How boards can decide whether to chase overseas assets

Directors may need to decide whether pursuing a claim is worth the effort and cost of doing so

The development of global commerce has made the world a small place. But the removal of barriers to legitimate international transactions has also opened the door to transfers of assets overseas as part of fraudulent schemes.

Companies with international partners may find a major trade debtor has closed its doors and its assets have mysteriously disappeared, perhaps through layers of related-company transfers and suspect payments to offshore companies. When these transfers happen during the course of litigation, innocent creditors may learn a target defendant is judgment-proof only *after* investing considerable assets into building a case.

The boards of these victim companies face a dilemma. Further investment in litigation risks the proverbial 'throwing good money after bad', but walking away creates certainty of loss and rewards the fraudulent debtor. Although the choice between these two paths can be difficult, analytical steps can illuminate the situation. Boards should address three key factors in deciding whether to invest further in pursuing transferred assets:

- Identifying and valuing the enforcement options
- Analyzing the jurisdictional basis of strong enforcement venues
- Evaluating the likely recovery in the context of a cost-benefit analysis.

Identifying and valuing the options

The first step to an informed decision on chasing funds offshore is understanding available options and their comparative value. A company doing business in the US, whether foreign or domestic, generally has three channels: US courts, arbitration tribunals and foreign courts.

US district courts

If the dispute carries even a remote nexus to the US, the country's district courts can be a powerful asset. In recent decades, courts have significantly expanded the long arm of their jurisdiction and have become increasingly friendly to plaintiffs. US district courts should be attractive to both domestic and foreign plaintiffs for many reasons, such as broad investigative tools and enforcement mechanisms that are highly unusual in the world.

Even the US Supreme Court has acknowledged that the nation's courts are 'extremely attractive to foreign plaintiffs' because, among other things, they provide a range of forums (which themselves can be shopped), jury trials are almost always available and discovery is more extensive than in foreign courts.

For example, US district courts will assert jurisdiction globally to secure evidence and testimony from foreign parties and non-parties with fairly minimal contacts with the forum. Therefore, in disputes with significant evidentiary burdens or discovery needs, invoking the jurisdiction of a district court – particularly a court with an expansive view of jurisdiction – can provide the muscle necessary to build a compelling case and develop a path to recovery.

Arbitration tribunals

While district courts may be the plaintiff's strongest ally when it comes to building and investigating a case, typically there is an even stronger channel for enforcement of a judgment. Contrary to common perception, arbitration awards are usually more readily enforceable in foreign jurisdictions than district court judgments. Unlike district court judgments, which can be appealed and tied up in post-judgment proceedings for years, the opportunities to appeal an arbitration award are narrow and typically short-lived.

Moreover, 156 nations have signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention, which provides an expedient and widely recognized mechanism for enforcing arbitration awards in the various signatory nations. A claimant who obtains an arbitration award in the US can usually enforce that award in any of the other 155 signatory nations – and even some non-signatory nations – through relatively straightforward motion practice.

As a result, arbitration is often the preferable route for a claimant who does not need district court muscle to pull parties or documents into court. Although the ability to pursue arbitration requires an arbitration clause, such clauses are often standard in international commercial contracts, and claimants may have the choice of pursuing contract-based or other related claims in arbitration.

Foreign courts

Lastly, any analysis of enforcement options should consider the courts where assets are likely located. While no foreign jurisdiction provides the aggression that has become the hallmark of US district courts, most foreign courts will readily enforce arbitration awards issued in the US.

Assessing jurisdictional basis

Once venue options are identified, the analysis should turn to whether the preferred venue is available and can be retained throughout the case. Among other things, this analysis should include assessing whether claims to be asserted before an arbitration tribunal bear a sufficient nexus to the arbitration clause and whether all parties are signatories to, or can otherwise be compelled to abide by, the arbitration clause.

Parties seeking to invoke the long-arm jurisdiction of US district courts should not only perform the routine assessment of personal jurisdiction, but also analyze their ability to serve process on foreign defendants, which is highly achievable but often requires significant strategic planning and may test the resourcefulness and creativity of counsel.

They should also assess potential challenges to the venue, such as *forum non conveniens* motions and other motions to transfer. Invoking the jurisdiction of a strong district court in the first instance is of little value if the court later transfers the case.

Is there a recovery to be had?

When trade debtors engage in fraudulent schemes to conceal assets, they often move those assets to renowned privacy and tax havens or countries where foreign customs and laws make enforcement appear daunting. Despite this, the enforcement laws of many foreign nations can be navigated to successful recovery.

Beyond chasing money overseas, experience has taught us that, though perpetrators of fraudulent asset protection schemes can successfully move some assets to distant shores, they often maintain some exposure in the US and their schemes often expose co-conspirators with US assets to liability.

Indeed, in some instances the most lucrative litigation strategy is built on the pressure of holding co-conspirators liable in the US, which may drive an amicable global settlement, rather than forcing pursuit of the assets siphoned offshore.

The dynamics involved in developing a sound recovery strategy are wide-ranging, and boards facing a decision on whether to invest in pursuing transferred assets should be cautioned against seeking to recover those assets directly as the only litmus test for further action.

Any analysis should, however, include sufficient investigation to determine whether the assets have been moved or dissipated. In circumstances where the debtor has not engaged in a scheme to hide assets but has – through poor management or failure to anticipate risks – merely dissipated all available funds, further investment in recovery is often futile.

The proper cost-benefit analysis should be informed by examining the full range of enforcement mechanisms available, and gaining a robust understanding of potential pressure points and sources of recovery. Those sources and the means to reach them will, in turn, dictate the likely costs involved.

This article originally appeared on www.corporatesecretary.com on April 27, 2017. The authors are Joseph Dunn, Daniel Pascucci and Heather Silver from the San Diego office of Mintz Levin.

Joseph Dunn

Daniel Pascucci

Heather Silver