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Looking to Enforce a PRC "Keepwell Agreement"? Look Outside the PRC

As Mainland Chinese companies teeter on default, offshore creditors should pursue every avenue to ensure recovery. One strategy would be to enforce keepwell agreements overseas, our global Claim Monetization team explains below, forming the basis of a cross-border pressure campaign on the debtor.

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Creditors are scrambling to recover funds from debtors amid the current wave of defaults by issuers based in the People's Republic of China (PRC). The overseas enforcement of keepwell agreements presents a practical opportunity to target parent companies with greater assets and more powerful decision makers susceptible to cross-border monetization techniques.

Keepwell Agreements

Keepwell agreements – an increasingly popular form of credit protection when PRC offshore subsidiaries issue offshore high-yield bonds – involve a PRC company's pledge to keep the debt issuer solvent and are often governed by the law and forum of jurisdictions outside of the PRC.

Offshore creditors enjoy significant advantages enforcing keepwell agreements *outside* the PRC, where courts increasingly recognize them, such as in Hong Kong. By deploying ways to enforce keepwell agreements overseas or by using them to create lawful leverage aimed at an expanded pool of assets and vulnerabilities, creditors can secure a more favorable return.

Gather evidence early

Besides simply starting off a suit at the contract-designated forum, offshore creditors should look to other jurisdictions to simultaneously support their case and add pressure to the keepwell issuer. For example, utilizing wide-ranging discovery under Section 1782 of the U.S. Code can yield valuable information, providing incentives for negotiations before the fight has even begun.

Exert pressure through post-judgment discovery

Creditors are entitled to post-judgment discovery against the keepwell issuer once they have a judgment or award overseas, which they can lawfully leverage to maximize pressure.

One effective angle is to reveal the keepwell issuer's potentially problematic global transactions by issuing subpoenas to correspondent banks. This could lead to a deeper investigation if they can identify transfers made by directors, senior management and their close allies.

Focus on parent-level decision makers

Focusing on the keepwell issuer's key decision makers is another effective strategy. Directors and senior management – or third parties such as accountants – are often required to provide details of the company's financial affairs. An examination order obtained where a key ally resides risks them giving evidence or being in contempt of court, creating collateral pressure.

By using enforcement strategies on keepwell agreements outside of the PRC, offshore creditors can simultaneously narrow options for the debtor and/or its decision makers outside of PRC while expanding the set of assets and decision makers to leverage against. These efforts very often trigger settlements event and are proven to be more efficient than passive strategies.

For more details on this strategy, click here. To subscribe to more insights like this, click here.

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Kobre & Kim is a global Am Law 200 law firm that focuses on cross-border disputes and investigations, often involving fraud and misconduct.

Our global Claim Monetization team helps clients realize value from their claims, developing investigative, enforcement and asset tracing/recovery plans in the pre-dispute stage, to maximize future monetization. Our integrated team, of former U.S. government lawyers, Hong Kong solicitors, UK solicitors and barristers (including King's Counsel) and offshore lawyers, uniquely positions us to drive cross-border proceedings — advocating directly for our clients or closely leading local counsel in jurisdictions around the world.

With lawyers admitted across the U.S., UK, Asia, the Middle East, Latin America and key offshore financial centers, our team offers deep experience coordinating investment monetization and judgment enforcement strategies across multiple jurisdictions.