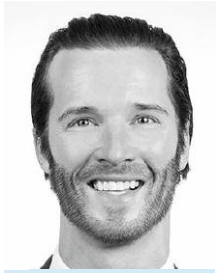
# Demystifying offshore: Obtaining information

In their second article "demystifying offshore", the authors examine some of the more common mechanisms for obtaining information in the four Crown Dependencies and Overseas Territories (CDOTs)



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**In our last article, building upon presentations by the Anti-Fraud Forum, the authors discussed steps European-based insolvency officeholders could take in order to obtain recognition and assistance from the British Virgin Islands, Cayman Islands, Guernsey or Jersey (which, for convenience, we called the four Crown Dependencies and Overseas Territories (CDOTs).**

In this article, we build upon that foundation by examining some of the more common mechanisms for obtaining information in the CDOTs.

## Information held in the CDOTs

Some essential information is publicly available in the CDOTs. All maintain registers of incorporated companies, a search of which will reveal basic information such as company name, number, date of incorporation, type of company, the status of the company[1] and address of its registered office. Such a search will reveal the company's Memorandum and Articles in most CDOTs[2] and, in Cayman, a search can be run to show a company's current directors. Similarly, court searches can be carried out, which will reveal any writs (i.e. forms commencing claims) or judgments to which a company has been a party.

In all CDOTs there is a requirement to maintain and file beneficial ownership information, which can be accessed by criminal and tax authorities in certain circumstances. Whilst the trend appears to be towards public accessibility, this information is not yet available publicly.

More information is held at the companies' registered offices. This includes registers of members and directors. The nature and extent of such records varies between jurisdictions and by type of entity, thus a good starting point is often to seek advice as to what records are likely to be held at the registered office and elsewhere.

## Norwich Pharmacal applications

Broadly speaking, a Norwich Pharmacal application for disclosure can be made against a non-party to litigation, provided that (i) they are mixed up or involved in a wrong that has occurred; (ii) they are at least likely to be able to provide the information sought; and (iii) the order is necessary to enable an action to be brought against the wrongdoer.

Norwich Pharmacal orders are frequently sought against registered agents or other service providers, who may hold ownership information, details of the movement of funds or KYC information[3]. Registered agents, in particular, will normally be found to be "mixed up" in the affairs of their principal company, so as to make them a potential target for this type of order.

The disclosure normally involves the production of documents. The information sought may be wide-ranging and may include the identity of wrongdoers, existence of wrongdoing and/or location of assets. In the BVI and the Cayman Islands Norwich Pharmacal relief has been successfully sought in aid of enforcement of an overseas judgment where there is reasonable suspicion that a respondent is mixed up in the willful evasion of another's judgment debt[4].

## Bankers' Trust applications

Where there is a *prima facie* case of fraud and the relevant information is required to trace, preserve or recover assets which may otherwise be dissipated before the conclusion of a legal claim against a defendant, then a Bankers Trust order may be sought against a non-party (usually a bank)[5].

In the right circumstances, this can be a powerful tool in the CDOTs. However, because the order overrides normal confidentiality obligations, it is only available in relatively narrow circumstances. There must be good grounds for believing that the assets are the applicant's assets, they were acquired by fraud or wrongdoing and that delay might result in the dissipation of the funds before the substantive action goes to trial. On the other hand, unlike for Norwich Pharmacal relief, there is no requirement for the respondent to be mixed up in wrongdoing.

## Injunctions

Our next article will deal, in detail, with freezing injunctions that may be available to support proceedings overseas. For the purposes of this article, it is worth noting that such injunctions are often coupled with ancillary

disclosure orders, e.g. orders requiring a defendant to deliver up a sworn statement of its assets; disclose documents in support of that statement (e.g. bank records) and/or provide other information to enable the injunction to be effective.

A different form of injunction, namely an Anton Piller order (sometimes known as a search and seizure order) can be made to allow an applicant to enter a respondent's premises, search for, inspect and seize documents and other property.

Such orders are relatively rare and will only be made in exceptional cases. Requirements include for the applicant to show an extremely strong *prima facie* case that the actual or potential damage would be a very serious matter for the applicant; that there is clear evidence that the respondent possesses incriminating evidence and that there is a real risk that such evidence will be destroyed before an on-notice application could be made and enforced. As litigation relating to data breaches, cyber fraud and cryptocurrencies increases, so may the use of such orders.

## Liquidators' powers to obtain information

Our last article discussed recognition and assistance for overseas insolvency officeholders. Such orders can include requiring the production of information and documents to the overseas officeholder.

Another common route to recovering information in the CDOTs is to look at proceedings seeking to wind-up entities located there, and to see if the winding up is just and equitable, on grounds of insolvency, or only for public policy reasons[6].

Once appointed, liquidators have extensive statutory and common law powers to obtain information and pursue their own investigations into wrongdoing. Although their efforts are made for the collective benefit of all company stakeholders (not merely the party who originally sought their appointment), liquidation is still one of the most common and effective methods of enabling information to be gathered and actions to be taken where wrongdoing has occurred and money has gone missing through an offshore entity.

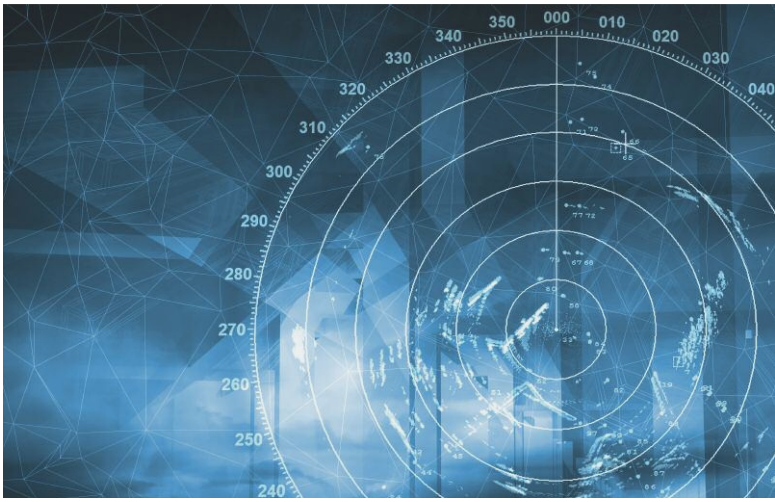
The details and extent of these powers vary from jurisdiction to jurisdiction, but commonly involve being able to recover documents and information that belong to the company in question, compel directors to provide statements of the company's affairs immediately prior to liquidation, and/or compel current and former directors (and, in some jurisdictions, other service providers) to provide documents relevant to the company and/or to be examined by the liquidators about matters relevant to the company.

## Letters of request

In addition to the powers to provide recognition and assistance to foreign insolvency officeholders discussed in our last article, in each of the CDOTs the courts also have the power to grant relief pursuant to a letter of request from a foreign court in furtherance of civil proceedings, typically with a view to taking or obtaining evidence in support of those foreign proceedings[7].

The requirements for such a letter of request are in line with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and the English Evidence (Proceedings in Other Jurisdictions) Act 1975. Essentially, they are that foreign proceedings must be contemplated or on foot and the evidence sought must be strictly limited to that necessary for those proceedings.

Letters of request are not often used in the CDOTs. However, in the right cases, they may be a potential route to obtaining a wide variety of evidence including documents or property, to examining witnesses, or even to taking samples of blood or conducting a medical examination.




## Conclusion

As set out above, there are various methods of obtaining information in the CDOTs and European-based professionals should not be deterred from seeking appropriate relief within these jurisdictions.

In most cases, the relevant inquiry will start with considering what information is likely to be located in the relevant CDOT that may assist an investigation or potential litigation. Once that information is in mind, it will be easier to consider who is likely to hold it and, from there, the best potential route(s) to obtain it.

The courts in these jurisdictions, supported by well-qualified legal and accounting professionals, are responsive to global developments and well-versed in cross border insolvencies and litigation. Accordingly, if you think that there may be information held offshore that could assist you in your efforts, it is likely to be worth speaking to a professional in that jurisdiction about potential ways to obtain it. ■

**Footnotes:**

1 e.g. whether active, struck off, or in liquidation.
2 but not in Cayman.
3 based on the equivalent English jurisdiction first established in *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133.
4 *UVW v XYZ* BVIHC (COM) 108 of 2016; ArcelorMittal USA LLC v Essar Global Fund Limited & Anor (Unreported, 29 March 2019).
5 Following the English case of *Bankers Trust v Shapira* [1980] 1 WLR 1274
6 Winding-up is a considerable topic in its own right, which we do not attempt to cover in this article.
7 e.g., the court in Cayman can grant letters of request from overseas courts, pursuant to the Evidence (Proceedings in Foreign Jurisdictions) (Cayman Islands) Order 1978, which extends certain sections of the similar UK statute to the Cayman Islands.

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