



**Asia-Pacific
Economic Cooperation**

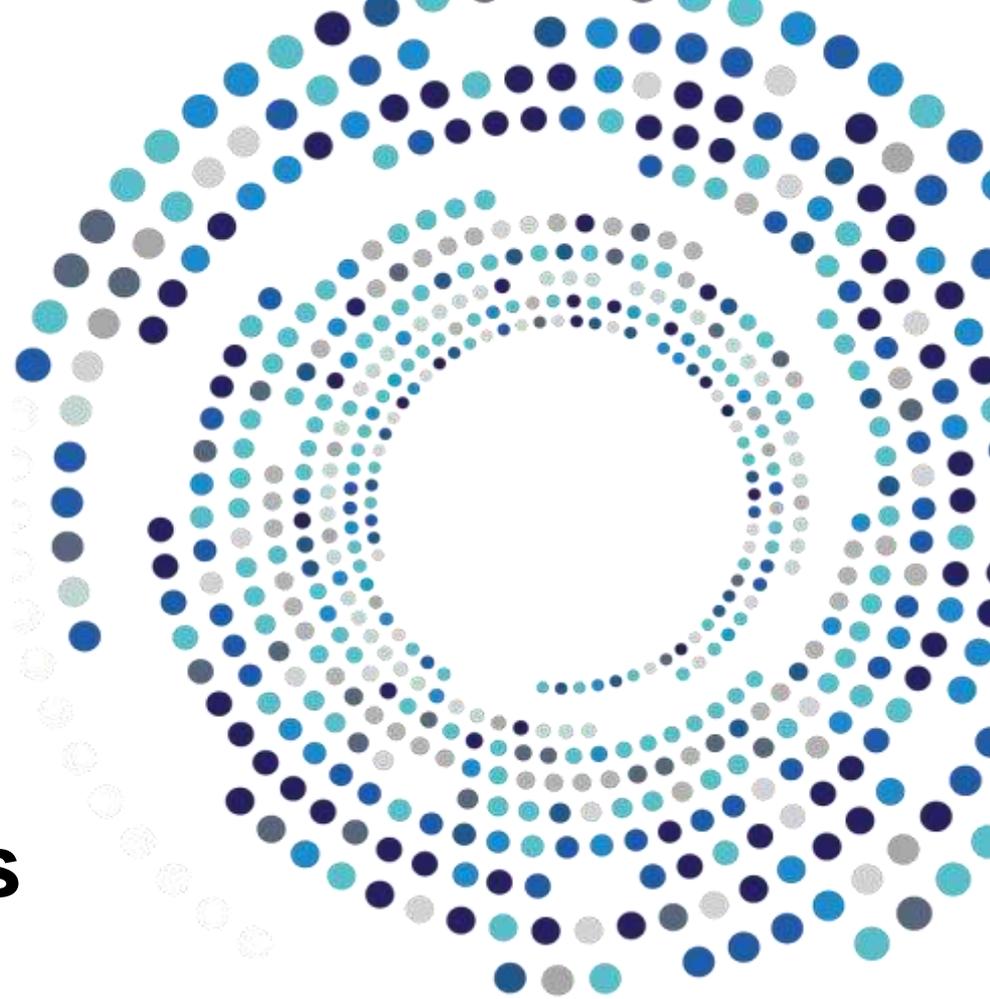
2018/ACT-NET/WKSP/012

Freezing and Confiscating Assets

Submitted by: O'Melveny & Myers



**Training Workshop on Asset Recovery
Bangkok, Thailand
20-22 March 2018**



Freezing and Confiscating Assets

APEC / ACT-NET

Training Workshop on Asset Recovery

Ronald Cheng, Partner, O'Melveny & Myers

This presentation does not constitute and is not a substitute for legal advice

Summary

- Options in Handling a Case
- Civil Litigation in the U.S.
- Enforcement of Judgments in the U.S.

Options in Handling a Case

- There are two options in the U.S. to pursue tainted assets
 - Civil litigation in the U.S.
 - Enforcement of Judgments in the U.S.



Civil Litigation in the U.S.

- Federal Court
 - Cause of Action:
 - The “Racketeer Influenced and Corrupt Organizations Act” (abbreviated as “RICO”)
 - The plaintiff must suffer injury to his business or property caused by (at least part of) the defendant’s pattern of racketeering activity
 - Pattern of Racketeering Activity
 - There must be at least two acts of racketeering activity,
 - The acts of racketeering activity in the RICO law are broadly defined; aside from extortion, the term includes many federal and state crimes. With regard to fugitives and tainted assets, the crimes that can be acts of racketeering activity include but are not limited to:
 - Mail fraud
 - Wire fraud
 - Bank fraud
 - Money laundering
 - transactions involving property derived from unlawful activity
 - Transportation of stolen goods or money
 - Sale or receipt of stolen goods or money
 - Jurisdiction: Individual litigation must be based on personal jurisdiction
- State Court :
 - Depends on the law of the state where the defendant or assets are located

Civil Litigation in the U.S. (continued)

- Issues Regarding Extraterritoriality
 - Can (civil) RICO actions can reach activities outside of the U.S., and can they redress injuries suffered outside the U.S.?
 - Ideally, the conduct is more than transferring stolen funds into or through the United States
 - Usually, in bringing stolen funds to the United States, the defendants very likely committed sufficient domestic predicate acts
 - in *United States v. Chao Fan Xu*, the court affirmed criminal RICO convictions based on predicate acts in the United States, although the defendants also embezzled funds in China
 - most courts have required some level of US connection to the racketeering activity or enterprise affected
 - the racketeering activity that caused the plaintiffs' injury happened in the U.S.
 - the decisions to engage in racketeering activity are made in the U.S.

Civil Litigation in the U.S. (continued)

- Statute of limitations
 - RICO contains no statute of limitations
 - The Supreme Court has set four years as the statute of limitations for civil RICO actions, calculated from when the plaintiff should know of the injury
 - Equitable tolling of the statute of limitations
 - If the defendant conceals the racketeering acts, the plaintiff does not know of the acts, and the plaintiff exercises due diligence



Civil Litigation in the U.S. (continued)

- Provisional Remedies
 - Purpose
 - To maintain the present condition of the assets and prevent the defendant from depleting the assets
 - Asset freeze
 - The plaintiff claims to enjoy an interest in the assets
 - Temporary restraining order (TRO)
 - In certain special situations, there is no notice to the defendant
 - There is immediate and irreparable injury
 - There is a certification by the movant's lawyer
 - A TRO is effective for 14 days, which the applicant can extend another 14 days
 - Preliminary Injunction
 - There must be notice to the defendant, and the defendant may be heard at formal hearing
 - Effective until the conclusion of the case
 - Whether a private party bringing a civil RICO action may seek a preliminary injunction may be unclear and subject to challenge

Civil Litigation in the U.S. (continued)

- Provisional Remedies

- Receiver

- Can be appointed at the very outset of the case

- analogous to a preliminary injunction; temporary receivers may be appointed without notice to the defendant (e.g. N.D. Cal. Local R. 66-1(b))

- a receivership is only appropriate if:

- plaintiff has an equitable claim to property that is the subject of the dispute, or,

- when the plaintiff is seeking to enforce a judgment

- Factors considered in deciding whether to appoint receivers

- inadequacy of the security to satisfy the debt

- financial position of the debtor

- fraudulent conduct on defendant's part

- inadequacy of legal remedies

- imminent danger of the property being lost, concealed, injured, diminished in value, or squandered

- probability that harm to moving party by denial of appointment would outweigh injury to parties opposing appointment

- probability of moving party's success in the action and the possibility of irreparable injury to its interest in the property; and

- whether moving party's interests sought to be protected will in fact be well-served by receivership

Civil Litigation in the U.S. (continued)

- Receiver
 - Powers
 - vested with complete jurisdiction and control of all the property with the right to take possession
 - has capacity to bring suit in the interest of the property
 - federal receivers take possession of all property subject to receivership within the United States, regardless of the district in which it is located.



Enforcement of Judgments in the U.S.

- The victim company first obtained civil judgment in the home jurisdiction.
- Conditions for recognition of the judgment
 - the foreign judgment grants or denies a sum of money (e.g., Cal. Code of Civil Procedure § 1715(a)(1)).
 - the judgment is “final, conclusive, and enforceable” (§ 1715(a)(2)).
 - the judgment is not for taxes, a fine or penalty, or divorce (§ 1715(b)).
- The judgment will not be recognized if:
 - the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
 - the foreign court did not have jurisdiction over the subject matter (§ 1716(b)).
 - other conditions
 - the specific proceeding was inconsistent with due process
 - the defendant did not receive sufficient notice
 - the judgment was obtained by fraud
 - the judgment is repugnant to public policy
 - the judgment’s circumstances raise doubt about the integrity of the rendering court with respect to the judgment

Enforcement of Judgments in the U.S. (continued)

- Default judgments may be recognized provided they satisfy the above elements
- Possible challenges
 - if a defendant appears, it is likely that defendant will argue the judgment is inconsistent with due process or there was inadequate evidence supporting the judgment
 - a court would require proof of the factual basis for the judgment even if not to the same extent as with a brand new civil case

Ronald Cheng



Partner

Resident Office

Los Angeles

Telephone

+1 (213) 430-6247

Email

rcheng@omm.com

Ron Cheng handles both anti-corruption and data security and privacy matters and is co-located in Hong Kong and Los Angeles. He has experience in both U.S. and Chinese criminal law enforcement. In the area of anti-corruption, Ron performs investigations for and advises multi-national companies, primarily regarding their operations in Asia. In the area of data security, Ron handles a variety of breach situations, including business email compromises, distributed denial of service (DDOS) attacks, and internal compromises.

During Ron's two-decade career at the Department of Justice (DOJ), in the US Attorney's Office for the Central District of California, he handled a number of high-profile prosecutions. He played a key role in the prosecution of United States v. Chao Fan Xu, a racketeering, money laundering, and immigration fraud trial against former Bank of China managers that resulted in convictions on all charges. In addition, Ron was a seasoned cyber-crime prosecutor who handled complex multi-jurisdictional cases

Ron has more than 10 years of experience dealing with criminal enforcement matters in China and Asia. Ron's work began with his service as DOJ's sole representative in the US Embassy in Beijing as Resident Advisor. From that time, through his subsequent work over the following seven years on corruption, money laundering, digital privacy, and other cases with DOJ, Ron worked directly with Chinese central and provincial law enforcement, prosecution, anti-corruption, and justice officials.