



2010 Legal and Compliance Conference

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MULTI-JURISDICTIONAL ASSET RECOVERY

The Money Went Where?

Cross-Border and International Fraud and Asset Recovery

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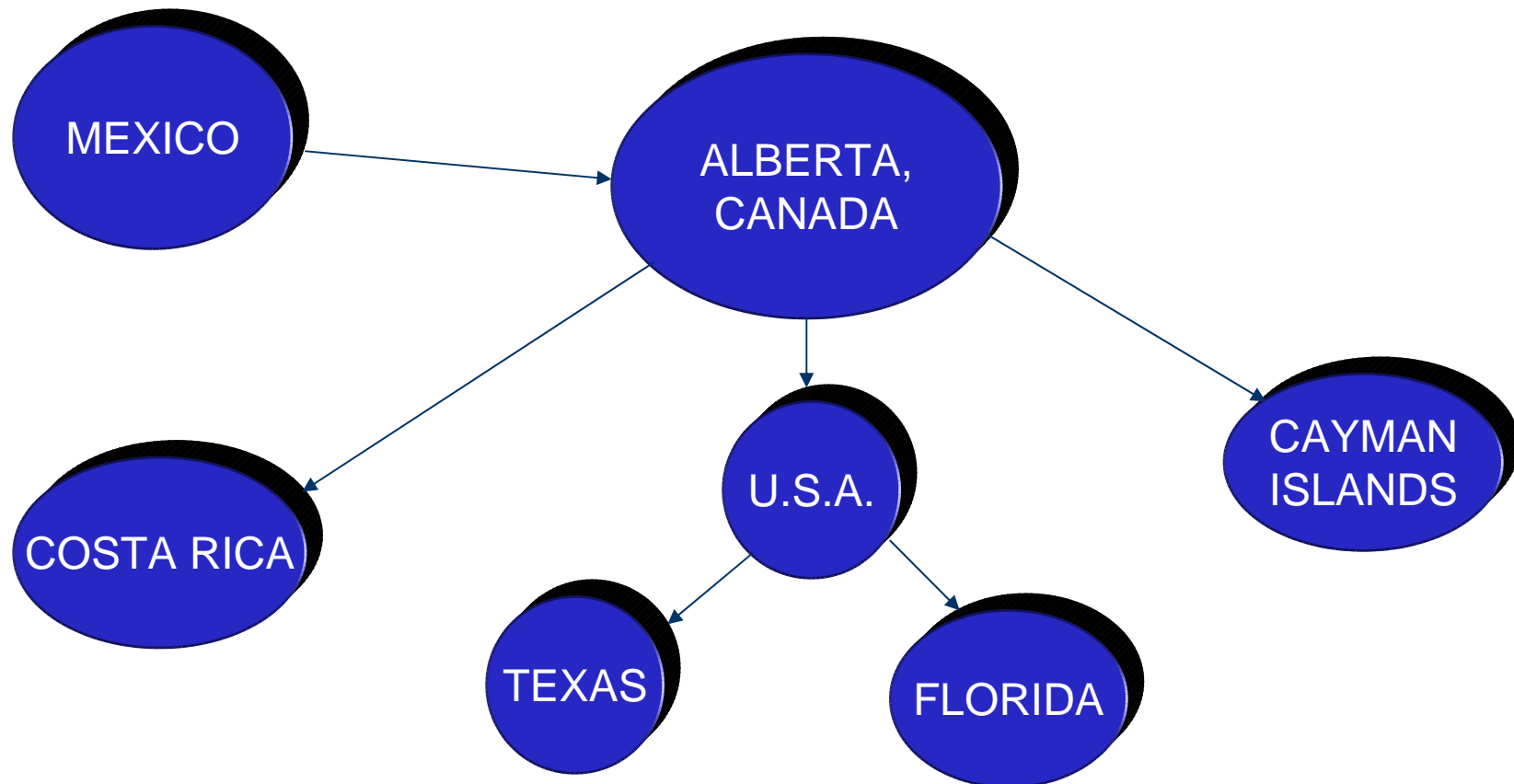
Fact Scenario

1. Salvador Casanova is a wealthy Mexican national, having made his fortune in the oilfield pipe business.
2. To keep his money safe in a stable North American country, he chose to hold US \$30 million in term deposits in a Canadian financial institution.
3. Being “old school”, he forms a working relationship with an employee of the FI and calls on her to be the sole point of contact between himself and the FI. The employee resides in Calgary, Alberta.
4. Over a six year period, the employee steals the whole US \$30 million in a scheme involving fraudulent replacement investment certificates.
5. The employee’s husband, a largely failed entrepreneur, is in on the scam. The stolen proceeds are funneled through his holding company (a numbered Alberta company), which has little other legitimate business. The family home, several expensive cars and several bank accounts with other Canadian financial institutions are held in the name of the holding company. They live a very lavish lifestyle.

Fact Scenario Continued...

6. Over the six year period, the employee and her husband use the money to invest in a number of companies in different jurisdictions. While the companies are separately incorporated and appear to be distinct, they are really alter-egos of the fraudsters. Each of the incorporating jurisdictions has a different approach to the priority treatment of wage claims by employees.
7. The employee's twenty-something son may be in on the scam. He lives in Austin and attends the University of Texas. He drives a Ferrari and owns a lavish condo held in his own name, along with a six figure bank account.
8. The employee and her husband own a high-end South Beach condo in Miami, and moor an expensive boat at a marina in the South Beach area.
9. The holding company has a number of bank accounts in the Cayman islands with seven figure balances and holds an interest in a Costa Rican gold mining operation.
10. Casanova became suspicious that something was wrong when he requested return of some funds for one of his children and was met with varied excuses why it could not be done. He is now aware that the FI holds no funds on deposit for him. Casanova has threatened to retain counsel and wants to know what steps are being taken to recover his money.

JURISDICTIONS



Planning and Coordination:

Speed, Stealth, Layering and Canadian Investigative and Freezing Orders

Victims

- Know the money is gone
- Circumstances are suspicious
- Have very little evidence about how it disappeared or where it went
 - Typically that information is in the hands of the fraudster or third parties
- Cannot move as quickly as the money can
- Believe it will be prohibitively expensive to recover the money
- Believe the fraudster will have their money to fight a defence

Planning and Coordination

- Move quickly
- Find the basic information
- Follow the money
- Identify the players and the assets
- Separate the fraudsters from the money/assets
- Repatriate the assets to the victims

Team Approach

- Legal counsel
- Private investigators
- Forensic accountants
- Electronic/computer forensics
- Law enforcement in some jurisdictions

Build the Case

- Open source intelligence
- Private investigators
- Profile targets
- Build the case to show judicial assistance required

Follow the Money

- Stolen property belongs to the victim – a proprietary interest
- Norwich Pharmacal/Banker's Trust Orders
- Now called Disclosure Orders:
 - Direct third parties to provide information
 - Without disclosing existence of or compliance with order
- All done covertly
- Leads to bank accounts, assets, potential targets
- Story starts to emerge
- Demonstrates origin of assets and beneficial ownership

Layering Orders

- Disclosure orders can be obtained and enforced in series, as assets and accounts are discovered
- May lead to discovery of assets in other jurisdictions
- Requests for Judicial Assistance/Letters Rogatory
- Common law/civil law jurisdictions have different approaches and need to be employed differently
 - E.g. Costa Rica – criminal proceedings vs. civil

Separate the Fraudster from the Money

- Freezing and Preservation Orders (vs. Mareva injunctions)
- Co-ordinated in all jurisdictions
- “Freeze” the assets and prevent fraudsters from access or use
- Again co-ordinated through Requests for Judicial Assistance/Letters Rogatory – and ancillary proceedings if required
- Related relief: Anton Pillar orders (civil search warrants)
 - Stand and deliver orders
- Review of electronic and hard records
- Preservation of evidence

Use of Funds

- Depending on the jurisdiction, there can be strict prohibitions on access to funds for defence costs or funding lifestyle
- Frequently have to swear evidence about source of funds/assets
- Have to prove no other money available to fund defence
- Critical juncture in recovery case

Funding Fraud Recovery

- Champerty/maintenance (common law only)
- Now private funds constructed to finance fraud recovery litigation

The Use of Insolvency Proceedings as a Multi-Jurisdictional Recovery Strategy

What is Chapter 15?

- Last chapter of the U.S. Bankruptcy Code, enacted April 20, 2005.
- Chapter 15 was an almost verbatim adoption of the Model Law on Cross-Border Insolvency.
- Recognized the necessity of uniform procedures for the administration of transnational insolvencies.
- Has become an important tool in combating complex international fraud and in tracing and recovering assets procured by fraud and other illegal activities.

Advantages of Chapter 15:

- Immediate “control” over assets.
- Can utilize injunctive recovery and distribution powers.
- Stops competing independent creditor actions.
- Chapter 15 treats the rights of foreign creditors equal to the rights of domestic creditors.
- Chapter 15 gives the foreign entity standing.

Disadvantages of Chapter 15:

- U.S. treaty obligations.
- U.S. courts may refuse to implement Chapter 15.

Application of Chapter 15 to the Fact Pattern:

- The Canadian trustee should first determine where to file the Chapter 15 petition.
- A Chapter 15 petition should be filed where:
 - i. the debtor has its principal place of business or its principal assets in the U.S.
 - ii. there is a pending legal action against the holding company, or
 - iii. if neither (i) or (ii), where venue would be consistent with the interests of justice or convenience of the parties.

Preliminary Relief:

- The most significant weapon under Chapter 15 is the automatic stay.
- The automatic stay is extremely broad in scope.
- The Canadian trustee should consider immediate interim injunctive relief from the U.S. bankruptcy court.
- Section 1521(a) of the Bankruptcy Code permits a U.S. court to enjoin actions that may otherwise fall outside the scope of the automatic stay.
- A U.S. court must first determine that granting an injunction would meet the “standards, procedures, and limitations applicable to an injunction.”

Recognition of the Foreign Proceeding:

- The U.S. bankruptcy court will likely determine that the Canadian bankruptcy is a “foreign insolvency proceeding” and the Canadian trustee is a “foreign representative.”
- Since the bankruptcy proceeding was initiated in Alberta, it will be presumed to be the holding company’s center of main interest (or COMI).
- If the U.S. bankruptcy court determines that the Canadian bankruptcy is a foreign non-main proceeding, the Canadian trustee will not have the full set of Chapter 15 tools.
- Once the court issues an order recognizing the Canadian bankruptcy as the foreign main proceeding, the employee and her family will be prohibited from accessing or transferring assets.

Recognition of the Foreign Proceeding (continued)

- Additionally, the Canadian trustee will have authority to appear in U.S. courts in other jurisdictions.
- The Canadian trustee will also have authority to:
 - Operate the holding company and its assets.
 - File a bankruptcy petition on behalf of the holding company.
 - Examine witnesses.
 - Obtain financial records, and
 - Sue to recover assets.
- Any act impeding the Canadian trustee's duties may be sanctionable.

Powers of Trustee of Debtor Entity

- Mutual Lateral Assistance Treaty Requests (MLATS)
- Recognition of Insolvency Proceeding (Rubin v. Euro Finance)
- Recognition as Replacement CEO (Access to all bank and financial records)
- Holder of Attorney-Client Privilege for Debtor Entity (Unless Debtor is Individual)

The UNCITRAL Model Law, COMI and the Need for Office Holders to Cooperate

Effect of Recoveries Based on Where the COMI of the Debtor is Located

\$1,200,000 Assets	-----	\$1,000,000 Labor Debt	-----	\$1,000,000 Secured Claims	-----	\$1,000,000 Unsecured Claims
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<i>Mexico</i>	<i>Canada</i>	<i>USA</i>
<u>1st Payment</u> Labor Debt	<u>1st Payment</u> Secured Creditors	<u>1st Payment</u> Secured Creditors
<u>2nd Payment</u> Secured Creditors	<u>2nd Payment</u> Labor Debt	<u>2nd Payment</u> Labor Debt
<u>3rd Payment</u> Unsecured Creditors	<u>3rd Payment</u> Unsecured Creditors	<u>3rd Payment</u> Unsecured Creditors

Finding and Connecting Recovery Counsel Where and When You Need Them

**FraudNet: Why It Was Created, How It Works and How To
Access It?**

Finding and Connecting Recovery Counsel:

- Determine the facts and the locations where foreign legal actions are needed.
- Often trans-national crimes cannot be pursued in only one jurisdiction; money/assets move too quickly.
- A cross-border legal task force is needed.

FraudNet

- ICC identified need 6 years ago.
- 56 attorneys in 50 strategic countries like Maritius, Panama, Switzerland, BVI, Isle of Man, etc.
- www.icc-ccs.org



Questions?

Thank you.

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