

# Asset recovery: “reaching down” to preserve and recover assets held at the bottom of a vertically-stacked corporate chain

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## Abstract

*This article explores an asset preservation and recovery strategy known as “reaching down” from the top to the bottom of a vertically-stacked corporate structure. The strategy targets assets at the lower levels of the structure, which are often indirectly held or controlled by a recalcitrant obligor at the top. It examines the practical challenges of holding difficult debtors or suspected fraudsters accountable, particularly those who hide behind complex, vertically-layered corporate entities. These asset protection fortresses are frequently spread across multiple jurisdictions, complicating enforcement efforts. The primary aim of this strategy is to help creditors mitigate the risk of asset flight from the lower levels of a layered asset protection construct. This article also highlights the effectiveness of appointing asset preservation receivers over the shares at the top of such structures, which can play a crucial role in safeguarding the value often found at the bottom of the corporate chain.*

In contemporary corporate governance, vertically stacked corporate chains are a popular structure. They typically feature a holding company at the top that owns various intermediate subsidiaries and underlying asset-holding entities. This arrangement, while offering advantages such as risk mitigation and financial

efficiency, complicates asset recovery due to the doctrine of separate legal personality established in *Salomon v Salomon & Co Ltd*.<sup>1</sup>

This doctrine affirms that a company has its own legal identity, protecting shareholders from personal liability and complicating creditors’ efforts to pursue assets within subsidiaries, especially when a shareholder at the top faces financial distress and seeks to hide assets or when these structures are misused to conceal proceeds from fraudulent activities.

The corporate structures in question are typically vertically stacked, comprising multiple layers of companies (“Topco, Midco, and Bottomco”) whose places of domicile are frequently spread across multiple jurisdictions. The Topco may be controlled and beneficially owned by recalcitrant debtors, fraudsters, or other dishonest actors, who are the ultimate beneficial owners (UBOs). These individuals are intentionally seeking to conceal or obfuscate their identities through this structure in an effort to evade their obligations. In this arrangement, assets may be funneled down through the structure, from Topco to Midco, and ultimately to Bottomco, the lowest-tier organ as an asset protection strategy.

Midco plays a crucial role in further distancing the true value or control from the obligations owed, often acting as an intermediary to obscure ownership of assets and their location. This multi-tiered structure is deliberately designed to make it difficult and cumbersome for creditors or victims to trace and recover the *fructus sceleris* (“the fruits of fraud”), as each layer serves to complicate the process of accountability and enforcement. The result is a web of corporate entities that shield those at the top from responsibility while leaving the lower companies, especially Bottomco, seemingly disconnected from any obligations owed to creditors or victims of the UBO at the top of the structure.

Some jurisdictions, such as the United States and Brazil, will permit the reverse lifting of the corporate veil to allow a court to “reach down” from a shareholder at the top to the bottom, where alter ego (US) or patrimonial confusion or bankruptcy extension (Brazil) theories permit a court to effectively impose the liabilities owed to creditors from the owner of shares (at the top) to the real assets (at the bottom).<sup>2</sup> However, the law of England & Wales and most Commonwealth jurisdictions continues to have a firm grip on the commercial certainty of maintaining the integrity of separate corporate personalities.<sup>3</sup> This legal conservatism does not provide relief in some fraud cases, however.

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<sup>1</sup> *Salomon v Salomon & Co Ltd* [1897] A.C. 22 HL.

<sup>2</sup> See *Litchfield Asset Management Corp v Howell* 799 A.2d 298 (Comm. App. Ct. 2002) (noting that there is a “growing recognition of the doctrine of reverse piercing of the corporate veil”).

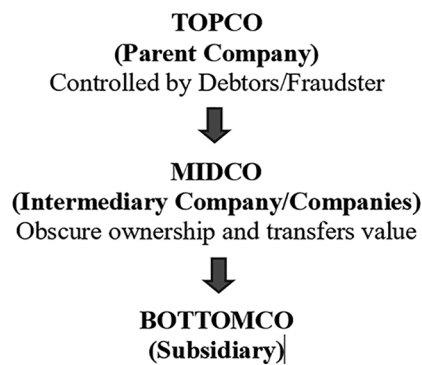
<sup>3</sup> See *Prest v Petrodel Resources Ltd* [2023] UKSC 34; [2013] B.C.C. 571 where the Supreme Court of the UK held that piercing the veil of limited liability of a company was to occur in very narrow fact circumstances; and that remedies outside of “piercing” the veil (a metaphor said to be unhelpful), particularly in equity, could achieve appropriate results on the facts of each case.

Securing damages or proprietary judgments can be a significant legal victory, but the practical challenges of enforcement can often make asset recovery a steep hill to climb. Creditors frequently face a long and frustrating struggle to uncover hidden assets, with little guarantee of success. This makes the enforcement process far more complex than conventional civil litigation suggests.

In addition, in situations where assets are located at the bottom of a corporate chain and the UBO at the top is a recalcitrant obligor, simply freezing the shares at the top may not suffice—particularly if an end to the litigation is not in sight. In such a case, the assets at the bottom can be spun off or emptied at the earliest sign of trouble, leaving a creditor with little recourse. A viable solution to this asset recovery challenge is the appointment of an interim asset preservation receiver over the shares of Topco at the top of the chain.

## Vertically stacked corporate chain

### Vertically Stacked Corporate Chain



This vertically integrated asset preservation model was exemplified in the case of *Chia Hsing Wang v Credit Suisse AG and Credit Suisse London Nominees Ltd*,<sup>4</sup> where the Grand Court of the Cayman Islands appointed interim asset preservation receivers on an ex parte basis over shares of a Topco held by a third-party custodian. The applicant was the ultimate beneficial owner of Topco in a vertically stacked group of companies, where it was suspected that \$500 million of the UBO’s assets had been concealed with Bottomco—at the bottom of the structure.

Under Cayman company law, the UBO had no standing to apply to the court to seek the appointment of provisional liquidators over Topco, because he was not a registered member of what was, in substance, his own company. A third-party custodian was. The Cayman Court, however, recognised the UBO’s right to seek the appointment of equitable interim receivers over the shares of Topco and to confer on them the power to vote the shares of Topco as an incident of the property rights represented by the shares.

This remedial model seeks to use the internal corporate governance rules of company law to allow a creditor, through a receiver, to reach down a vertically-stacked structure to the bottom. This is done by the receiver exercising the power to vote the shares at the top to remove and replace the directors of Topco. Topco’s new directors will in turn convene a members’ meeting of Midco to remove and replace its directors; they in turn will do the same to take charge of Bottomco and its assets.

In *Chia Hsing Wang*, the interim receivers voted the shares of Topco to pass resolutions removing and replacing Topco’s directors, thereby facilitating the preservation and investigation of the underlying assets by means of an application to appoint provisional liquidators over Topco. By bridging the gap between legal title and beneficial ownership over share capital, this remedial model addresses the opacity created by multiple corporate layers. It also avoids the problems presented by veil piercing or lifting law by respecting the separate personality of each company in the chain.

In *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan*,<sup>5</sup> the BVI High Court appointed, on an ex parte basis, an interim asset preservation receiver to protect assets estimated to be worth over US \$1 billion and that were targeted in a US \$6 billion ICSID arbitral award enforcement case. The receiver was given the power to vote the shares of two BVI holding companies (two Topcos) to remove and replace their directors, with this authority extending down the vertical chain of subsidiaries to Bottomco. The order appointing the receiver conferred this power on him as follows:

- “18. ... the Receiver shall have the power to recover and take over the shares of PIA BVI and PIA Hotels (including, without limitation, the shares held by PIA BVI and PIA Hotels in any direct or indirect subsidiary ...) to:
- iv. ... exercise the right to vote the shares of PIA BVI and PIA Hotels’ subsidiaries to remove and replace the directors thereof with a director answerable to the Receiver; and to in turn procure such replacement director(s) of the subsidiaries of PIA BVI and PIA Hotels to vote the shares of any company that they own so as to avail the Receiver of the power to take charge of any company down the chain of layered companies – so that the Receiver may take charge of any and all assets of PIA BVI and PIA Hotels which are directly or indirectly legally or beneficially owned or controlled by either of them and which are

<sup>4</sup> *Chia Hsing Wang v Credit Suisse AG and Credit Suisse London Nominees Limited* (Cause No. FSD 262 of 2021).

<sup>5</sup> *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* (BVIHC (COM) 2020/0196).

held at any point down a layered corporate structure wheresoever or howsoever to the bottom (e.g., to the level of the Properties).”

In the instance of the *ex parte* order granted in *Tethyan v Pakistan*, the seat or place of domicile of the two British Virgin Islands (BVI) companies in question was the BVI.<sup>6</sup> Under BVI company law, the High Court has the jurisdiction to order the removal and replacement of directors of a company—owned by a defendant who poses an asset flight risk—via the appointment of an interim receiver. This power also lies in the equitable jurisdiction of the High Court to appoint a receiver over the assets and affairs of a debtor or other obligor.

Furthermore, as per the English High Court judgment in *JSC VTB v Skurikhin*,<sup>7</sup> a receiver can be appointed over property in relation to which a judgment debtor: “ha[s] a legal right to call ... to be transferred to him [or] ... has *de facto* control over” (at [46]–[50] of the judgment).

Implementing the appointment of asset preservation receivers involves navigating various complexities:

1. Jurisdictional issues: identifying the appropriate court for the appointment of a receiver over the shares of Topco. The place of the domicile of Topco is ordinarily the optimum place to seek such appointment.
2. Corporate veil: the doctrine of separate legal personality serves as a barrier to asset recovery. Creditors must provide substantial evidence to pierce the corporate veil and access subsidiary assets, as courts often require proof of misuse of corporate structures.
3. Beneficial ownership: distinguishing between beneficial and legal ownership is crucial. In the *Chia Hsing Wang* case, Mr Wang’s claim to beneficial ownership illustrated the complexities involved, particularly when assets were held by intermediary entities or by nominees or custodians.
4. Receiver appointments: the request for asset preservation receivers over the shares of a Topco is a strategic remedial model for beneficial owners, judgment creditors or victims of fraud, to regain control over assets locked at the bottom or in the middle of a vertically-stacked corporate structure. However, this process may face challenges from existing corporate governance

structures. Each company in a structure must be studied in terms of its local corporate governance rules and law.

5. Minority shareholders: if a debtor does not own 100% of the shares of a Topco, how will a court treat of an application to appoint an interim asset preservation receiver over the debtor’s shares (with the power to vote the same), when the rights of the minority shareholders of Topco need to be taken into account? It is submitted that the interests of minority shareholders can be protected by ensuring that the receiver’s actions add value for the entire shareholder community, thus safeguarding the overall integrity of the company.

Civil law jurisdictions which are involved in the pursuit of cross-border asset recovery claims, within vertically-stacked corporate chains, can complicate matters due to differing corporate governance frameworks, jurisdictional challenges and procedural rules.

For example, under the law of the Netherlands, a director of a private Dutch company with limited liability can be appointed only by a decision of the general meeting of shareholders, which requires a formal convening of that meeting by the existing directors. If the existing directors are beholden to a fraudster who owns 100% of Topco, the directors might be expected to ignore the requests of a director of Topco appointed by a receiver over the assets of the fraudster.<sup>8</sup>

If a member of a Dutch Midco or Bottomco is frustrated by the existing directors who drag their feet on convening a members’ meeting to remove and replace themselves with a new director answerable to a court appointed receiver over the shares of Topco, the frustrated member has the right to seek urgent relief from a local Dutch court to put the matter right.<sup>9</sup> However this may take time and assets may be emptied out from the bottom of the corporate chain in the meantime.

Accordingly, local corporate governance rules will affect this asset preservation strategy. Creditors or victims who procure the appointment of a receiver over the shares of a Topco must ensure compliance with local corporate procedures governing Midco or Bottomco to get at the assets at the bottom. Creditors may face higher barriers to enforcing judgments in civil law jurisdictions. The distinct treatment of beneficial ownership and asset protection in civil law may hinder recovery efforts, and third-party involvement could add complexity.

Overall, creditors must adapt their strategies to navigate these legal differences on a jurisdiction by jurisdiction basis to effectively pursue claims and recover assets.

<sup>6</sup> This *ex parte* order was ultimately set aside on grounds unrelated to the order conferring a power on the receiver to vote the two Topcos’ shares to take control of the vertically stacked chain of subsidiaries underneath them. In this case, two Bottomcos held properties valued at in excess of US \$1 billion.

<sup>7</sup> *JSC VTB v Skurikhin* [2015] EWHC 2131 (Comm) QBD.

<sup>8</sup> Section 2:242 of the Dutch Civil Code (DCC) regarding the appointment of directors by the general meeting of shareholders; DCC s.2:238 for the formalities of convening a general meeting and DCC s.2:220(1) for the right of shareholders to request a general meeting.

<sup>9</sup> Section 2:221(1) of the DCC for judicial relief allowing shareholders to convene a general meeting if management fails to act.

Before launching the asset preservation strategy aiming to preserve the assets of Bottomco proposed by this note, a plan must be worked out to help the prospective receiver practically and swiftly take control of each link in the vertically-stacked corporate chain.

### **Conclusion**

The challenges of asset recovery within vertically-stacked corporate chains arise from the complexities of separate legal personality and the risk of asset flight.

To address these issues, the appointment of asset preservation receivers has proven effective, as seen in *Chia Hsing Wang*, where the Cayman Court empowered

interim asset preservation receivers to take control of shares; to vote those shares; and to remove and replace the existing directors, potentially safeguarding assets placed at the bottom of a vertical chain of companies.

Additional strategies include piercing the corporate veil to access subsidiary assets, initiating winding-up proceedings for insolvent entities, and pursuing fraudulent conveyance claims to recover assets transferred to evade debts. By employing these solutions, creditors can enhance their prospects of recovering assets, despite the intricate legal challenges posed by vertically-stacked corporate structures.