

**FINDING FOREIGN ASSETS
A Case Study In Tenacity**

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FINDING FOREIGN ASSETS: A Case Study in Tenacity

1. INTRODUCTION

Recovery of concealed assets from foreign countries is hard. This concise, simple statement summarizes the complex legal, jurisdictional and practical aspects of recapturing assets that have been intentionally hidden from creditors. It does not mean, however that the recovery task is impossible. Each foreign asset recovery is unique. Each has its own challenging aspects. *There is no road map to success.* Compliance with international treaties such as the Hague Convention, which allows the taking of evidence abroad in civil matters and contemplates use of letters rogatory for the service of process and discovery often are both time consuming and, ultimately, unproductive. What it does mean is that each recovery effort is filled with risks and pitfalls; that, it can be time consuming and expensive; that, there is never any guarantee of recovery; that, statutes in foreign countries where assets are likely to be concealed may favor the person or entity hiding the assets; and, if the professional's fees are based on recoveries or some percentage thereof, that those fees and expenses may well not be paid.

There have been numerous articles and legal treatises written that have outlined the types of transactions that lead offshore, including asset recovery techniques.¹ Not surprisingly, these cogent works also relate to specific foreign statutes, especially those that have the potential for criminal sanction lest the unwary tread abroad without heed.

The purpose of this article is not to provide a legal framework or analysis of laws foreign, but rather provide firsthand, practical insight into the myriad issues that faced the author as a Receiver appointed under receivership statutes in the United States, the British Virgin Islands and the Turks and Caicos Islands. Lessons learned from my experience in this case may

¹See "The Hunt for Offshore Assets" by Lisa M. Poulin, American Bankruptcy Institute Winter Leadership Conference.

apply to all quests for assets abroad. Its secondary intent is to be thought provoking as I review with you crucial issues that were encountered in a fraud investigation that spanned the United States, Mexico, four European and three Caribbean countries, but which ultimately yielded a return to the creditors.²

2. BACKGROUND or, "You want me to do what?"

This was my first reaction as president of The McManigle Company, a business reorganization and crisis management consulting firm after being approached to act as Receiver in the matter of Banco Mexicano, S.A. v. World Manufacturing Limited ("World") and Manufacturera Del Bravo, Ltd. ("Bravo"), both British Virgin Islands ("BVI") corporations. This contentious and complicated case pending in state court in El Paso, Texas presented new and novel challenges. The immediate issue was to attempt to collect on two \$22 million Judgments entered against World and Bravo by the Texas State Court (the "Texas Judgments").

3. INITIAL CONSIDERATIONS

a. Finding and Engaging Legal Counsel

Prior to qualification as Receiver by the State Court, an initial consideration became, "who is going to act as my primary legal counsel?"³ At first it seemed simple. All I

²See Fourteenth Interim Report of Receiver filed in *Banco Mexicano, S.A. v. World Manufacturing Limited and Manufacturera del Bravo*, Cause No. 95-8616, in the 205th Judicial District Court of El Paso County, Texas.

³A sensitive, subsidiary issue, especially one posited in a paper presented before the State Bar of Texas Bar is, should *practicing* lawyers be appointed as the primary decision maker in cases such as these? My opinion, (and most, if not all of my close friends are lawyers) is no. Why? For the same reason I don't want my physician to also be my estate planner. Lawyers are highly trained professionals who spend their lives viewing issues and problems from a particular point of view. Generally speaking, lawyers hate risk; they don't like taking chances that are not reasonably quantifiable They're professionals, they don't want people saying bad things about them; they don't like anything (real or not) that could put their license at risk. Some

needed was competent, domestic counsel who understood Texas receivership law, cross-border insolvency issues (the transactions underlying the World and Bravo Receivership had their origination in Mexico) and, who had experience in Swiss litigation and discovery proceedings. Fortunately, I was well able to locate competent counsel to assist with the coordination of more than a dozen separate law firms worldwide, excluding the services of other professionals.⁴

For those leading the recovery effort, the choice can be crucial. It cannot be overemphasized and it is the basis for a key tenet in foreign asset recovery cases. That is, the concept and development of a team approach. All foreign legal counsel should be kept well informed of the “big picture” of the case and recovery efforts in other locales. Failure to do so underutilizes valuable insight that may add unique perspective to the recovery strategy and the overall advancement of the case. It became no surprise to me when one or more of my foreign counsel posited novel questions or solutions during general case status discussions.

How do you find such professionals? There are many avenues, including reviewing Martindale-Hubbell which lists international and offshore legal counsel or contacting domestic law firms with international offices. Numerous published works written by counsel exist which detail specialized, international practice areas. The age-old technique of contacting legal and business associates to obtain a referral to other professionals is ever-present and remains a reliable source. At a minimum, prospective counsel should be given a clear, concise evaluation of the case during the interview. In this case, one technique was to provide one of

the unique issues we were addressing and ask for prospective counsel’s ideas. This wasn’t an effort to gain free legal advice, but rather to provoke thought on particular issues which led to further discussion.⁵

Prior experience in interviewing and engaging legal counsel cannot be undervalued. In my opinion, it is effectively, an art. It is comprised of one-quarter determination of intellect and legal experience; one-quarter availability; one-quarter fee and cost payment issues; and, one-quarter compatibility. The last component is as important as the prior three. Without compatibility in goal, communication and frankly, personality, the best intentions can be overshadowed.

Of equal importance to finding and engaging legal counsel is providing for payment of legal counsel’s fees. It is not unusual to encounter base rates for experienced counsel in foreign countries that start in the \$375 per hour range and quickly escalate. Experienced cross border litigators can command even higher rates up to \$650 per hour or more, excluding costs. I am always candid about this issue with prospective counsel and have found foreign counsel to be equally candid with me. In fact, payment of a substantial retainer is, in my experience, *de rigueur*. The subject of payment of professional fees arise very early on in my initial interview with prospective counsel after generally describing the case.

As a pragmatic businessperson, I want my legal counsel’s focus on the tasks and issues at hand, not worrying about defending himself before his firm’s sub-committee on accounts receivable collection.⁶ These issues can be expected to be encountered by any decision maker undertaking a foreign asset recovery. It must be factored into the over-all case strategy when allocating resources in the case.

love adjudicating novel legal concepts for the challenge of it. Likewise, as a business professional, I view issues from a particular perspective, but I can take more risks. I’m used to people saying bad things about me; in my experience, it’s usually indicative and proportionate to the level of success I’m achieving. My reputation for obtaining results, getting a job done on time and within budget is my only “license”. The point is this: I believe in a division of labor and a checks and balance system. In my experience, it works.

⁴I often referred to this case as the *Lawyers Full Employment Act*.

⁵In several instances, the interviews became decidedly shorter.

⁶In fact, I personally loath getting legal counsel in-over-their-heads in cases. I respect my legal counsel as I do all professionals engaged by me, but I also manage their efforts. I am a pro-active client. It protects them and it protects me from un-happy surprises. Each law firm in this case was paid in full for their efforts and expertise.

b. Getting Down to Business

he real work in my case began by cynically examining the facts upon which the original collection litigation had been based and the internecine discovery undertaken during that litigation. That information was voluminous and complex. This data and the Texas Judgment's findings were the basis upon which the investigation and recovery action was to be predicated.

c. To Litigate or Not To Litigate, That is The Question⁷

In which foreign jurisdiction do you believe you will be able to achieve tangible results? This is a threshold question for each undertaking during the quest for foreign assets. It naturally leads to a second practical consideration: the early development and implementation of a workable, cohesive strategy which will be maintained throughout the asset recovery process. This strategy should not be inflexible, but it should be the "touchstone" upon which all litigation decisions are tested. As an example, our strategy, based upon available resources and recovery prospects was, in essence, quite simple. The focus was to undertake only those tasks or actions that would likely lead us to (i) additional quantifiable information or (ii) recovery of assets. Simple, right? Not so, when numerous tantalizing and intriguing facts are developed in multiple foreign locations. The litigate, don't litigate question is critical both in maintaining a strategic focus and in maintaining control of the inevitable hard costs that will be generated in a case of this type. It is well to remember that the novelty of the engagement, the challenge and the "sexiness" of working on an international case should not overshadow the point of the exercise. That is, the recovery of assets on behalf of a creditor *in excess of all professional fees and costs associated with the recovery effort*.

Initially, at issue in my case was the Receiver's authority and jurisdiction. We

concluded that a U.S. appointed Receiver for British Virgin Island entities would encounter little legal co-operation in international forums. On the other hand, after engagement of BVI counsel and numerous discussion of the facts with him during the first week of the Receivership, it became clear that a BVI appointed Receiver who, also held the power of corporate governance, could wield significantly more authority in investigating the international and U. S. business affairs of both World and Bravo. Of assistance were the findings of fraud and intent to commit fraud contained in the Texas Judgments. These findings supported an application for appointment of Receiver in the BVI. Once entered, these appointment Orders displaced the existing corporate directors which, allowed me access to corporate records typically shrouded by BVI secrecy laws. It successfully allowed us to gain access to World and Bravo's corporate servicing agent's original books and records.⁸ This information was crucial in identifying the parties who had directed both the fraud and the defense to the plaintiff's original collection lawsuit. This initial success at implementing our strategic design of only undertaking actions reasonably calculated to produce results set the tone for the remainder of the case.

Decision makers in cases of this nature must also be willing to perform a continual analysis of cost versus benefit of each action, including its effect on the entire recovery effort. This is another important point to remember especially where fungible cash has or likely will be transferred. Tracing each "rabbit trail" while hoping for a positive result is tantamount to basing your retirement income on winning the lottery. As a decision maker in a case of this type, constant relative value decisions will be required to made by you.

⁷Apologies to William Shakespeare.

⁸Generally, an offshore corporate servicing agent assists in and forms the offshore or foreign corporation. It may provide corporate legal or tax advice. It is the shield of the true owners of the entity and likely provides the corporations incorporators and directors. The servicing agent also may act as the registered agent for service of process may provide a plethora of other related services.

Again, in my case, facts pointed to cash transfers from German banks to Switzerland; transfers of equipment in Mexico from one Mexican company to another; and, the transfer of the ownership of a Texas corporation, previously owned by World, to a Cayman Islands corporation. The analysis became clear: if cash exists, it has been moved (more than once) and is unlikely to be found in World's name. We knew from the outset we would have to "back in" to the cash trail and that recovery of cash would be the singular most challenging task. Again, at this juncture and based on U.S.-Mexican cross-border considerations, somewhat less emphasis was placed on recovering the equipment transferred in the Mexican interior.

The issue of the "transferred" ownership of the share capital of the Texas corporation, which owned significant manufacturing equipment that was leased to a third party in the U.S., was entirely another matter. The fraudulent transfer analysis and the efforts to recover World's rightful ownership became of paramount importance. In the fourth quarter of 1995, after engaging and consulting with Cayman counsel, we initiated fraudulent transfer litigation in the Cayman Islands.⁹ We calculated this litigation would have the fastest turnaround time that would lead to a significant recovery. Other considerations also drove this decision, including adverse management's efforts to, as quickly as possible, negotiate the cash sale of the corporate assets to a third party. As Receiver, I had little recourse or hope that the sales proceeds would be recoverable. In December, 1995, as sale negotiations continued, the date for the Cayman trial rapidly approached. Within a twenty four hour period, I flew to the Cayman Islands, prepared for and testified at trial where, the Court entered a ruling overturning the fraudulent transfer.¹⁰ As I traveled back to

Texas, the Cayman Order was being entered, certified and express delivered to Texas. The next morning, I traveled to El Paso where I informed existing management and their legal counsel that ownership had reverted to World, terminated their services and gained control of the corporation.¹¹ Ultimately, the assets were sold and the proceeds placed under the protection of the registry of the Texas Court. While others have decried the "do anything to achieve results" ethic, the reality in these types of cases is that if you are not willing to go the extra mile, *legally*, the results obtained may be less than optimal.

There are two points to be made. First, we were fortunate and had good facts. Secondly, based on these facts, we correctly believed, that the Cayman "owners" would not make an appearance in either the Cayman proceedings although they were properly served in compliance with Cayman law. This again underscores the necessity of carefully reviewing jurisdictional issues from a "global" standpoint while employing a selective strike strategy. Had I attempted to force the "sham" Cayman corporation's appearance in a Texas or BVI forum, we would likely still be conducting litigation on the threshold issue of standing. The assets, the sales proceeds and the recovery would be a faded memory.

Around this time, I facetiously coined the use of the phrase "subjective pragmatism". What does that mean? One definition of subjective is, "Of, pertaining to, or determined by the mind, ego, or consciousness, as the subject of experience and knowledge". While the applicable definition of pragmatic states, "Practical; matter-of -fact." Under my definition, the decision process became, "based on practical experience and understanding, *how do you feel about it?*" As issues and subsequent undertakings became ever more complex, the

⁹As an example of the complexity of foreign asset recoveries, it was necessary to obtain BVI Court approval for filing the Cayman litigation. This required submission of Cayman pleadings to the BVI Court prior to filing the Cayman case, in essence, proving the Receiver's case twice.

¹⁰Contrary to popular belief, these cases are not necessarily passports to unlimited travel. With the exception of one trip to Mexico City, my travel to Grand Cayman and two trips to South Florida in connection with discovery, I handled

the remainder of this case from my office via phone, facsimile and e-mail.

¹¹A humorous moment occurred when opposing litigation counsel in Texas, after being informed of the result of the Cayman litigation stated to the effect, "I would try to set it aside, but I'm a pirate too!"

task was to try to maintain a reasonably straightforward focus.

Another consideration is the level of commitment of the creditor to the asset recovery effort. This issue can and will impact the level of your ability to proceed in a rational and fiscally responsible manner. Unless unusually stalwart, creditor commitment will not remain static and likely will ebb and flow with the case dynamics (read, “as costs increase without recovery”). Creditor commitment comes in a number of forms. One is compensatory, are the creditors willing at the outset to financially support the entire recovery process or only part of the process? I did not state, through a “successful recovery” or “eventual distribution”.

Success is based partly in the expectation of the parties. It is important to be clear that, although the creditors may agree to fund the recovery effort, those funds may ultimately not yield tangible, financial results. It must also be made clear that once undertaken, the foray into foreign legal jurisdictions is not one which lends itself to abrupt changes in strategy. This is especially true when considering that in many foreign countries, litigation requires placing substantial sums in the foreign Court’s registry in connection with commencement of a case. Another aspect of this commitment is desire or the creditor’s “will” to see the process through. After two years in litigation prior to my appointment, the primary creditor in my case, while consistently supportive, simply wanted it to all be over. These questions are best asked early and periodically reviewed between all parties.

e. Ethics

The sensitive issue of ethics and propriety in foreign asset recovery matters and the specter of foreign legal and criminal sanction for violation of such statutes, have been widely and well written about by other authors. It is clear that Switzerland and other financial havens have strict laws governing every issue from legal service on their residents to obtaining banking information. Obviously, these countries have significant penalties for breach of these statutes

d. Creditor Commitment

and a vested financial interest in maintaining their status quo.¹²

Let me state clearly, I do not disregard foreign statutes of this nature nor would I advise anyone to do so. The penalties are clear. Searching and recovering foreign assets that have been intentionally secreted *is not*, however for the timid in nature or those not willing to aggressively, but legally “push the edge of the envelope”. Tenacious recovery efforts must be based upon solid fact and the risks calculated accordingly.

As yet another example of this, in August, 1996, after fully developing and tracing numerous offshore financial transactions, I engaged legal counsel in the Turks and Caicos Islands (the “Turks”). This experienced offshore litigator concurred with our fraudulent transfer analysis which was based upon our discovery efforts, including numerous depositions. Utilizing World’s corporate authority, I filed an application to place a Turks exempt corporation into receivership. The Supreme Court of the Turks and Caicos Islands (the “Turks Court”) entered the Receivership order and I was named the Receiver. After this Turks company’s legal counsel and corporate servicing agent wholly failed to turnover documents, my counsel filed a Motion for Turnover of Records, coupled with a request for sanctions. The Turks Court granted our motion, the documents were recovered and \$2000.00 in sanctions were awarded (which were eventually paid). These efforts yielded sufficient facts to place a second, related, Turks exempt company into Receivership.¹³ Aggressive? Yes. Legal? Yes, but would a lawyer acting as a receiver push the envelope that far? Maybe, Ken Starr,

¹²See “The Recovery of Overseas Assets, Barbarians At the Gate or Accepted Interlopers by Christopher J. Redmond, American Bankruptcy Institute Winter Leadership Conference.

¹³I strategically waited until my lead counsel was on vacation in the wine country of California with his wife before I commenced to more risky second Turks receivership action. I have it on reasonable authority that 1986 Cakebread Chardonnay *does* have medicinal value.

but who else? Successful? Yes. Within days after providing Swiss banking institutions with notice of the appointment, my Swiss counsel advised me that over \$650,000 was held in three separate accounts in the name of one of the Turks companies. Not surprisingly the “beneficial owners” were the principal fraudsters.¹⁴

f. Other Practical Considerations

In the first sentence of this article, I made the simple statement that, “the recovery of concealed assets from foreign countries is hard”.

It is, but the real challenge is maintaining the strategic focus and *tenacity* to pursue those avenues of recovery. This brings one of the least quantifiable, but important concepts of recovery of foreign assets to the forefront. That is, the will to, if necessary, prod, push and provoke others which will allow the recovery process to move forward. This does not mean being un-professional or boorish. It does mean, in the author’s opinion, being *steadfast*. The first reaction to initial queries of banks, legal counsel and others in these types of cases is, at almost each juncture, invariably, “you can’t do this; you can’t do that”; “its been tried without success by others”; and, “its too time consuming and costly”.

So be it, but this does not mean that recovery is impossible. The point I made earlier about the creativity, commitment and dedication of the recovery team of professionals to *find a way to make it work* applies here. In some cases, this effort may require treading on new and novel legal ground. In others, the application of *steadfast* pressure. The primary decision maker in the process cannot afford to be unreasonable, but cannot allow first or even second opinions to dissuade, if a prospective avenue of action may yield important recovery information. A fine line? Again, yes. But in my opinion, a fine line that can be safely negotiated with a complete knowledge of all relevant facts and with the advice of counsel. We, my team of professionals and I, recovered monies held in

the name of a Turks corporation, at the Swiss branch of a Spanish Bank that, had been transferred, hidden away and obfuscated for several years prior to my appointment. Foreign asset recovery cases will have these types of twists, complications and complexities. Its simply, “Standard Operating Procedure” for the process.

4. THE SWISS CHALLENGE

The name itself brings to mind high, snow capped mountains, green valleys and money. Lots and lots of money. Money in bank vaults, money in secret numbered accounts. Secrecy, intrigue and impenetrable. Volumes can and have been written on Swiss banking laws, bank and brokerage confidentiality and penalties for breaching these laws. Obtaining assets in Switzerland, is hard. Not impossible. Complying with Swiss laws is hard, but not impossible.

The validity of the Turks orders were challenged under Swiss recovery statute and *it was a challenge* to meet all the requirements necessary to effect a final recovery, *it was not impossible....some days it just seemed that way*. After obtaining notification that monies existed and had been frozen by me, numerous legal questions arose. Some of these included: (i) applicability and enforcement of the Turks orders; (ii) interim-authority over corporate assets in Switzerland; (iii) release of bank account information; and (iv) how to conform orders issued in other jurisdictions to Swiss requirements.

These and other issues were litigated through the Swiss Court of First Instance as an Application for Injunctive Relief was prosecuted by the alleged “beneficial owners” of the corporate accounts frozen by. This injunctive action was brought to delay and forestall both gaining information about and control of these fraudulently transferred monies.

¹⁴Opening a Swiss Bank accounts requires that a “Beneficial Owner” be designated on the account. This rule also applies to corporate accounts.

One of many novel questions arising in this case and, indicative of the types of issues that can be expected in asset recovery cases, was the question of, when is a final order a final order? In summary, the Turks Court had, over a period of months and after proper notice, issued a number of orders, including two separate, \$2.5 million Judgments (the “Turks Judgments”). The Turks Judgments were in favor of World.¹⁵ All applicable Turks appeal dates for these interlocutory orders had passed. The Turks Judgments were final. During course of this case, we had provided to my Swiss counsel copies of all relevant pleadings and orders from all jurisdictions. These all had the appropriate *Apostile* affixed in each jurisdiction certifying their authenticity.¹⁶ Yet under Swiss statute, an additional order was required stating that all prior Turks orders were final.¹⁷

This proved to be a significant challenge which required the creativity and tenacity mentioned earlier.¹⁸ Significantly, after notice and contested hearing, the Swiss Court denied the injunctive relief request based on our worldwide facts, findings and orders, yet this did not vitiate our obligation to fully comply with existing statute. We were required to file a novel motion with the Turks Court seeking a ruling that its own prior orders were final. Months later, at that hearing, the Turks Court generally expressed the same, “You want me to do what?” as he had at the beginning of the case. The Order was nevertheless entered, an *Apostile* affixed and couriered to Swiss counsel.

This greatly shortened description of the Turks sequence of event which, in reality, took approximately seven months to accomplish underscores the lengths that may be required, no matter how well designed and strategically sound your efforts. Further, unanticipated obstacles like this one is guaranteed to consume resources, energy and crucially, time. Straightforward issues become complex; complex issues only become more so and, sometimes it just pays to be lucky

Had we been unable to initially “convince” the Spanish bank of my receivership authority, had the Swiss court ruled differently, or had the “beneficial owners” believed they weren’t “bullet proof”, the ultimate outcome could have been dramatically different.

5. CONCLUSION

The quest and recovery of foreign assets can be one of the most challenging engagements undertaken by any professional. It requires a dedicated team of highly skilled professionals and advisors. It requires a sound and highly serviceable strategy. Flexibility and creativity must be utilized within the context of sometime, un-friendly and problematic foreign statute. It is not for the risk adverse. Most importantly, successful recoveries are not impossible, but neither are they simple or easy. Each case will present opportunities to find novel approaches and solutions. It will be expensive. It will, simply, be a case you won’t forget. *Bon Chance*.¹⁹

¹⁵This was the amount money that had originally been fraudulently transferred away from World.

¹⁶With, in some instances, attractive gold seals and red ribbons.

¹⁷If it looks like a duck and sounds like a duck....you know the rest.

¹⁸After review, it was determined a never used Turks statute existed for the issuance of such order, but no accompanying court rule existed. Initially, a Clerk of Court’s Certification was sought which, in effect, would have the same authority. After the Clerk’s careful review and, consultation with the Court, it was determined by that office that formal motion would be required.

¹⁹The contribution to this article by Charles A. Beckham, Jr. of Kemp, Smith, Duncan & Hammond, P.C. is gratefully acknowledged.