgment, allowing parties to seek remedies, such as seizing assets or claiming revenues, without the need for a separate domestic lawsuit. This streamlines the process and minimizes additional legal expenses and delays.

7. Privacy related issues when investigating and tracing assets

7.1 Privacy law issues related to assets of the insolvent company

7.1.1 Which (privacy) laws and regulations govern the processing of personal data in asset tracing investigations?

In the United States, the processing of personal data in asset tracing investigations is governed by a myriad of state and federal regulations. State Attorneys Generals enforce state-specific data protection laws, with many states having their own privacy statutes governing diverse data types, including biometric information. At the federal level, agencies like the FTC oversee data security. The Gramm-Leach-Bliley Act protects consumer data at financial institutions, and the Stored Communications Act and Fair Credit Reporting Act respectively manage the disclosure of electronic communications and consumer data. In bankruptcy proceedings, FRBP rule 9037(a) stipulates redaction requirements for personal details in court documents. Despite these measures, the United States lacks a uniform privacy framework, leading to varied approaches across states.

7.1.2 Who is considered the controller within the meaning of article 4 par. 7 of the General Data Protection Regulation (GDPR) (e.g. for keeping the books and administration or processing personal data) during insolvency proceedings?

The GDPR is not applicable to the United States. The United States has not yet implemented a comprehensive federal data protection framework, relying instead on state-specific data protection laws enforced by State Attorneys Generals and sector-specific privacy laws enforced by various federal agencies.

7.1.3 If the GDPR is not applicable, who is considered the person (natural person or entity) responsible for compliance with privacy laws (e.g. for keeping the books and administration or processing personal data) during the insolvency proceedings?

In the United States, where the GDPR is not applicable, the entity undergoing insolvency, whether a natural person or a legal entity like a company, is responsible for compliance with privacy laws. During insolvency proceedings, this duty often falls to a trustee or a DIP. They manage the affairs of the insolvent entity, encompassing legal obligations such as adherence to privacy regulations, ensuring proper maintenance of books, and processing of personal data in alignment with relevant laws. The responsibility for compliance typically remains with the insolvent entity throughout the proceedings.

7.1.4 Are there any legal requirements or obligations for obtaining and processing personal data, including sensitive data (e.g. criminal records), during the asset tracing process?

In the United States, asset tracing endeavors that involve obtaining and processing personal data, including sensitive records like criminal histories, are governed by specific legal frameworks. Moreover, individual states have their own privacy regulations. Thus, while asset tracing in the United States permits the examination of various personal data, it should be conducted within boundaries that respect privacy rights under these specific legal frameworks.

7.1.5 Are there any other relevant obligations in relation to the processing of personal data in the course of insolvency proceedings?

In the United States, insolvency proceedings involve specific obligations related to processing personal data. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) limits the use, lease, and sale of personally identifiable information (PII), including details such as names, addresses, and social security numbers. In addition, Bankruptcy Rule 9018 safeguards personal data and outlines the procedure for seeking confidentiality for sensitive matters, including trade secrets, governmental matters, and more.

7.1.6 Are there restrictions on sharing personal data with third parties (e.g. law enforcement or creditors) involved in the insolvency proceedings?

Yes, for example, the Privacy Act 1974's "No Disclosure Without Consent" rule restricts agencies from disclosing records without the concerned individual's written consent, though exceptions exist. The Gramm-Leach-Bliley Act (GLBA) further mandates that financial institutions cannot disclose a consumer's non-public personal information to non-affiliated third parties without providing notice and an opt-out option. These institutions must also adopt security measures, including data encryption and ensuring that legal professionals handling such data comply with security standards.

7.1.7 If the GDPR is not applicable, are there any restrictions for transfers of personal data to countries outside your jurisdiction?

While the GDPR is not applicable in the United States, the transfer of personal data outside the United States is governed by a mix of federal and state privacy laws, as well as industry regulations and contractual obligations. The United States does not have a singular, comprehensive federal data protection law akin to the GDPR. However, specific federal laws target particular sectors or data types, and various states have implemented privacy laws addressing international data transfers.

7.1.8 Are there pending legislative proposals or amendments that may impact the processing of personal data during asset tracing in insolvency proceedings?

There are currently no pending legislative proposals or amendments in the United States that may impact the processing of personal data during asset tracing in insolvency proceedings.

7.2 Privacy law issues related to assets of directors or other parties

7.2.1 What legal grounds or exemptions allow the processing of personal data of directors or other parties during asset tracing, particularly when the insolvency representative considers actions or has initiated actions against them?

In the United States, there are no specific grounds or exemptions that allow the processing of personal data of directors or other parties during asset tracing. The United States has less stringent privacy controls than other jurisdictions and has not yet implemented a comprehensive federal data protection framework, relying instead on sector-specific privacy and data security laws and regulations, as described in section 7.1.

7.2.2 Do these legal grounds or exemptions only apply to a (court appointed) insolvency representative, or also to other parties?

See the above response.

8. Considerations when criminal law is involved

8.1 How should the insolvency representative or provisional insolvency representative or other authorised person deal with the authorities when criminal law is involved?

When a malfeasance is suspected or detected, the debtor-in-possession should promptly report it to the Office of the United States Trustee. The Trustee may escalate the matter to federal agencies like the criminal division of the United States Department of Justice for further investigation.

8.2 Are there any relevant laws, authorities and considerations under criminal law which may be applicable in relation to an application made by the provisional insolvency representative or authorised person for any provisional measures?

United States federal law, specifically under Title 18 of the United States Code, identifies various bankruptcy-related crimes. These encompass knowingly making false declarations related to a bankruptcy proceeding (18 U.S.C. § 152(3)), fraudulently transferring or concealing estate assets (18 U.S.C. § 152(7)), participating in bribery within the bankruptcy context (18 U.S.C. § 152(6)), and embezzling from the estate (18 U.S.C. § 153).

Chapter 9 of Title 18 of the United States Bankruptcy Code covers crimes, criminal procedures, and federal laws governing the concealment of assets. The crimes covered include:

- §152. Concealment of assets; false oaths and claims; bribery
- §153. Embezzlement against estate
- §154. Adverse interest and conduct of officers

- §155. Fee agreements in cases under title 11 and receiverships
- §156. Knowing disregard of bankruptcy law or rule
- §157. Bankruptcy fraud

  The Federal Bureau of Investigation (FBI) and the Attorney General are designated to enforce these laws even though these are bankruptcy-related crimes.

9. Digital assets and crypto assets

This section discusses cryptocurrency in the context of insolvency. Basic questions on cryptocurrency ownership will first be explored, followed by mechanisms to trace and recover cryptocurrencies, concluding with the involvement of government agencies or regulators.

9.1 Crypto as an asset and ownership issues

9.1.1 How is cryptocurrency classified?

In the United States, the classification of cryptocurrency is multifaceted, varying by regulatory context and legal framework. While not viewed as legal tender, cryptocurrencies can serve functions akin to "currency" or "digital currencies."

The United States Securities and Exchange Commission (SEC) applies the "Howey Test"[26] to determine if certain cryptocurrencies qualify as securities. However, the SEC has indicated that Bitcoin does not necessarily meet this criterion. The United States Commodity Futures Trading Commission (CFTC) categorises Bitcoin as a "commodity," subjecting certain cryptocurrencies to regulations akin to commodities and derivatives. From a taxation standpoint, the Internal Revenue Service (IRS) treats cryptocurrencies as "property," imposing capital gains and losses tax regulations upon their transactions.

9.1.2 What rights and interest do cryptocurrency exchanges or trading platforms have in the cryptocurrency held in accounts at the exchange or platforms?

In the United States, cryptocurrency exchanges or trading platforms can hold assets via custodial or non-custodial accounts. The distinction significantly affects the rights and interests of both the platforms and their clients, especially in bankruptcy scenarios. With custodial accounts, a client's assets are pooled with the assets of the platform and other client assets. The clients' assets are generally considered part of the bankruptcy estate and are subjected to unsecured claims against the estate. In contrast, non-custodial accounts segregate a client's assets, providing the client with exclusive access. Furthermore, if a platform establishes an express trust agreement or a custody agreement identifying the client as a beneficiary with a separate account, the customer's holdings may be exempted from the bankruptcy estate, providing the customer with the right to all the property in its account even following a bankruptcy filing. However, without such agreements, where control over cryptocurrencies is dictated by the general terms in a user agreement, customer assets could be deemed a part of the broader bankruptcy estate, highlighting the crucial role of the specific agreements in place between platforms and their customers.

9.1.3 Is cryptocurrency capable of being subject to a trust, secured creditor interest or custody arrangement?

Yes, cryptocurrency can be subject to express trusts, either direct, where the customer is the beneficiary, or intermediate trusts, where the platform itself is the beneficiary. In bankruptcy, direct trust assets must be returned to customers, but under intermediate trusts the platform is the beneficiary. Cryptocurrencies can also be collateral for secured creditors. However, legal ambiguities can arise under the Uniform Commercial Code (UCC) and affect the recognition of the owner of the asset. Additionally, cryptocurrencies can be part of custody arrangements. Note, however, that in custodial settings, platforms may control and possibly commingle customer assets in a singular wallet. While they might be for the customer's benefit, these custodial accounts can mean that the customer is unable to trace and establish a direct ownership interest in its cryptocurrency, resulting in that customer becoming a general unsecured creditor in the bankruptcy proceeding.

9.2 Core issues in insolvency

9.2.1 When a cryptocurrency exchange / platform is subject to insolvency proceedings, what are the applicable legal standards for determining whether the exchange / platform or the accountholder owns the cryptocurrency held at the exchange / platform?

If a cryptocurrency exchange enters bankruptcy, the exchange, rather than individual account holders, is often considered the cryptocurrency owner (particularly where the accounts and associated digital wallets are controlled by the exchange), causing those assets to join the bankruptcy estate. This implies that investors

26 S.E.C. v W.J. Howey Co., 66 S.Ct. 1100.

might not receive their cryptocurrency directly but might get a proportional share of the value apportioned to all unsecured creditors. Since this group could include various parties like vendors and litigants, investors might only retrieve a fraction of their investments.

9.2.2 *Have there been any significant legal decisions regarding ownership of cryptocurrency in insolvency proceedings?*

In the bankruptcy case of the crypto exchange platform, Celsius Network LLC, before the United States Bankruptcy Court for the Southern District of New York, a key issue arose concerning the ownership of cryptocurrency assets held in interest-bearing accounts.[27] The court needed to determine whether these assets were the property of the debtor crypto-platform or the account-holder creditors. Drawing on traditional contract law principles, the court found that the account holders did not own their respective accounts. The decision rested on the establishment of all elements of a valid contract under New York law:

(1) an offer by Celsius via its terms of use;

(2) acceptance by almost all earn account holders through a "clickwrap" agreement;

(3) valid consideration provided by Celsius in the form of interest and other incentives; and

(4) a clear intent by both parties to be bound by the terms.

As a result of this determination, numerous earn account holders found themselves in a position where they were treated as general unsecured creditors, and had to wait until the conclusion of the case to receive any payment from Celsius's bankruptcy estate.

9.2.3 *How is cryptocurrency valued in insolvency proceedings?*

In the United States, cryptocurrency is considered an asset in bankruptcy and must be disclosed at the commencement of the bankruptcy case. Failure to disclose cryptocurrency assets may constitute an offense under the Bankruptcy Code. Cryptocurrency is valued in bankruptcy proceedings at the US dollar equivalent on the date of the bankruptcy filing. As a consequence, where a creditor's claim is based on cryptocurrency holdings, an increase or decrease in the value of the cryptocurrency following the bankruptcy filing will not affect the amount of the creditor's claim.

9.2.4 *When a cryptocurrency / platform goes into insolvency, do customers have any special priority or are they treated as general unsecured creditors?*

In the United States, the treatment of customers when a cryptocurrency platform becomes insolvent under a Chapter 11 regime varies based on the characterisation of the crypto assets. First, if the crypto assets are deemed as the property of the debtor's bankruptcy estate, customers are classified as general unsecured creditors and receive a pro-rata distribution after senior creditors are paid. Second, if customers have a valid security interest in their crypto assets, they are treated as secured creditors and are entitled to certain protections or compensation for their collateral. Third, if the customer's crypto holdings are determined to be held in trust by the debtor for the benefit of the customer, these assets cannot be distributed under a plan and are usually returned to the customers, as illustrated in the case of *In re Voyager Digital Holdings, Inc.*, 2022 WL 3146796 (Bankr. S.D.N.Y. Aug 5. 2022). Lastly, if cryptocurrencies are considered equity securities, customers might rank below general unsecured creditors and will only receive payments once these creditors are fully compensated.

9.2.5 *If the UNCITRAL Model Law on Cross-Border Insolvency has been enacted, how can that law be used to assist with the tracing and recovery of cryptocurrency assets? Are there other laws or rules dealing with cross-border insolvency that can be used to assist with the tracing and recovery of cryptocurrency assets?*

As noted, the United States has enacted the UNCITRAL Model Law on Cross-Border Insolvency in Chapter 15 of the Bankruptcy Code. There are several provisions of Chapter 15 that may facilitate the tracing and recovery of cryptocurrency assets. Under section 1521(a)(4), the bankruptcy court may authorise the foreign representative to pursue broad discovery (document production and deposition testimony) from third parties relating to the debtor's assets. This discovery power (similar in scope to a rule 2004 examination) could be used to identify the location of cryptocurrency held at a United States cryptocurrency exchange, or to learn the identities of the relevant account holders. Additionally, section 1521(a)(5) authorises the bankruptcy court to entrust the foreign representative with the administration or realisation of the debtor's United States assets. Section 1521(a)(5)'s "entrustment" relief can provide the basis for the foreign representative to request that the bankruptcy court order United States-based parties (including exchanges) to turn over cryptocurrency assets of the debtor held by those parties.

27 In *re Celsius Network LLC,* 647 B.R. 631 (Bankr. S.D.N.Y. 2023), leave to appeal denied, No. 23-CV-523 (JPO), 2023 WL 2648169 (S.D.N.Y. Mar. 27, 2023).

9.3 Clawback / recovery of cryptocurrency assets

9.3.1 What types of non-insolvency claims are available to recover stolen / misappropriated cryptocurrency?

Applicable non-insolvency claims may include fraud, conversion, unjust enrichment, breach of contract and negligence. Referrals to the United States Department of Justice by government agencies, such as the Office of the United States Trustee, are another tool for cryptocurrency recovery, with the Department of Justice's National Cryptocurrency Enforcement Team and the Federal Bureau of Investigation's Virtual Asset Exploitation Unit.

9.3.2 Are there any clawback or avoidance claims under insolvency law that can be brought to recover cryptocurrency transferred from the debtor prior to commencement of insolvency proceedings?

Fraudulent and preferential transfer claims can be brought to recover cryptocurrency transferred from the debtor prior to the commencement of the bankruptcy proceedings.

9.3.3 Are there any special or unique issues in bringing a clawback / avoidance claim to recover cryptocurrency? Have there been any significant decisions in this area?

There remain certain uncertainties with respect to the use of clawback claims for cryptocurrency transfers. Specifically, there is ambiguity about when a cryptocurrency transaction is deemed completed, especially concerning the timeframes for fraudulent and preferential transfers, and the manner in which courts will view transfers that did not mix customers' assets but instead held them in trust.

Whether the cryptocurrency is considered property of the estate has been a key dispute lately and is highly fact-specific. In an illustrative case from January 2023, during the Chapter 11 bankruptcy case of Celsius Network, the bankruptcy judge held that the digital assets deposited by customers into what was referred to as an "earn" program belonged to the debtors, rather than the customers.[28] This decision was based on the terms of service agreed upon by the users. Specifically, the court recognized these terms as constituting a legitimate and enforceable agreement, clearly transferring the ownership and control of the assets from those who deposited them in the "earn" program to Celsius Network. In contrast, that court had earlier determined that digital assets stored in separate "custody wallets" and some "withhold accounts" did not constitute a part of the debtors' estates under the Bankruptcy Code.[29]

Where stolen cryptocurrency can be traced to a cryptocurrency exchange located in the United States, several steps can be taken to recover such assets. In a situation where an exchange own and control the wallets holding the cryptocurrency on deposit, a plaintiff may seek injunctive relief against the exchange, requesting the exchange to freeze the account linked to the stolen cryptocurrency. Alternatively, a "John Doe" proceeding could be initiated against the exchange to obtain discovery of John Doe's real identity. This would facilitate further litigation against the ultimately identified individual. Cryptocurrency exchanges in the United States are likely in possession of such information due to Know-Your-Customer (KYC) procedures in which users of the exchange will need to provide before being allowed to trade.

In situations where fraud or criminal activity is involved, a plaintiff may also be able to obtain an informal injunction by putting the exchange on notice that a particular wallet or transaction is tainted. Cryptocurrency exchanges are highly sensitive to such notices due to increasing regulatory scrutiny, and do not want to be seen as facilitators of illegal activity. Should the cryptocurrency exchange be receptive to such notices, the exchange may halt further transactions from an account pending resolution of a dispute. The outcome of serving such a notice to the cryptocurrency platform is essentially the same as issuing a formal injunction or restraining order.

Due to the limited opportunities available for cryptocurrency to be exchanged with goods or services of significant value, cryptocurrencies are typically converted into cash before it can be usefully spent. Therefore, another path to recovery is to identify any points of contact the cryptocurrency assets have with the traditional banking system, and direct enforcement efforts at specific bank accounts, rather than the cryptocurrency itself.

9.3.4 What remedies are available under both insolvency and non-insolvency law to freeze or compel the turnover of cryptocurrency assets? What are the legal standards / requirements for obtaining those remedies?

As described in section 4.1, a prejudgment writ of attachment is a non-insolvency tool for creditors to freeze a debtor's assets. A prejudgment writ can be sought on an *ex parte* basis if the applicant possesses a verified complaint or affidavit. The moving party must prove that the defendant is absconding, secreting property, fraudulently disposing of property, or removing themselves or their property from the jurisdiction; it must also post a bond to secure potential damages as a result of the prejudgment writ.

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28 The "earn program" was a financial service offered by Celsius where customers could deposit their cryptocurrencies into the platform to earn interest. Essentially, customers would lend their digital assets to Celsius, and in return, they were promised a certain percentage of interest, accruing more cryptocurrency over time.

29 A "custody wallet" was a service where customers could store their cryptocurrencies securely with Celsius. Unlike the Earn program, funds in custody wallets were not used by Celsius to earn income; they were simply held for safekeeping, akin to a safety deposit box. On the other hand, "withhold accounts" were specific accounts where certain assets were withheld or set aside either because the assets were not supported by Celsius' platform or the account holders of the assets were in jurisdictions in which Celsius was not authorized to offer the earn or custody programs.

9.4 Tracing of cryptocurrency

9.4.1 What discovery or information gathering tools are available, under insolvency and non-insolvency law, to obtain information on the location of cryptocurrency and the owner of that cryptocurrency?

A party seeking information on the location of the cryptocurrency and the owner of that cryptocurrency may pursue that discovery under Bankruptcy Rule 2004. Under non-bankruptcy law, it may issue a third-party subpoena to a cryptocurrency exchange within the context of an active litigation.

9.4.2 What type of information are cryptocurrency exchanges / platforms required to collect from customers (including KYC information) when they open an account?

The United States Bank Secrecy Act mandates cryptocurrency exchanges to adhere to Know-Your-Customer (KYC) protocols. This Act is designed to combat money laundering, tax evasion, and other illicit activities by holding financial platforms accountable. To meet KYC standards, cryptocurrency exchanges usually gather information such as birth date, physical address, and social security number. However, because decentralised, peer-to-peer cryptocurrency exchanges may not comply with KYC requirements due to their lack of intermediary authority, the requirements' utility in asset tracing will be case-dependent. Willful violations of the Bank Secrecy Act may subject the offender to punishments from a fine to prison term.

9.4.3 Can the KYC information about accountholders collected by a cryptocurrency exchange / platform be obtained through a formal discovery process? Are there any special issues to navigate in order to obtain such information?

Yes. In *Jacobo v. Doe* (2022), the Eastern District of California approved a subpoena directed to several prominent centralised cryptocurrency exchanges (e.g. Binance and FTX) to obtain KYC information that would identify an anonymous defendant, identifiable only by digital trails, accused of misappropriating cryptocurrency.[30] However, requests of KYC information must remain narrowly tailored: in *Jacobo*, the court did not allow for the subpoena of a social security number, deeming it superfluous to the stated objective of identifying the defendant.[31] *Jacobo*'s rationale was cited and reapplied in *Wuluvarana v. Does* (2023), in which the Eastern District of Wisconsin allowed the subpoena of defendants' names, telephone numbers and street addresses, but not social security numbers.[32] While precedent on this issue is scarce, these recent cases signal a potential emerging consensus: subpoenas, so long as narrowly tailored, may be deployed to obtain KYC information that will identify users behind cryptocurrency transactions.

9.4.4 What type of forensic or tracing tools are available to assist with the tracing and recovery of cryptocurrency?

In tracing cryptocurrency, parties may pursue wallet artifacts (e.g. wallet.dat files), wallet software, hardware devices, seed phrases and passwords, web / email / chat history, and deploy blockchain explorers.

9.4.5 What type of expert evidence is necessary to establish the tracing of stolen or misappropriated cryptocurrency to a particular account / wallet?

While helpful, expert evidence is not required. Expert evidence may be used, for example, to supplement a factual record on the transfer of cryptocurrency from one account to another (whether or not transferred to an exchange). Cryptocurrency tracing software – such as Chainalysis Reactor – is increasingly used to help trace and recover stolen cryptocurrency. Those trained and certified in the use of those programs may assist in legal proceedings to help establish that the transfer of cryptocurrency was in fact made to a particular electric wallet, exchange or account.

9.5 Government / regulatory intervention

9.5.1 What governmental bodies or agencies have oversight over fraud or theft of cryptocurrency?

In the United States, multiple federal agencies oversee cryptocurrency-related fraud and theft. The Department of Justice's Market Integrity and Major Frauds Unit (MIMF) stands as a central enforcement entity, addressing significant cryptocurrency frauds globally. The SEC's Crypto Assets and Cyber Unit focuses on securities law violations connected to various crypto activities, including DeFi platforms, NFTs and stablecoins. The Commodities Futures Trading Commission (CFTC) has asserted its authority over virtual currencies since 2014, classifying them as commodities and has undertaken various enforcement actions.

Additionally, consumer protection agencies like the Consumer Financial Protection Bureau (CFPB) and Federal Trade Commission (FTC) have been directed by the Biden administration in 2022 to probe cryptocurrency fraud. An ongoing 2022 legislative initiative seeks to more clearly define the roles of the CFTC and SEC, but until then, the regulatory environment remains dynamic and decentralised.

30 *Jacobo v. Doe*, No. 122CV00672DADBAKBAM, 2022 WL 2079766 (E.D. Cal. 2022).

31 Ibid.

32 *Wuluvarana v. Does*, No. 22-CV-982-PP, 2023 WL 183874 (E.D. Wis. Jan. 13, 2023).

9.5.2 *Are there remedies available to law enforcement that could lead to the recovery or forfeiture of stolen / misappropriated cryptocurrency and the return of that cryptocurrency to the victims?*

Consumers can report stolen or misappropriated cryptocurrency to the FTC, the CFTC, the SEC, and the Internet Crime Complaint Center of the Federal Bureau of Investigation (FBI). The FBI's newly formed virtual asset exploration unit has located and recovered significant ransoms in recent cryptocurrency attacks.

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