



Kobre & Kim's International Judgment & Offshore Asset Recovery Contacts



Jason J. Kang

Shanghai / Hong Kong

jason.kang@kobrekim.com



Peter Tyers-Smith

Cayman Islands

peter.tyers-smith@kobrekim.ky



Timothy de Swardt

BVI

timothy.deswardt@kobrekim.com

Keeping Offshore Assets Offshore

New legislation in the British Virgin Islands follows the Cayman Islands' lead in making it easier for parties, including those based in Asia, to protect against the risk of offshore assets being dissipated pending a judgment. Below, a team comprised of both Offshore and onshore lawyers breaks down the new opportunities presented to those involved in onshore proceedings with a nexus to either BVI or Cayman.

BVI follows the Cayman Islands' lead in making it easier for parties, including those based in Asia, to protect against the risk of offshore assets being dissipated pending judgment.

It is a perennial onshore/offshore enforcement problem: by the time an onshore court has handed down its judgment, there is nothing of value to enforce against because the offshore defendant has hidden or dissipated their assets.

One form of protection against this risk is an interim freezing (or "*Mareva*") injunction, where the Court makes an order prohibiting the disposal of the defendant's assets up to the value of the claim, pending the outcome of the case. However, prevailing case law has historically not allowed injunctions to be granted by the offshore courts unless there is an existing claim against the defendant within the jurisdiction of the Court granting the injunction.

Fortunately, that position has changed in the Cayman Islands and now in BVI, with claimants, including those from onshore jurisdictions such as Hong Kong and the People's Republic of China, able to obtain "free-standing" injunctive relief in both offshore jurisdictions.

The British Virgin Islands makes new law

On the last day of 2020, the BVI House of Assembly approved a legislative change that permits interim injunctive relief, including freezing orders, in support of onshore proceedings. It was previously only possible to obtain such relief through a limited common law fix, which is now the subject of challenge in the Judicial Committee of the Privy Council (BVI's highest appellate Court).

The new law cuts through the historic difficulties posed by the common law and gives the BVI Courts, for the first time, a power to grant "freestanding" injunctive relief. This development is also groundbreaking in that it provides a statutory basis for the BVI Courts to grant pre-action disclosure (often referred to as "*Norwich Pharmacal*" disclosure) in aid of existing or intended foreign proceedings.

Following the Cayman Islands' lead

By introducing this new law, BVI is to an extent following the lead of the Cayman Islands. In 2015, the Cayman Islands' legislature introduced a similar law permitting the Grand Court to grant interim relief of any kind – including freezing orders – in support of any proceedings "which have been or are to be commenced outside of the Islands."

To date, the Grand Court in the Cayman Islands has shown that, under the right circumstances, it is willing to grant injunctions in support of foreign proceedings. The first exercise of this law, *Classroom Investments Inc v China Hospitals Inc et al*, 2015 (1) CILR 451, involved proceedings in Hong Kong, while the operations of the underlying business were located in Mainland PRC. Once it was convinced that there was evidence of fraud, the Grand Court swiftly granted the Plaintiff wide-ranging protective and disclosure orders.

In doing so, the Grand Court took a stand that Cayman-based companies are not to be used to dissipate assets that might otherwise be available to satisfy a foreign judgment. Other more recent decisions have followed in support of foreign proceedings, helpfully freezing assets to protect against the risk of dissipation by a defendant.

Lastly, for those involved in arbitration, both the Cayman Islands and BVI Courts now also have the power to grant free standing injunctive relief, including freezing injunctions, in support of foreign arbitral proceedings.

With the advent of the new law in BVI, and the continuing willingness of the Cayman Islands' Courts to make protective orders, victims of fraud are now in a better position than they have ever been to guard against a defendant's dissipation of its offshore assets whilst they are waiting for a judgment. However, maximizing a cross border strategy that makes the best use of these protective measures and puts a claimant in the best possible position will require an in depth understanding of the opportunities and limits that exist in every jurisdiction involved, both onshore and offshore.

About Kobre & Kim's International Judgment & Offshore Asset Recovery Team

Kobre & Kim is a conflict-free Am Law 200 law firm focused on disputes and investigations, often involving fraud and misconduct.

Our offshore asset recovery team has an acute focus on complex, cross-border asset tracing and claim monetization. Comprised of English solicitors, barristers, King's Counsel, as well as Hong Kong solicitors, our team has deep experience tracing, freezing and recovering misappropriated assets hidden in offshore structures.

Our lawyers are qualified in key offshore jurisdictions, including the Cayman Islands and the British Virgin Islands, and have been successful in freezing assets through both judicial and non-judicial means to repatriate funds to victims. One lawyer, Timothy Haynes, served as lead partner in the above-mentioned *Classroom Investments* case. Frequently, the team works alongside our lawyers based in major onshore jurisdictions such as Hong Kong.

Our work has been featured on the cover of *The Wall Street Journal*, *Forbes* and other leading publications, and we are repeatedly recognized as one of the most highly-regarded offshore asset recovery firms in the world by leading rankings guides.